CHAPTER – 8
CONCLUSION AND SUGGESTIONS

1. CONCLUSION IN GENERAL

After having studied the historical background of the doctrine of *ultra vires*, along with its nature, concept, origin, development and applicability, we can conclude that this rule was first developed by the courts in the 17th century and hence this doctrine is a judge-made rule and there is no enacted law on this subject, like any other.

It is further clarified from conducting this study that from its very beginning till now the doctrine has remained static, continuously present and apparent in one form or other in the corporate world and it has been hammering the defaulting corporate enterprises by means of various judicial pronouncements, as and when delivered by appropriate judicial authorities.

Notwithstanding the recommendations for abolishing this doctrine by various committees and attacking this doctrine by draftsmen by framing lengthy objects clauses thereby restricting its effect, the rule has gained favorable and positive response from courts. The enterprises managers and directors have always preferred profit making activities to be attached to their present activities and have tried to prove the same as more advantageously to be carried on with the existing one, but in such cases also the judicial authorities have minutely analyzed the objects clause contained in the memorandum of association and have declared the same to be *ultra vires*.

It is pertinent to mention here that few countries specially the Westerns are not serious about the protection of this doctrine, and the same has been described as dead horse also, since they mainly think of protecting the interests of third parties dealing with the company, means that the recommendations of Cohen Committee for abolition of the doctrine is not fully acceptable to Western World and the recommendations of Jenkin committee regarding protection of third parties dealing with the company is soundly acceptable.
However we have to agree that this doctrine is going to lose its value day by day and can be said to be in a fatal condition because the purpose for which this doctrine was used is now being taken by the codified laws.

In the series of the same thought, in England section 9(1) of the European Communities Act 1972 was adopted which was further given the shape of section 35 of the U.K. Companies Act 1985, followed by further improvements by U.K. Companies Act 1989 which further enacted section 35 of 1985 act as new section 35 in 1989 Act, and lastly section 31 and 39 of the English Companies act 2006, thereby reducing the applicability of the doctrine in England.

In corporate law, *ultra vires* describes acts attempted by a corporation that are beyond the scope of powers granted by the corporation’s objects, articles of association or in any clause or in its by-laws, in the laws authorizing a corporation’s formation, or similar founding documents. Acts attempted by a corporation that are beyond the scope of its charter are void or voidable.

An *ultra vires* transaction cannot be ratified by shareholders, even if they wish it to be ratified. The doctrine of estoppels usually precluded reliance on defense of *ultra vires* where the transaction was fully performed by one party. A fortiori, a transaction which was fully performed by both parties could not be attacked. If the contract was fully executor, the defense of *ultra vires* might be raised by either party.

If the contract was partly performed, and the performance was held to be insufficient to bring the doctrine of estoppels into play, a suit for quasi-contract for recovery of benefits conferred was available.

If an agent of the corporation committed a tort within the scope of his or her employment, the corporation could not defend on the ground that the act was *ultra vires*. Several modern developments relating to corporate formation have limited the probability that *ultra vires* acts will occur. Except in the case of non-profit corporations (including municipal corporations), this legal doctrine is obsolescent within recent years, almost all business corporations are chartered to allow them to transact any lawful business. The Model Business Corporation Act of the United States provides that:

---

960 Gower & Davies on Principles of Modern Company Law 7th Ed 2003 (By Sweet & Maxwell) Page 139
“The validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.”

The doctrine still has some life among non-profit corporations or state-created corporate bodies established for a specific public purpose, like universities or charities.

According to American laws, the concept of ultra vires can still arise in the following kinds of activities in some states:

1. Charitable or political contributions
2. Guaranty of indebtedness of another
3. Loans to officers or directors
4. Pensions, bonuses, stock option plans, job severance payments, and other fringe benefits.

As reference is given above also, in the United Kingdom, that the companies Act 2006 under sections 31 and 39 greatly reduced the applicability of ultra vires in corporate law, although it can still apply in relation to charities and a shareholder may apply for an injunction, in advance only, to prevent an act claimed to be ultra vires.

In many countries jurisdictions, such as Australia, legislation provides that a corporation has all the powers of a natural person plus others also. The validity of acts which are made ultra vires is preserved.961

A perusal of the case law in India on the doctrine of ultra vires reveals that the Indian judiciary, much like its English counterpart was during the pre-reform years, has been grappling with containing the inequitable results that this doctrine generates, by inter-alia, passing vague and subjective clauses like that employed in the case of Bell house Ltd.962, while almost all Commonwealth jurisdictions have mitigated the harshness of the doctrine of ultra vires through legislative reforms. India has conspicuously refrained from exercising such an option. Such reluctance on the part of Government, it is submitted, could adversely effect the growth of the corporate law in India. While some commentators have maintained that the doctrine of ultra vires is necessary in the light of existing socio-economic conditions in India, an instance what

962 (1966) 2 All ER 674
has been re-enforced by the numerous corporate scandals, most recently, being the much publicized Satyam fiasco.\textsuperscript{963}

It was perceived to be a valuable protection to shareholders and creditors from risky and wasteful ventures by the directors; i.e. shareholders and creditors could be assured that their investment would not be put to uses beyond those authorized by the company’s memorandum which contain six clauses out of which the third clause is the objects clause which is very much concerned with the topic of \textit{ultra vires}, which has been undertaken for the purpose of research.

Further it is important to look at section 17(1) of the companies Act 1956, which provides for alteration of the objects clause within the substantive limits and sub-clauses (a) to (g) provide various purposes for which alteration can be made in the clause by passing a special resolution. Out of these clauses, clause (d) is very much connected with the doctrine of \textit{ultra vires}, since this clause is related to alteration of the objects of the company. This section allows the companies to carry on some business, which under the existing circumstances may conveniently or advantageously be combined with the existing business of the companies. Therefore most of the alterations sought in the objects clause are made under this clause, as this clause enables the companies to diversify their activities. This clause allows a company to start a new business not already provided in the objects of the company, except that the new objects must be such as can be conveniently or advantageously be combined with the company’s existing business.\textsuperscript{964}

A. FOCAL POINTS OF CONCLUSION

I. DOCTRINE OF CONSTRUCTIVE NOTICE

The doctrine of constructive notice is nothing but a presumed notice and every person dealing with the company is presumed to know and understand in their proper meaning and contents of these documents irrespective of the fact whether anyone has actually read or not, because as per the companies Act 1956\textsuperscript{965}, the memorandum and articles of association when registered with the registrar of the companies become

\textsuperscript{963} By Sanklecha Jai Manoj, “An Article On Doctrine of Ultra Viros; Lessons For Indian Company Law”, ( 2011), 1 Comp. L.J. page 8 
\textsuperscript{964} Straw Products Ltd. V R.O.C. (1969) 39 Comp Case 974 
\textsuperscript{965} Section 610
public documents. These documents are open and even can be inspected by any one dealing with the company for the purpose of ascertaining the powers of the company and to what extent these powers have been delegated to directors. So every person dealing with the company or in any other way entering in to any transaction with the company is treated to have actual or constructive knowledge of the contents of these documents.

