



A STUDY ON PROSPECTUS AND ITS KINDS UNDER THE COMPANIES ACT, 2013

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ABSTRACT

One of the great advantages of promoting a company is that the necessary capital for business can be raised from the general public by means of the public issue. This advantage is, however, enjoyed only by a public company which is listed at a recognized stock exchange. After the receipt of certificate of incorporation, if the promoters of a public limited company wishes to issue shares to the public, he will issue a document called prospectus. Prospectus is a document which helps the public company to raising funds. It is an invitation to the public to subscribe to the share capital of the public company. The prospectus should be prepared according to the law and issuing procedure also takes place according to the law. In this paper we will try to know about the kinds and contents of included under the prospectus as per the Companies Act, 2013.

Keyword: Company, Prospectus, Legal person,

1. INTRODUCTION

The word 'Company' is derived from the Latin word 'Com' and 'Panies'. 'Com' means 'with' or 'together', 'Panies' means 'bread' or 'meals' i.e. heaving bread or meals together. The word 'Company' in terms of the Companies Act, 2013, 'means a company incorporated under this Act or under any previous company law.'¹ In common law a company is a "legal person" or "legal entity" separate from, and capable of surviving beyond the lives of its members.²

Company is an artificial person and company gets its existence only by the law. By fulfilling the procedure³ of the Companies Act, 2013 in India, an artificial person takes its birth by receiving the Certificate of Incorporation from the Registrar of the Companies.

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¹ Section 2 (20) of Companies Act, 2013

² Saloman v. Saloman & Co, (1895-99) All ER Rep 33

³ Section 3 Formation of Company, Section 7 Incorporation of Companies.

In case of Private Company⁴ they have to start the business immediately after getting the Certificate of Incorporation from the Registrar of the Companies. But in case of Public Company⁵ has to issue the Prospectus.

A public company invites public to subscribe towards its share capital or debentures through the issue of prospectus. A prospective investor would naturally like activities, future programmes, nature of investment, element of risk involved etc. every investor would like to receive reasonable but sure returns. Prospectus of a company provides this information through prospectus an investor is informed of the soundness of the company's venture.⁶ Under Chapter III, Part - I Public Offer, from Sections 23 to 35, of the Companies Act, 2013 covers elaborately about the prospectus, their kinds and related provisions for the public issue.

2. MEANING AND DEFINITION OF PROSPECTUS

A prospectus is any document, which outlines the company's financial securities for sale to interested investors. A prospectus can be issued by or on behalf of the public company.

Section 2 (70) of the Companies Act, 2013 defined the prospectus in the following words: "Prospectus" means any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of body corporate." In simple words, any document inviting deposits from the public or inviting offers from the public for the purchasing shares or debentures of a company is a prospectus.⁷

In *Pramatha Nath Sanyal v. Kali Kumar Dutt*, case⁸ court held that 'An advertisement which stated that some shares are still available for sale according to the terms of the company which may be obtained on application was held to be a prospectus as it invited the public to purchase shares'.

On the basis of aforesaid definition, it may be said that a document should have following ingredients to constitute a prospectus:

⁴ Section 2 (68) 'Private Company' means a company having a minimum paid-up share capital*** as may be prescribed, and which by its articles,—

(i) restricts the right to transfer its shares;

(ii) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

(A) persons who are in the employment of the company; and

(B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company;

⁵ Section 2 (71) —public company means a company which—

(a) is not a private company;

(b) has a minimum paid-up share capital 1*** as may be prescribed:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles ;

⁶ K.R. Bulchandani, *Business Law for Management*, 2009, P-344.

⁷ Dr. Niraj Kumar, *Business Legislations*, 2009, P-589.

⁸ AIR 1925 Cal 714.

- a) There must be an invitation to the public.
- b) The invitation must be made “by or on behalf of the company or in relation to an intended company”.
- c) The invitation must be “to subscribe or purchase”.
- d) The invitation must relate to any securities of the company.

3. OBJECTIVES OF PROSPECTUS

The object of prospectus is arousing the interest of the potential investors in the company and induces them to invest in its share or debentures. Prospectus is issued with the following broad objectives:

- a) It is an official and formal notice of formation of a new company.
- b) It is also an official record describing the terms and conditions of offer of capital issues to investors.
- c) It serves as written evidence about the terms and conditions of issue of shares or debentures of a company.
- d) It is a means of promotion to promote the marketing of new issues and plays the role of silent salesman.
- e) However, it is a controlled advertisement and seller beware, attitude is honored.
- f) It maintains all authentic records on the issue and makes the directors liable for the misstatement in the prospectus.

