GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

Syllabus 2017

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MODULE 3

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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(Under the jurisdiction of Ministry of Corporate Affairs)
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These answers have been written by competent persons and the Institute hope that the GUIDELINE ANSWERS will assist the students in preparing for the Institute's examinations. It is, however, to be noted that the answers are to be treated as model answers and not as exhaustive and the Institute is not in any way responsible for the correctness or otherwise of the answers compiled and published herein.

The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be updated with the applicable amendments which are as follows:

CS Examinations	**Applicability of Amendments to Laws**
December Session	upto 31 May of that Calender year
June Session	upto 30 November of previous Calender Year

CONTENTS

MODULE 3

CORPORATE FUNDING AND LISTINGS IN STOCK EXCHANGES

MODULE 3 PAPER 7

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

PART A

Question 1

(a) BDE Ltd. has its equity shares listed on both the National Stock Exchange (NSE) and Bombay Stock Exchange (BSE), with total outstanding long-term borrowings amounting to ₹ 1,000 Crore for the financial year ending on March 31, 2023. In preparation for the incremental borrowing requirements for the fiscal year 2023-24, the company's management has projected a fund requirement of ₹ 500 Crore. Ascertain the mandatory incremental borrowings it must raise through debt securities from the overall projected outlay and brief the consequences of shortfall and surplus in required borrowings.

(*5 marks*)

(b) Regulation 102 of SEBI (ICDR) 2018 stipulates certain conditions that make companies ineligible to make a Follow-on Public Offer (FPO). Which are those conditions ? Explain in brief.

(*5 marks*)

(c) RST Ltd is preparing to issue a ₹ 10 crore specified securities offered at ₹ 600 per share. The total specified securities also include offer made to :

Qualified Institutional Buyers (QIBs) – ₹ 6.66 crore specified securities

Retail Individual Investors (RII) – ₹ 1.00 crore specified securities

Considering the above facts, comment on :

(1) How many specified securities can Romesh apply in the net offer category ?

(2) What is the maximum number of specified securities which non-institutional investors can apply in the said issue ?

(*5 marks*)

Answer 1(a)

A listed entity which has outstanding long term borrowings of ₹1000 crore or above shall be considered as Large Corporate (LC). Further, an LC shall raise not less than 25% of its qualified borrowings by way of issuance of debt securities in the financial years subsequent to the financial year in which it is identified as an LC.

Accordingly, the mandatory incremental borrowings of BDE Ltd. (LC) shall be 25% of incremental borrowings i.e. 25% of ₹ 500 Crore = ₹ 125 Crore

If a Large Corporate (LC) exceeds the 25% borrowing requirement in the three-year block, it is entitled to incentives such as reduced annual listing fees and a credit in the form of a reduction in the contribution to the Core Settlement Guarantee Fund (SGF) of LPCC (Limited Purpose Clearing Corporation) and in case if it fails to meet the 25% incremental requirement, it faces a disincentive in the form of an additional contribution to the Core Settlement Guarantee Fund (SGF) of LPCC. These are staggered over future periods.

Answer 1(b)

Entities not eligible to make a FPO (Regulation 102 of SEBI (ICDR) Regulations, 2018

An issuer shall not be eligible to make a FPO of specified securities if: -

a) The issuer or any of its promotors/promotor group/directors/selling shareholders are debarred from accessing the capital market by SEBI

b) If any of the promotors/directors of the issuer is a promotor or a director of any other company which is debarred from accessing the capital market by SEBI

c) If the issuer or any of its promotors/directors is a willful defaulter or a fraudulent borrower

d) If any of the promotors/directors is a fugitive economic offender.

Restrictions under (a) and (b) above shall not apply to the persons or entities mentioned therein, who were debarred in the past by SEBI and the period of debarment is already over as on the date of filing of the draft offer document with SEBI.

Answer 1(c)

1. As per Regulation 2(1)(z)(vv) of SEBI (Issue of Capital and Disclosures) Requirements Regulations, 2018, "retail individual shareholder" means a shareholder who applies or bids for specified securities for a value of not more than two lakhs rupees. Assuming Romesh as Retail Individual Investor (RII), he can apply for specified securities for a value of up to ₹ 2 Lakhs in the category of RII which is ₹ 1 crore specified securities in the given case.