The doctrine of constructive notice was evolved by the courts in United Kingdom for the protection of the company against third party, dealing with the company in which the public is presumed to have known the company's documents which are filed by the company and kept in the office of registrar with the facts recorded in the relevant registers by the Registrar, which are open to public inspection with the right to have certified copy or extract from these documents after paying the requisite fee as prescribed. These documents are final once filed with the office of registrar and taken on record by the Registrar however the companies are free to file the revised documents to rectify any error or mistake committed earlier in such documents.

The registrar of companies has no power to deregister any document already registered by him. Although, the requirement for the Registrar to publish public notices in the official Gazette in respect of alterations to the memorandum and articles of association of companies provided for in the English Act, is not present in our Act, except in the case of publication of the resolution for voluntary winding up under section 485 by the company and the notice for striking the name of the company off the register under section 560 of the Act by the Registrar.

The position of the doctrine of constructive notice in U.K. has been statutorily ended to a large extent, since in market economy, a company is recognized by its people and in the fast moving world of business and commerce, knowing a company by documents and public facts on record with the registrar is rather abstract and far fetched, and the business people recognize a company by its people at the front-lines over the market in their representations and acts. A limited company also has in its characteristics other than its name by which it is identified.966 This is the effect of

966 F. Goldsmith Ltd. V Baxter (1970) 40 Comp Case. 809 (Ch .D)
section 9 of the European Communities Act 1972, which now stands incorporated into section 711A of the 1989 Act.

Position in our country is different from U.K. in this regard, because there is no such drastic change in our Indian law and the doctrine holds good at its own place. Every person dealing with a company is taken to have actual or constructive knowledge of the contents of its memorandum,\textsuperscript{967} and of course, the knowledge of the articles too.\textsuperscript{968}

\textbf{II. FAMOUS CASES AS PART OF CONCLUSION OF THE DOCTRINE}

The doctrine was invoked for the first time in the beginning of the 17th century, in \textit{Sutton's hospital case},\textsuperscript{969} which states that anything done, but falling outside the objects and powers stated in the registered, or duly altered memorandum at any given point of time was considered as \textit{ultra vires}, that is beyond the powers or capacity of the company and void, and the company could not sue or be sued on any such acts, except in the case of chartered corporations to which the \textit{ultra vires} doctrine had no application, probably on the footing of Royal Prerogative taken as conferred on them, unless the charter is granted under statutory powers and the statute itself restricted the corporation’s powers.

In the application to companies the doctrine of \textit{ultra vires} was demonstrated for the first time by House of Lords in \textit{Ashbury Railway Carriage & Iron Co. Ltd. V Riche},\textsuperscript{970}, the memorandum of the company defined its objects:-

“To make, sell or lend on hire, railway carriages and wagons and all kinds of railway plants etc. and to carry on the business of mechanical engineers and general contractors. The company entered into a contract with Riche, a firm of railway contractors, to finance the construction of a railway line in Belgium. The company however repudiated the contract as \textit{ultra vires} and Riche brought an action for damages for breach of contract. House of Lords held that a contract or act which is outside the objects of the company is void and even a unanimous consent of shareholders cannot make it valid. An \textit{ultra

\textsuperscript{967} Rajendra Nath Dutta V Shibendra Nath Mukherjee (1982) 52 Comp Case 293 (Cal)
\textsuperscript{968} Mahony V East Holy Ford Mining Co. (1974-80) All ER 427 (HL)
\textsuperscript{969} (1612) 10 Co. Rep. La 23a
\textsuperscript{970} (1875) LR 7 HL 653
vires act could not even be ratified by consent of all the members of the company though the act was not otherwise vitiated by any other attendant illegality, the contract was ultra vires and, therefore null and void.971

Soon after the above case in the year 1880, in another case of Attorney-General V Great Eastern Railway Co.972, House of Lords observed that the doctrine of ultra vires, as it was explained in Ashbury’s case should be maintained. But it ought to be reasonably and not unreasonably understood and applied, and that whatever may be fairly regarded as incidental to the objects authorized ought not to be held as ultra vires, unless it is expressly prohibited. Thus a company may do an act which is

(a) Necessary for, or

(b) Incidental to, the attainment of its objects, or

(c) Which is otherwise authorized by the concerned Acts?

But no company can devote any part of its funds to objects which are neither essential nor incidental to the fulfillment of its objects, how beneficial so ever that object might seem likely to prove. Accordingly in London County Council V Attorney General973, the council having statutory power to work tramways was restrained from running omnibuses in connection with the tramways. The court found that the omnibuses business was in no way incidental to the business of working tramways, and therefore, could not be undertaken although it might have materially contributed to the success of the council’s tramways.

In one of the leading English case the suppliers and builders could not recover the amount due to the ultra vires activities of the company. The firm of builders brought an action for recovery of 2078 pounds, another firm which supplied veneer made a claim of 1011 pounds, and another firm sought to prove a simple contract debt of 107 pounds which was in respect of supply of fuel to the factory. Although the builders had obtained a consent decree in the nature of compromise but it was obviously held that the contract was ultra vires.974

971 Ibid
972 (1880) 5 AC 473
973 (1902) AC 165
974 Jon Beauforte (London) Ltd. Re (1953) 1 All ER 634
According to the main objects rule of construction the company does not have the implied power to spend the corporate capital beyond the objects clause like the following:

1. Using its capital for political purpose.
2. To give gifts and make donation or contribution for charities not related to the objects stated in the memorandum.
3. To sell or dispose off the whole undertaking.
4. To enter in to contract of surety-ship or guarantee.
5. To give loan by a company, not engaged in financing or banking business.
6. Taking shares of other companies where such investment authorizes doing indirectly that which will not be *intra vires* if done directly.