The law is very strict regarding the contents of prospectus and wants to give maximum protection to numerous innocent investors against unscrupulous promoters and directors.

4. TYPES OF PROSPECTUS

According to the nature of public issue and their usefulness to a company and to public, there are four types of prospectus. They are: Deemed Prospectus, Red Herring Prospectus, Shelf Prospectus and Abridged Prospectus.

Deemed Prospectus: Section 25 of the Companies Act, 2013 deals with the deemed prospectus. When a public company allows or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company.

The original allotment is presumed to have been made with a view of offering them to the public where (1) shares are offered to the public within six months of allotment and (2) where at the date of offer to the public the whole of the consideration has not been received by the company.⁹

In the case of SEBI v. Kunnankulam Paper Mills Ltd,¹⁰ it was held that where a right issue is made for the existing members with a right to renounce in the favour of the others, it becomes a deemed prospectus if the number of such others exceeds 50.

⁹ Section 25(2) of the Companies Act, 2013.

¹⁰ (2013) 178 Comp Cas 371 (Ker).

Red Herring Prospectus: Section 32 of the Companies Act, 2013 deals with the Red Herring Prospectus. A company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus. A company proposing to issue a red herring prospectus shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer.

A red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus. The red herring prospectus does not include complete particulars of the quantum or price of the securities.

Shelf Prospectus: Section 31 of the Companies Act, 2013 deals with the Shelf Prospectus. Any class or classes of companies, as the Securities and Exchange Board may provide by regulations in this behalf, may file a shelf prospectus with the Registrar at the stage of the first offer of securities included therein which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required. [S. 31(1)]

Information memorandum: A company filing a shelf prospectus shall be required to file an information memorandum containing all material facts relating to new charges created, changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities. [S. 31(2)]

Abridged Prospectus: Abridged prospectus means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf.¹¹ It is also called as a Summary of the prospectus. Normally companies' prospectus consists of 300 to 500, 600 pages and it is difficult to attaché with the application form.

Application form¹² for securities cannot be issued unless they are accompanied by a memorandum containing such salient features of a prospectus as may be prescribed. This is known as abridged prospectus. The purpose is to reduce the expense-burden of a public issue. The full "prospectus" has to be maintained in the office of the company.

¹¹ Section 2(1) of the Companies Act, 2013.

¹² 33. Issue of application forms for securities.— (1) No form of application for the purchase of any of the securities of a company shall be issued unless such form is accompanied by an abridged prospectus:

Provided that nothing in this sub-section shall apply if it is shown that the form of application was issued—

(a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to such securities; or

(b) in relation to securities which were not offered to the public.

(2) A copy of the prospectus shall, on a request being made by any person before the closing of the subscription list and the offer, be furnished to him.

(3) If a company makes any default in complying with the provisions of this section, it shall be liable to a penalty of fifty thousand rupees for each default.

5. CONTENTS OF PROSPECTUS

Section 26 of the Companies Act, 2013 deals with the contents of prospectus. Every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed and shall state the following information:

1. Names and addresses of the registered office of the company, company secretary, Chief Financial Officer, auditors, legal advisers, bankers, trustees, if any, underwriters and such other persons as may be prescribed;
2. Dates of the opening and closing of the issue, and declaration about the issue of allotment letters and refunds within the prescribed time;
3. A statement by the Board of Directors about the separate bank account where all monies received out of the issue are to be transferred and disclosure of details of all monies including utilised and unutilised monies out of the previous issue in the prescribed manner;
4. Details about underwriting of the issue;
5. Consent of the directors, auditors, bankers to the issue, expert's opinion, if any, and of such other persons, as may be prescribed;
6. The authority for the issue and the details of the resolution passed therefor;
7. Procedure and time schedule for allotment and issue of securities;
8. Capital structure of the company in the prescribed manner;
9. Main objects of public offer, terms of the present issue and such other particulars as may be prescribed;
10. Main objects and present business of the company and its location, schedule of implementation of the project;
11. Particulars relating to—
 - (A) management perception of risk factors specific to the project;
 - (B) gestation period of the project;
 - (C) extent of progress made in the project;
 - (D) deadlines for completion of the project; and
 - (E) any litigation or legal action pending or taken by a Government Department or a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company;