2. As per Regulation 47 of SEBI (Issue of Capital and Disclosures) Requirements Regulations, 2018 a person shall not make an application in the net offer category for a number of specified securities that exceeds the total number of specified securities offered to the public. However, the maximum application by non-institutional investors shall not exceed total number of specified securities offered in the issue less total number of specified securities offered in the issue to qualified institutional buyers.

Accordingly, the maximum number of specified securities which a non-institutional investor can apply are:

Securities offered in the issue (A)	₹ 10 crore
Less: Securities offered to QIB (B)	₹ 6.66 crore
Net available to non-institutional investors (A-B)	₹ 3.34 crore

Thus, the total number of specified securities to non-institutional investors shall not exceed ₹ 3.34 crore.

Attempt all parts of either Q. No. 2 or Q. No. 2A

Question 2

(a) What are the differences between Sponsor of an InvIT and Promotor of a Company ?

(b) SEBI amendment introduced framework for "Accredited Investor" as per SEBI (Alternative Investment Funds) (Third Amendment) Regulations, 2021.

Who is "Accredited Investor" as per amended framework ?

(c) SEBI (LODR) Regulations 2015 provides that prior intimation is required to be given to Stock

Exchange about the meeting of Board of Directors for proposals to issue of bonus shares by a listed entity.

Briefly explain the provision of Regulation 29 & Regulation 42 of SEBI (LODR) Regulations 2015.

(*5 marks each*)

OR (Alternate question to Q. No. 2)

Question 2A

(*i*) How is the day count dealt with under SEBI (Issue and Listing of Debt Securities) Regulations, 2018, in normal situation and in case of a leap year ?

In the light of the above convention explain the following situation :

Date of issue of corporate bonds : January 01, 2024

Coupon payable : Quarterly

Date of coupon payments : April 01, July 01, October 01 & January 01.

(ii) DAL Ltd is in urgent need of funds and hence decides to discount its invoices worth ₹ 2 crore which are due in the next 2 months. Blue Ltd factor is ready to make a payment of 80% of the invoice to the company at flat @ 2% discount rate for the first 30 days and @ 3% discount for 60 days on the full invoice value.

Calculate the factoring cost / fee for DAL Ltd for 60 days.

(iii) SCL Ltd has outstanding bank guarantee of ₹ 325 Lakh as per Audited Balance Sheet of March 31, 2023. During the year 2023-24 the Company availed additional bank guarantee of ₹ 125 lakh. The Company needs additional bank guarantee of ₹ 750 lakh in December 2023 in order to meets its one-time. The bank guarantees maturing and cancelled by December 2023 are worth ₹ 250 lakh and ₹ 120 lakh respectively. The Bank guarantees cancelled during the year are worth ₹ 150 lakh. The Company has ₹ 850 lakh as sanctioned Bank Guarantee Limit.

Given these circumstances, you are required to assess whether the company should enhance its bank guarantee or if the existing bank guarantee will suffice to cover the additional requirement of ₹ 750 lakh.

(*5 marks each*)

Attempt all parts of either Q. No. 2 or Q No. 2A

Answer 2(a)

Sponsor of InvIT

The Sponsor of an InvIT is the author of the InvIT and is responsible for transferring or undertaking to transfer the initial portfolio of the assets to the InvIT and is responsible for the formation transactions involved in setting up and establishing an InvIT. Sponsor is required to lock in 15% or 25% (as the case may be) of the outstanding units of the InvIT, held by it, for a period of three years and any additional unitholding for a period of one year.

Promoter of a Company

Promoter shall include a person who has control over the affairs of the issuer, directly or indirectly whether as a shareholder, director or otherwise, or in accordance with whose advice, directions or instructions, the Board of directors of the issuer is accustomed to act.

A financial institution, scheduled commercial bank, mutual fund, venture capital fund, alternative investment fund, foreign venture capital investor, insurance company registered with IRDA or any other category as specified by SEBI shall not be deemed to be a promotor merely by virtue of the fact that 25% or more of the equity share capital of the issuer is held by such person unless such person satisfies other requirements prescribed under SEBI (Issue of Capital and Disclosures Requirements) Regulations, 2018. A promoter can be reclassified as a non-promoter subject to conditions whereas a Sponsor cannot.