Hence the doctrine of *ultra vires* confines the scope of the activities of the company within the limits of the objects clause of memorandum and it handicaps the ambitious manager. It also goes against the interest of the creditor, as he can not file a suit against the company for *ultra vires* contracts.\(^{975}\)

In India the origin of the doctrine dates back to the year 1866, when the Bombay High Court applied it to a joint stock company and held on the facts of the case before it that “the purchase of shares by the directors of a company in other company, on behalf of company without authorization into the memorandum is *ultra vires*.”\(^{976}\)

### 2. EVASION OF THE DOCTRINE

In framing the objects clauses the intention of the legislature was that in these clauses companies should briefly state the kind of business the company was going to undertake and furthermore it was left to the courts to infer the incidental objects which the companies were required to undertake as a result of which the courts at their discretions started deciding various transactions of the companies as void and therefore *ultra vires*.

These rulings of courts changed the minds of the draftsman and they started making very wide clauses so as to include many more activities which the company

---

975 B.K. Goyal on Company Law 7th Ed. 2006 Page 62
976 Jehangir R. Modi V Shamji Ladha, (1866-67) 4 Bom HCR 185
was expected to undertake without having being challenged and declared void. In famous case of *Cotman V Brougham*<sup>977</sup>, there were 30 sub-clauses enabling the company to carry on almost every kind of business, and the main objects rule was excluded by a declaration in the objects clause mentioning that-

“Every clause should be construed as a substantive clause and not limited or restricted by reference to any other sub-clause or by name of company and none of them should be deemed as merely subsidiary or ancillary.” The House of Lords expressed strong disapproval of the inclusion of such a clause, but their Lordships held that it excluded the “main objects rule” of construction.

Hence as seen in above case in wider objects clause, multitude of the objects are mentioned in such a way that no distinction is made between objects and powers and which further results in burying down the principles objects of the company. The distinction between objects and powers can be better explained that the power, for example to borrow or to make a charity is not an object. Objects have to be stated in the memorandum and not powers, and even if powers are stated than these powers can be used to effectuate the objects of the company and they do not become independent objects by themselves.

Thereafter the draftsmen found another way of evasion of the doctrine of *ultra vires* and they started drafting the objects clause by concluding and adding a further clause which mentioned “to carry on all such kind of business or trades or things whatsoever which, in the opinion of the board of directors, can be advantageously carried on by the company in connection with or ancillary to any of the above business or any of them or the general business of the company. The benefit of the above was given by court of appeal in the case of *Bell House Ltd. V City Wall Properties Ltd*<sup>978</sup> and a stamp has been put on the new technique of evasion of the doctrine. The company’s objects clause authorized the company to carry on any other trade or business which in the opinion of board of directors could be carried on advantageously in connection with the company’s general business. The court held clause to be valid and an act done in bona-fide exercise of it to be *intra vires*. Hence the doctrine of *ultra vires* has been given a death blow in the above mentioned case.

---

<sup>977</sup> (1918) AC 514  
<sup>978</sup> (1966) 2 Q.B. 656
The Judgment of the English Court of Appeal has chalked up another victory for the businessmen in their long endeavor to escape the limitations imposed by the doctrine of *ultra vires*.

Apart from the above mentioned English cases, The Bombay High Court had, in *Wamanlal C. Parekh V Scindia Steam Navigation Co.*\(^{979}\), passed a vague and subjective clause like this in company’s objects. The clause enabled the directors, “to invest money of the company in such manner as the directors think fit”. The directors bought gold and silver out of the funds of the company. Holding the transaction as valid, Kania J. (after chief justice of Supreme Court) said: on a plain reading of this clause it is clear that it does not restrict the power of the company to utilize its money for any limited purpose. Hence these were the efforts to evade the role of the doctrine of *ultra vires* in England and as well in our country too.

Further it is important to go through the reports of few expert Committees and Commissions, along with their recommendations about the doctrine of *ultra vires*.

**A. POSITION IN ENGLAND**

In England many a times discussions took place about the doctrine of *ultra vires* and probably at the end of Second World War a committee was appointed under the chairmanship of Justice Cohen to review various requirements pertaining to formation of the companies and other affairs of companies, including the safeguards/protections which could be afforded to the investors etc. The report of this committee was presented to the British Parliament in June 1945. This committee was also known as English companies Law Amendment Committee since it made various suggestions and proposals to be incorporated in the future companies Act 1948 after being debated in the British parliament. And it was observed thereafter that most of the proposals and suggestions of the committee were accepted and incorporated in the new Companies Act 1948, except the recommendation of abolishing the doctrine of *ultra vires*.

As regard this doctrine is concerned the Cohen committee reviewed on the pattern which was being used in framing the objects clause by draftsmen using tendency of inserting more and more objects in the objects clause. The committee also

---

\(^{979}\) AIR 1944 Bom. 131
reviewed the judicial response pertaining to the doctrine of *ultra vires* during last 65 years as a result of which the committee made a striking proposal to abolish the doctrine. In support of the abolition statement, it was mentioned in the report submitted to British Parliament that due to the reasons of liberal drafting the memorandum very widely by the draftsmen and thereby conferring all the ancillary powers to attain all activities which form part of objects clause renders the doctrine of *ultra vires* an illusory protection for the shareholders and may be pitfall for the third parties dealing with the company. It was further stated that it served no positive purpose because of unnecessary prolixity and vexation.

It was further suggested that company should have as regards the third persons same powers as an individual and the memorandum in future should operate as a contract between a company and its shareholders. However, these suggestions were not totally incorporated in the Companies Act 1948. It was further recommended that if the company possesses the same powers as an individual, it will be held liable to the third persons for its *ultra vires* acts and if the memorandum operates as a contract, then the company will also be answerable to the shareholders and investors for the money invested by them. Most of the recommendations of the Cohen committee were accepted and also incorporated in the companies Act 1948, but the recommendation pertaining to the abolition of the doctrine of *ultra vires* was not accepted.

At the Same time, the company law was evolving alternative rules to protect shareholders and the directors from funds made available to the company. The English legislature did not seem fit to accept the suggestion of the Cohen Committee that the doctrine should be so limited as to define the powers of the company between the shareholders and the directors, but as regards to the outsiders the company should have all powers.