12. Minimum subscription, amount payable by way of premium, issue of shares otherwise than on cash;
13. Details of directors including their appointments and remuneration, and such particulars of the nature and extent of their interests in the company as may be prescribed; and
14. Disclosures in such manner as may be prescribed about sources of promoter's contribution; [S. 26(1)(a)]

The prospectus contains the reports for the purposes of the financial information of the company they are:

1. Reports by the auditors of the company with respect to its profits and losses and assets and liabilities and such other matters as may be prescribed.
2. Reports relating to profits and losses for each of the five financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries and in such manner as may be prescribed.
3. Reports made in the prescribed manner by the auditors upon the profits and losses of the business of the company for each of the five financial years immediately preceding issue and assets and liabilities of its business on the last date to which the accounts of the business were made up, being a date not more than one hundred and eighty days before the issue of the prospectus.
4. Reports about the business or transaction to which the proceeds of the securities are to be applied directly or indirectly. [S. 26(1)(b)]

Make a declaration about the compliance of the provisions of this Act and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992) and the rules and regulations made there under. [S. 26(1)(c)] State such other matters and set out such other reports, as may be prescribed. [S. 26(1)(d)].

Sub-section (2) provides that nothing in sub-section (1) is to apply- (a) to the issue to existing members or debenture-holders of a company, of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant has a right to renounce the shares or not under sub-clause (ii) of clause (a) of sub-section (1) of section 62 in favour of any other person; or (b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange.

Filing of copy with Registrar - Sub-section (4) No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of its publication, there has been delivered to the Registrar for registration, a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorised attorney.

Statement of independent expert - A prospectus is not include a statement purporting to be made by an expert unless the expert¹³ is a person who is not, and has not been, engaged or interested in the formation or promotion or management, of the company and has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration and a statement to that effect shall be included in the prospectus. [S. 26(5)]

Delivery of copy to Registrar - the prospectus has to state on the face of it that a copy has been delivered to the Registrar. The statement has also to specify the documents which have been delivered along with the copy of the prospectus. [S. 26(6)]

Registration of prospectus by Registrar - The Registrar shall not register a prospectus unless the requirements of this section with respect to its registration are complied with and the prospectus is accompanied by the consent in writing of all the persons named in the prospectus. [S. 26(7)]

Date of Issue after registration - No prospectus shall be valid if it is issued more than ninety days after the date on which a copy thereof is delivered to the Registrar. [S. 26(8)]

Penalty for contravention - If a prospectus is issued in contravention of the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and every person who is knowingly a party to the issue of such prospectus shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both. [S. 26(9)]

The prospectus of the Public company shall compel to fulfill the provision of Section 26 of the Companies Act, 2013 for obtaining the SEBI approval, and there after registration with ROC. The contents of the prospectus shall be true. If any misstatements or untrue statements are found under the prospectus, then the company will face the consequences of Criminal and Civil liabilities.

Where an advertisement of any prospectus of a company is published in any manner, it shall be necessary to specify therein the contents of its memorandum as regards the objects, the liability of members and the amount of share capital of the company, and the names of the signatories to the memorandum and the number of shares subscribed for by them, and its capital structure. [S.30]

6. CONCLUSION

In simple words prospect is any document inviting deposits from the public or inviting offers from the public for the purchasing shares or debentures of a company is a prospectus. The prospectus shall contain all material information which shall be true and adequate so as to enable the investor to make informed decision on the investments in the issue. The material facts disclosed in the prospect by the company must be true, it should not

¹³ The term 'expert' has been defined in 2(38) expert includes an engineer, a valuer, a chartered accountant, a company secretary, a cost accountant and any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force;

be a misleading, if any statement or the material facts disclosed falls or misleading than the persons who are directors at the time of issue of prospects, promoters of the company and the person who are authorized for issue of the prospects were held to be liable. Misleading not only amounts to a falls statement of the material facts but also omission of the any relevant fact also amount to the misleading. In case of a misleading liability can arises both criminal and civil.

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