Thereafter in the year 1962 the Jenkin Committee reconsidered the question of *ultra vires*, and recommended that the constructive rule should also be abolished, and that the actual knowledge of the contents of the memorandum should not deprive a third party of its right to enforce the contract, if the contract was made in bona-fide faith. 

---

980 Palmer’s Company Law (1959) 20th Ed. 141
981 Excerpt from Jenkin Committee Report 1962
The committee suggested that the *ultra vires* rule should not be repealed but protection should be provided to the third parties contracting with the companies in good faith, because in the view of the committee, it rarely led unjust result.

**Following were the recommendations of the committee:**

(a) Third parties entering into contract in good faith, the dealing should not be held invalid on the ground of this doctrine.

(b) It should be presumed in the favor of the third parties entering into contract with the company that:

1. There should be no change in the position of the company.
2. Other party should not be deprived of his right to enforce the contract on the ground that he had actual knowledge of the contents of the memorandum.
3. He should still be able to enforce the contracts if he honestly and reasonably failed to appreciate that.

The committee also pointed out towards the small sphere of the section 5 of the companies Act 1948 (which deals with the alteration of the objects) and recommended that it should cover the every lawful objects and should have certain specified powers for the attainment of its objects.\(^{982}\)

The doctrine of *ultra vires* was restricted in England by the European Communities Act 1972. According to section 9 (1) of the European Communities Act, in favor of a person dealing with a company, any transaction decided by its directors shall be deemed to be within the capacity of the company to enter into validly and the other party to transaction is not required to enquire about the capacity of the company and thus, such transaction may be enforced by the other party acting in good faith against the company and the company cannot plead that the transaction was *ultra vires*, but it cannot be enforced by the company against the other party, for the other party still can plead that the act was *ultra vires*.

Hence section 9(1) of the European communities Act 1972 merely restricted the application of the doctrine of *ultra vires* but did not abolish it. Although the company could still plead against the third party that the act was *ultra vires*, if it is proved that the third party has not acted in good faith. It can be pleaded by the company against the third party if the transaction or the act has not been approved by

\(^{982}\) Ibid
the directors. Along with it, as has been stated, the third party can still plead against the company that it has acted *ultra vires* i.e. *the ultra vires* transaction cannot be enforced by the company against the third party. Hence the doctrine of *ultra vires* was made applicable in England with certain restrictions and modifications by virtue of the applicability of section 9 (1) of the European Communities Act 1972.\(^{983}\)

The provisions of section 9(1) of the above act have been incorporated in to section 35 of the companies Act 1985 by making an attempt to dispose of all the problems pertaining to this doctrine. This has been done by means of two sub-sections-

Firstly- it states that in favor of a person dealing with a company in good faith, any transaction decided on by directors of the company should be deemed to be within the capacity of the company and

Secondly- it will relieve the other party of any obligation to inquire about those matters.

Although it was a considerable step forward, it was widely criticized as failing fully to implement the Directive and as leaving much to be desired on policy grounds. It covered only the transaction decided on by directors and protected only a third party dealing with the company in good faith. And it did nothing to protect the company against invocation of *ultra vires* by the other party. The few reported cases on this section show that the courts did their best to construe it sensibly and consonantly with the Directive, but it was recognized that more needed to be done. Hence anticipating a future legislation of 1989, the Department Of Trade and Industry commissioned and appointed Professor Dan Prentice to review the position and his report came in the year 1986 which was described as Refined (i.e. a more complicated but less far reaching) version, of his recommendation was enacted in the companies Act 1989.

After inserting the new provisions of the English act of 1989, namely section 35, 35A, 35B, 711a and 322A, and section 719 of the English act 1985, read with section 187 of the insolvency Act 1986, to comply with EC Directive and section 64 and 65 of the Charity Act 1993, to synchronize with domestics laws, the scope of doctrine of *ultra vires* and its corollary of constructive notice evolved by the courts in

---

\(^{983}\) Supreme Court Journal (1988) Vol-1 page 58
U.K. is very much narrowed down, as may be seen from section 35 and 35A of the 1989 Act.

It is therefore be seen that the protection afforded to a third party who has dealt with an employee is considerably less, than that afforded to one who has dealt with the board of directors, or with someone who is actually authorized by the board. The statutory reforms have improved his position by the modifications of ultra vires and constructive notice, but section 35A helps him only to the extent that he may safely assume that the board had power to delegate to that employee. That will not protect him, unless the board has actually done so, or is stopped from denying that it has or has ratified what he did. If he has not, he will be unprotected unless the employee has acted within his apparent authority; and he will loose protection, notwithstanding, if he has acted in good faith, but also if he failed to make proper enquiries, about the authority of officer who must have exceeded the authority.984

Normally, as a result of new sections, if a transaction with a third party acting in good faith is effected on behalf of a company by the board of directors or by a person whom, in fact, the board has authorized, the transaction will bind the company. But except where the company is very small or the transaction is very large, the third party will probably not have had dealings through the board. His dealings will be in practice more often with someone who is an executive of the company or even a comparatively lowly employee of whom the members of the board of directors may never have heard. Nor will the third party be likely to know, whether in fact that executive or employee has actually been authorized by the board. Is he than entitled to assume that the board has, in fact authorized that person to bind the company? And that the board has imposed no limitations on the exercise of that person’s authority? And what is his position if in fact there is no legally constituted board of Directors? The new sections 35A and 35B give no answers.985 For them we have to turn to the basic common law principle of agency as refined in relation to companies by the rule in Royal British Bank v Turquand.986

---

984 Supra Note 960, Page 164
985 Ibid
986 (1856) 6 E&B 327 Exch.Ch
Once sec 711A or its equivalent is implemented, the third party will be free of the doctrine of constructive notice arising out of public filing, but the doctrine of constructive notice arising out of failure to make enquiries is preserved by sec 711A (2) and, as we have seen, is embraced in the common law formulation of the Turquand rule. Section 35B provides as under

That a party to a transaction with the company is not bound to enquire, whether it is permitted by the company’s memorandum or as to any limitations on the powers of the board to bind the company or to authorize others to do so. Thus the form of constructive notice arising out of failure to enquire is specifically excluded in the area covered by sec 35B. However this is only limited value to third party, since the form of constructive notice which arises out of public registration appears not to be covered by sec 35B.987

There are many ways by which a principal can limit the authority of an agent, but where the principal is a company, an obvious method of limitation is the inclusion of a provision in the company’s memorandum or articles of association. In principle, there is no reason why a provision in company’s constitution should not be effective to limit the agent’s actual authority and in appropriate cases, the provision might effectively limit the agent’s ostensible authority as well. The courts in the 19th century would have regarded the restrictive impact of provisions in the constitution upon both the actual and more important, the ostensible authority of the company’s agent as entirely unproblematic. Indeed by developing the doctrine of constructive notice the courts substantially enhanced the restrictive impact of provisions upon agent’s ostensible authority. In recent decades, however, the legislature has become skeptical about the utility of allowing constitutional provisions to restrict agents’ ostensible authority, to the detriment of third parties. The view has been taken that commerce will be promoted by believing third parties of the need to check the company’s constitutional documents before engaging with company’s representatives This is not to say that the company is not free to limit the authority of its agents as it wishes, but constitution is no longer seen as an obviously appropriate way to communicate such limitations to third parties. Other and most direct methods must be employed.988

987 Supra Note 960, Page 162
988 Ibid, Page 142
The recommendations of Professor Dan Prentice, of Oxford University, made in the line with the Cohen Committee recommendation for the abolition of the ultra vires rule in 1945 prior to the 1948, and 1989 amendments of English Act, that the companies should be afforded the capacity to do any act whatsoever and should have option of not stating their objects in the memoranda. This recommendation was partly accepted by the British Board of Trade for amending the law, though the recommendation came forth in the wake of its instance and the ground reality is not very different in United Kingdom, consequent to the import of three devices into objects clauses at the point of registration of companies.

By way of law reform in an attempt at the sway of the doctrine, section 3A, 4 and 5 inserted by the 1989 Act provide:

(a) For a general commercial company, for prospective companies to be formed, for which it is sufficient to make just one statement as its objects in its memorandum adopting the very language of section 3A to the effect that the company’s object is to carry on business as a general commercial company, that is, to carry on any trade or business, with powers to do all such things as are incidental or conducive to the carrying on any trade or business.

(b) Other companies have now the freedom to alter the objects by special resolution, subject to the confirmation of, if it is taken before the court objecting to it by members, holding not less than 15 percent in nominal value of the company’s issued share capital, within 21 days of passing of special resolution. The court has the power to confirm the alteration in whole or in part as also to order purchase of the dissenting members shares or order any alteration to the memorandum and articles.\(^{989}\), however it is not clear whether general commercial companies that may be presently formed in UK can validly do away with stating the elaborate objects clause in their memoranda excepting the insertion of the contents of section 3A of the 1989 Act and at the same time have unrestricted or unlimited corporate capacity.\(^{990}\)

\(^{989}\) Section 4 & 5 of English Companies Act 1989
\(^{990}\) Taxmann’s Company Law by Krishnamurti DSR 2006 Ed. page 305-306
In many ways though one may agree with Dr. Prentice in his view that companies should be deemed to have unlimited capacity and need not be compelled to state their objects in the memorandum, which means abolition of the doctrine of *ultra vires*, so far as companies are concerned, there appear to be difficulties and complications in opting in favor of or against implementing it.\textsuperscript{991}

B. POSITION IN INDIA AND RECENT LEGISLATIVE DEVELOPMENTS AFFECTING THE DOCTRINE

A similar range of law reforms have not yet been attempted in our Act and other laws of our country and accordingly, the *ultra vires* doctrine, approved by the Supreme Court in *Dr. A. Lakshmanaswamy Mudaliar V L.I.C.*\textsuperscript{992}, holds good.

In the year 1952 the Government of India appointed a committee which is known as Bhabha committee, the purpose of which was over hauling of the company's legislation in the country. The committee submitted its report in the year 1952, recommending the overhauling of the company legislation, on the basis of which, a bill was drafted and laid down before Indian parliament in the year 1953, which after the consideration of Join Select Committee in 1953 enacted in the form of companies Act 1956 repealing the old act of 1913, which was brought in to force from 1\textsuperscript{st} April 1956.

The view of this committee on the doctrine of *ultra vires* was same as that of Cohen Committee stating that “Since the Memorandum of associations are drafted by corporation, the doctrine of *ultra vires* is an illusory protection for shareholders and pitfall for third parties dealing with the company”.\textsuperscript{993}

Thereafter under the chairmanship of Justice Vivian Bose a commission of enquiry was appointed with direction to investigate into the affairs of Dalmia Jain concern on the measures, necessary for proper administration of the funds and assets of the companies in the interest of the investing public. The report of the commission of enquiry disclosed that this company, namely Dalmia Jain Airways Ltd. was floated ostensibly for the purpose of carrying on Air Transport Business. But even from its

\textsuperscript{991} Ibid page 311
\textsuperscript{992} AIR 1963 SC 1185
\textsuperscript{993} Report of company Law committee, 19 of 1952
very inception, the company promoters had never intended that the huge sum of over 319 Lac raised by public subscription towards the share capital should be utilized for such business. They had only intended to form a private company for carrying on a totally unrelated business, namely purchasing surplus motor vehicles and spare parts and machineries left by the U.K. and the American forces at the conclusion of the last war, and after reconditioning the vehicles, selling them in market on the profit basis. The attempt was to run a skeleton air transport as a make believe show. The memorandum of association included an omnibus clause that gave power to the company to deal in vehicles of all kinds and which even specified cycles, carriages and perambulators. Hence it was a case of diversification of the activities and the funds. Therefore, the commission recommended that:

1. That the companies Act 1956 be amended to provide that every company shall clearly state its purposes and objects under two separate categories, viz;- (a) The principal and ancillary objects which the company intends at the time of its incorporation to pursue, and (b) All other objects which are separate from the principal and ancillary ones mentioned in item (a) above

2. A provision should be made in the act to the effect that a company shall not engage itself in any activities coming within the scope of clause (b) unless such activities are sanctioned by a special resolution of the company in general meeting. 994

Another committee (known as Daphtary-shastri committee) was appointed in the May 1957 under the Chairmanship of Shri Vishwanath Shastri, an Advocate of Supreme Court and the committee submitted its report in Nov. 1957, about the doctrine of ultra vires and the objects clause. This committee reviewed the report of Vivian Bose Commission and stated in its report that, generally real objects often get buried beneath the mass of words, when the objects clause packed with objects and powers without discrimination and the shareholders could not acknowledge in what enterprise their money is going to be spent. Though the committee accepted the division of the objects into

(1) Principal and
(2) Ancillary and
(3) Others,
for recommendations, suggested by Vivian Bose commission, but pointed out that the remedy does not lie merely in making provisions for separating the principal objects from other objects, for even then it is possible to include under the head “principal objects” a variety of objects not necessary having any connection.

The committee weighed to the sanction of the shareholders and expressed that the first directors should be required to obtain approval of shareholders by a resolution in the general meeting in the first instance; and thereafter, if it is proposed to engage in new activities, by a special resolution, and every such resolution should be incorporated in all copies of the memorandum of association of the company.995

On the basis of reviewing the recommendations of Vivian Bose Commission, The Daphtry-Shastri committee recommended, amendment in Companies act 1956 which was enacted in the form of the Companies Amendment Act 1965 thereby amending section 13 and 149 of the Act, which are related to the doctrine of ultra vires.

As the company cannot invest its capital beyond the objects mentioned therein, after the amendment Act of 1965 in the companies Act 1956, certain new conditions for the commencement of business by a company have been introduced. It has added two new sub-clauses to section 149 and as a result of the above amendment section 13 have to be divided in two sub clauses namely:

1. Main Objects- This will state the main objects of the company and the objects incidental or ancillary to the attainment of the main objects.

2. Other Objects- This will include a statement of other objects not mentioned in the above clause.996

Hence it is the requirement of section 13(1) (d)997, that the company must state its objects in the memorandum of association, to serve a two-fold purpose as explained by Lord Parker in Cotman V broughm998, to put on the notice of:

995 Report of the Companies Act ( Amendment Committee) 1957
996 Section 13(1) (d)
997 Of Companies Act 1956
998 (1918) A.C. 514 page 520
(a) The members as to the purposes of the company on which the money subscribed by them would be laid out to protect themselves, and

(b) The other outsiders intending to deal with the company on the extent of the company’s powers to protect themselves, as a corollary to the doctrine of constructive notice. 999

This was founded on the analogy of the common law principle of *ultra vires* followed in the enforcement of Acts of Parliament leaving the details to be spelt out by the executive entrusted with its enforcement in the rules and orders made by it known as subordinate legislation in the exercise of the delegated powers, the postulate being that the procedural or other rules and orders made to effectuate the substantive law cannot go beyond the red-line limit of the original substantive law. The purpose of analogy extension to companies was the protection of shareholders and the outsiders intending to deal with the company whether as a creditors or others, and in addition members of the public in general in public interest to mitigate the mischief of companies and their operators in the area of their vicarious liability in tort, if taken as a strict liability flowing from the acts or omissions irrespective of the company’s actions being *ultra vires* or *intra vires*. 1000

As regard the amendment carried out in section 149 of the companies Act 1956 by the Amendment 1001 requires a special resolution to be passed in terms of section 149 (2A) of the companies Act, which was inserted simultaneously, before the commencement of any new business pertaining to the ‘other objects’ and subject to the further requirement of every such resolution to be incorporated in all copies of the memorandum of association of the company made available by it after such commencement. The amendment to clause (c) and (d) of section 13(1) is that existing companies embarking to start any new business not ‘germane’ to the business presently being carried on, the provision of section 149 (2A) and (2B) should be complied with, that is passing a special resolution or ordinary resolution coupled with Central Government’s approval, plus filing of the statutory declaration by a director/secretary of the company followed by issue of commencement of business

999 Supra Note 990, page 301
1000 Ibid
1001 Act of 1965
certificate by the registrar. All prior contracts entered into by the company are deemed as ‘provisional’ and they become binding on the company on issue of new certificate for commencement of business by the Registrar.\textsuperscript{1002}

All actions carried out in the name of the company are of the company’s in general perception though legally they may or may not be. The company as an artificial person is created by individuals or the nominees of other companies or the state, associated as subscribers to the registered memorandum, but it can operate only through the resolutions passed by the board of directors or the members and carried out in to effect as the company’s action in virtue of delegation and sub-delegation of powers, or ostensible authority to the extent recognized by courts by the agents or employees engaged by the company who are integral to its existence. However such exercise of powers delegated by the board of directors to the first line controllers and sub-delegated down the line in the company to agents engaged by them as employees or others, may be normal or excessive, and in some cases when it impinges on the affairs of the members or other third parties it becomes necessary for the courts dealing with such matters coming up for adjudication to identify which acts could bind the company and which could not.\textsuperscript{1003}

Hence if a company wishes to start a business included in the “other objects”, than it shall have to obtain the authority of a special resolution of its shareholders. Similarly when an existing company wants to commence any new business which though included in its objects is not germane to the business which it has been carrying on at the commencement of the amendment it shall have to obtain the authority of a special resolution. Where however a special resolution has not been passed, but the votes cast in favor of resolution exceed the vote cast against it, the Central Government may, on an application by the board of directors, allow the company to commence such business.\textsuperscript{1004}

In both the above cases there must be filed with the Registrar a declaration by secretary or a director that the requirement as to the resolution has been complied with.\textsuperscript{1005}

\begin{footnotes}
\item 1002 Section 149(4) of Companies Act
\item 1003 Ibid
\item 1004 Section 149 (2B)
\item 1005 Section 149 (2A), A Penalty Provision ( imposed for contravention of this provision)
\end{footnotes}
As the companies began to draft their way around these restrictions of the doctrine by devising even more extensive objects, the usefulness of the objects clause as a source of information to shareholders and creditors declined.\(^\text{1006}\)

However, with the change in section 17(2) of the Companies Act 1956 by the 1996 Amendment Act with effect from 1-3-1997, restricting the confirmation procedure for the alteration of the memorandum so far it relates only to a change in the situation of the registered office from one state to another, and doing away with it for alteration of objects. However this relevance may seem to be largely diluted unless a petition is filed by the shareholders alleging oppression or mismanagement under section 397 and 398 of the Act bound up with the alteration of objects affected by the majority in passing the required special resolution. But it is not so because the statutory change, regarding confirmation of alteration of the objects has no effect on the inherent nature of the objects and their effect in whatever shape they exist at a given point of time, in law, which determine the scope of the company’s capacity to act. Accordingly the doctrine of *ultra vires* holds good, and in all probability it will be held unlawful for any company, not necessarily section 25\(^\text{1007}\) companies, to abuse its power to alter the objects by merely passing a special resolution with any retrospective force or to ratify a past act *ultra vires* the company merely for the reason that the objects may be altered simply on its own, behind the court\(^\text{1008}\)

While it is clear that the *ultra vires* doctrine in the arena of companies has failed to be purposeful in the main, it seems that its moorings are bound to persist in our company law in the foreseeable future, because the state of our company law in this behalf as it stands at present more or less corresponds to its state in UK as it was prior to the 1948 English Act, with the 1965 amendments to section 13 and 149 of the act not accounting for much, with at least one improvement, and that is section 291 of the companies act mandating the residuary powers of the company as vested in the board of directors, to which there is no corresponding provision in any of the English Acts, made at the instance of the company law committee in framing our 1956 Act in

\(^{1006}\) Gauhati Law Times Vol-I, 2000 page 18
\(^{1007}\) Dispensing “Limited” from Name of Company
\(^{1008}\) Supra Note 990 page 310

361
the wake of the havoc created and left by the managing agency system in over-riding
the board of directors of the company managed.1009

3. CONCLUSION OF THE CONSEQUENCES OF ULTRA VIRES
TRANSACTIONS

The important consequences of ultra vires acts in relation to a company are:

1. If the ultra vires act is carried out by the company, it may be prevented by
   the members seeking the court’s injunction against it.

2. If the company’s funds are laid out on an ultra vires act, the directors may
   be held to replace the funds in an action by the members and alternatively,
   the directors as agents of the company, may be charged with breach of
   warranty of their authority, in an action by the company.

3. If a property is acquired by the company against the funds laid out in an
   act ultra vires the company, the property is lawfully vested in the
   company. “Property legally and by formal transfer or conveyance
   transferred to a corporation is in law duly vested in such corporation, even
   though the corporation was not empowered to acquire such property.”1010,
   In Turner V Bank of Bombay1011, it was held that a company which is a
   party to an ultra vires transaction is entitled to claim the recovery of its
   assets delivered under it.

4. Again in Selangor United Rubber Estates V Cradock1012, it was observed
   that “the fact that the companies Act makes it unlawful for the company to
   give any financial assistance for anyone to purchase any of its shares does
   not prevent such a person from being held a constructive trustee for the
   company of such of its money as is unlawfully provided for such purpose.”

5. The general position of the company contracts is that it is considered direct
   if the person who concluded the contracts on behalf of the company are the
   primary authorities as per the memorandum and articles of association and
   otherwise identified as the board of directors qua directors or as a fiduciary

1009 ibid
1010 Ad Sait V Bank of Mysore, 59 MLJR 28 (1930)
1011 (1901) ILR 25 Bom 52
1012 (1968) 2 All ER 1073

362
agents/constructive trustees, the board level chief executives or functional whole time directors, to whom the board had delegated its managerial powers. In regard to the contracts and acts done by other agents or employee/officers who acted pursuant to the authorization by way of permitted sub-delegation by managers made of their peer-powers entrusted to them by the first line managers, it is indirect and the principles of agency law as modified by the Act will be applied if their acts complained against fall within the scope of their agency or employment.\footnote{Supra note 990 page 313}

6. “An ultra vires contract is void \textit{ab initio} and cannot become \textit{intra vires} by reason of estoppels, lapse of time, ratification, acquiescence or delay.”, per Lord Cairns, LC, in \textit{Ashbury Rly. Carriage Co. V Riche}.\footnote{(1875) 44 LJ Exch. 185}

7. Another company authorized to carry on allied businesses took to making veneered panels and erected a factory for the purpose in Bristol. The builders of the factory resulted in apparent injustice as held in \textit{Re Jon Beauforte (London) Ltd}.\footnote{(1953) Ch. 131}, in that case a clothier claimed 2078 pounds, the veneer supplier claimed 1011 pounds and the cock supplier claimed 107 pounds, respectively from the company on account of the factory, and none of them knew about the \textit{ultra vires} nature of the factory raised by the company. Held the company was not liable to make payments to these suppliers although the builders had obtained a consent decree by means of compromise.

8. There is no authority of a seceded case about who can set up the plea of \textit{ultra vires} contract against the company, as for example, a third party, which would defeat the very purpose of the protection to the shareholders of the doctrine for which it was evolved by the courts.

9. As regard liability of the company for the acts of its agents and employees in contracts, civil matters other than contracts (torts) and criminal matters free of \textit{mens rea} and imprisonment as the only punishment, it may be
direct or vicious, and where the liability attaches no defense of *ultra vires* is allowed.\textsuperscript{1016}

10. In regard to non-contractual liability in civil matters like torts, it is according to the strict liability fastening to the company vicariously on account of negligent or fraudulent acts injuring third parties if they fall within the scope of the company, as if those acts were the acts of the company.

11. In *Dabur India Ltd. V Emami Ltd.*\textsuperscript{1017}, the plaintiff was the manufacturer of Chywanaprash and had a market share of 63 percent for the products the defendant was also a manufacturer of the same product. The defendant aired T. V. Commercial on various channels saying consumption of Chywanaprash in summer season was not advisable and instead Amrithprash was more effective. The question was whether such an advertisement was clearly disparaging to the product of the plaintiff with an element of insinuation present in the advertisement; held yes and temporary injunction restraining the defendant from telecasting the impugned advertisement granted.

4. CONCLUSION WITH SPECIAL EMPHASIS ON LACK OF CORPORATE SOCIAL RESPONSIBILITY

After examination of the Foreign and Indian position with regard to the doctrine of *ultra vires*, and the reports of above mentioned Expert committees and commissions and subsequent codified laws/amendments carried out there-after in to laws, and consequences of *ultra vires* transactions/acts on the part of the companies as mentioned immediately above, having direct impact on the doctrine, it can be concluded that these expert reports, and the directors of companies as well, have failed to look at the scenario from the jurisprudential angle and badly failed to appreciate the actual role of the companies toward the society at large in this modern age and have narrowly considered the welfare and the so called interest of shareholders and creditors alone.

\textsuperscript{1016} Supra Note 990 Page 312-13  
\textsuperscript{1017} (2005) 58 SCL 8 (Delhi) (Mag.)
They failed to appreciate the interest of so many other categories of personnel connected to their enterprises and these are the employees whether employed in their factories, corporate offices, head offices, branch offices working sites etc., the customers of the companies, the vendors, the consumers and resident of the locality as well, where the dangerous and hazardous manufacturing process must be carried on, and various kind of pollutions specially water and air pollutions and also noise pollution must be spreading over in the areas. Therefore the companies must not forget their social responsibilities toward the society and should not confine itself to the walled areas of the companies.

It is pertinent to mention here that so many companies having their corporate offices in cities, particularly in metropolitan cities, install their plants into the remote area of villages, where the land is cheaply available. They even go to the extent of building a labor colony there-in for the smooth functioning of the production shifts, so that no production loss is caused to the unit. Their director, managers, secretary and other executives of managerial level, visit the plant occasionally, from their corporate offices situated in Capital, Metropolitan cities and other big cities, and confine themselves in the walled boundaries and never think even to come out of the boundaries of the factories and listen to the problems of villagers, regarding creating pollution in the area by discharging polluted water and emitting smoke and fumes, thereby causing water and air pollutions. It has been observed that these companies situated in remote areas are normally causing air and water pollutions and even noise pollution in few cases in the area which is punishable under those special laws such as The water (Prevention & Control of Pollution) Act 1974, The Air (Prevention & Control of Pollution) Act 1981 and Noise Pollution (Regulation & Control) Rules 2000 and even under the general law of the land too being public nuisance.

5. **GENERAL SUGGESTIONS**

After having reached at the above conclusion, the author opines the following suggestions:

1. That the doctrine of *ultra vires* should not be treated as a dead horse as has been remarked in few Western countries, and it should not be abolished in the light of the present socio-economic conditions of our country.
2. It should be made compulsory for every company to define its main objects in a clear cut terms, with no ambiguity what so ever and the doctrine of constructive notice should not be discarded at all.

3. The memorandum of association should not be abolished, and the memorandum of association and articles of associations should not be clubbed together.

4. The memorandum of association should not lay down the powers but only the objects of the company, and if the powers are mentioned in the memorandum, then these should be used only to effectuate the objects only, and if directors take the company beyond those powers, causing financial loss to the company, then the directors should refund to the company the entire amount spent in, due to activities beyond those powers.

5. As regard third party any transaction made by the company outside the objects clause should be treated *intra vires*, and as regard the company is concerned the same transaction should be held as breach of trust by the company through its directors.

6. While making any dealings/transactions, if one party has rendered loss of any amount of money or property, than, the party who was at loss should be compensated by other party.

7. In United Kingdom, a company may only state that “its objects are commercial”, and thereby minimize the problems of *ultra vires* contracts with the stipulation to treat the doctrine as dead horse, such evasion are not suited to the Indian conditions.

8. While applying the main objects rule of construction, the rule of *ejusdem generis* is to be applied, and if the company venture into same or similar nature of business, the same should not be treated as *ultra vires*.

9. As we know that *ultra vires* contracts are void *ab-initio* and carries no legal effects, hence neither party should be allowed to take the benefit of such contracts and both the parties should be resorted back to their original position.

10. To protect the interest of shareholders and creditors the doctrine should be fully survived, (in spite of the voice of critics and those in favor of
abolishing it, that now a days most of the creditors are the financial institutions like IFCI, IDBI and ICICI etc. for the purpose of giving term loans to the companies and for the purpose of working capital, there are schedule banks, who also protect their loan by taking security of the moveable and immovable property along with personal guarantee of the directors/promoters. They further add that banks similarly take security by way of first charge on the current assets and second charge on the fixed assets, also coupled with the personal guarantee of the promoters). But they have not thought about the protection of other suppliers and vendors, who enter in to transactions with the company in their day-today matters, hence in their interest it should not be abolished.

6. FOLLOWING AMENDMENTS ARE SUGGESTED IN THE COMPANIES ACT 1956

1. An amendment should be carried out in companies Act 1956 for the protection of third parties dealing with the company, while incorporating the amendment in the companies Act 1956, regarding dealing with outsiders, a list of such officials, which will be competent in binding the company while entering in to any transaction with third parties, should also be annexed in the form of a schedule to the Companies Act 1956. This provision will protect the third parties dealing with the company.

2. The provision of English Companies Act, that within 21 days of passing resolution for alteration of the objects clause, the moving of an application by 15 percent of the nominal value of issued capital shareholders, against the resolution, may be incorporated into the Indian companies act 1956 which is a safeguard in favor of the doctrine. Since alteration of objects clause has become internal matter after 1996 amendment of companies act and restraining the company, by means of civil proceedings, for making any extraneous change beyond the limits of section 17(1), hardly takes place by one or two or few shareholders.

3. The companies Act 1956 should incorporate provisions for constituting Tribunals for the trial of such offences, where-in the directors have
misappropriated the funds of the company and committed breach of trust, by adopting new techniques of evading the doctrine of *ultra vires*, thereby flouting the objects, without following the proper procedure prescribed by law and thereby rendering financial losses to the company.

4. The word incidental and ancillary and even germane as provided in the respective objectives clauses should be properly defined in to the companies act by giving necessary examples/illustrations

5. Obligation to discharge social responsibilities by the companies toward the society at large should not be ignored and the same should be included in the ‘objects clause’ of the memorandum of association of companies not only of larger size but including SME’s (Small Medium Enterprises defined by Government of India in 2005) by making necessary Amendment in the present companies Act 1956, so that the amount spent on these activities out of the corporate capital should not be treated *ultra vires* the objects of the company.

Although the companies amendment Act 1996 has further made easy the alteration of the objects clause in our country, by passing special resolution and filing the same with the registrar, therefore making alteration of the objects clause is an internal matter, and the requirement seeking confirmation of company law board has been dispensed with.

But if we look at the strict provisions of our companies Act 1956, the alteration of objects clause still takes longer time by intimating each shareholder, for the purpose of passing special resolution, and even after, those shareholders who could not be served with a proper notice or who may have objections to any extraneous change beyond substantive limits of section 17(1) can even restrain the company by means of civil proceedings.

Hence doctrine of *ultra vires* still stands static and strong at its own place and is not to be treated as dead horse at the present time.