Answer 2(b)

As per SEBI (Alternative Investment Funds) (Third Amendment) Regulations, Accredited Investor means any person who is granted a certificate of accreditation by an accreditation agency who,

i. In case of an individual, HUF, family trust or sole proprietorship has:
   a) An annual income of at least ₹ 2 crore; or
   b) Net worth of at least ₹ 7.50 crore, out of which not less than ₹3.75 crore is in the form of financial assets or
   c) Annual income of at least ₹ 1 crore and minimum net worth of ₹ 5 crore, out of which not less than ₹ 2.50 crore is in the form of financial assets
ii. In case of a body corporate, has net worth of at least ₹ 50 crore;
iii. In case of a trust other than family trust has net worth of at least ₹ 50 crore;
iv. In case of a partnership firm set up under the Indian Partnership Act 1932, each partner independently meets the eligibility criteria for accreditation.

However, the Central Government (CG) and State Governments (SG), developmental agencies set up under the aegis of the CG/SG, funds set up by the CG/SG, qualified institutional buyers as defined under the SEBI (ICDR) Regulations 2018, category I portfolio investors, sovereign wealth funds and multilateral agencies and any other entities as may be specified by SEBI from time to time, shall be deemed to be an accredited investor and may not be required to obtain a certificate of accreditation.

Answer 2(c)

Regulation 29 of SEBI (Listing Obligation and Disclosure Requirements) Regulations 2015 deals with Prior Intimation which states that -

1) The listed entity shall give prior intimation to stock exchange about the meeting of the board of directors in which any of the following proposals is due to be considered:
   a) financial results viz. quarterly, half yearly, or annual, as the case may be;
   b) proposal for buyback of securities;
   c) proposal for voluntary delisting by the listed entity from the stock exchange(s);
   d) fund raising by way of further public offer, rights issue, American Depository Receipts/ Global Depository Receipts/Foreign Currency Convertible Bonds, qualified institutions placement, debt issue, preferential issue or any other method and for determination of issue price.

   However, the intimation shall also be given in case of any annual general meeting or extraordinary general meeting or postal ballot that is proposed to be held for obtaining shareholder approval for further fund raising indicating type of issuance.

e) declaration/ recommendation of dividend, issue of convertible securities including convertible debentures or of debentures carrying a right to subscribe to equity shares or the passing over of dividend.

f) the proposal for declaration of bonus securities.

2) The intimation required under sub-regulation (1), shall be given at least two working days in advance, excluding the date of the intimation and date of the meeting:

However, the intimation regarding item specified in clause (a) of sub-regulation (1), to be discussed at the meeting of board of directors shall be given at least five days in advance (excluding the date of the intimation and date of the meeting), and such intimation shall include the date of such meeting of board of directors.

3) The listed entity shall give intimation to the stock exchange(s) at least eleven working days before any of the following proposal is placed before the board of directors -

a) any alteration in the form or nature of any of its securities that are listed on the stock exchange or in the rights or privileges of the holders thereof.

b) any alteration in the date on which, the interest on debentures or bonds, or the redemption amount of redeemable shares or of debentures or bonds, shall be payable.

Regulation 42 of SEBI (Listing Obligation and Disclosure Requirements) Regulations 2015 deals with Record Date or Date of closure of transfer books which states that –

1) The listed entity shall intimate the record date for the following events to all the stock exchange(s) where it is listed or where stock derivatives are available on the stock of the listed entity or where listed entity's stock form part of an index on which derivatives are available:

a) declaration of dividend;

b) issue of right or bonus shares;

c) issue of shares for conversion of debentures or any other convertible security;

d) shares arising out of rights attached to debentures or any other convertible security

e) corporate actions like mergers, de-mergers, splits, etc;

f) such other purposes as may be specified by the stock exchange(s).

2) The listed entity shall give notice in advance of at least seven working days (excluding the date of intimation and the record date) to stock exchange(s) of record date specifying the purpose of the record date

However, in the case of rights issues, the listed entity shall give notice in advance of at least three working days (excluding the date of intimation and the record date).

3) The listed entity shall recommend or declare all dividend and/or cash bonuses at least five working days (excluding the date of intimation and the record date)before the record date fixed for the purpose.

4) The listed entity shall ensure the time gap of at least thirty days between two record dates.

5) For securities held in physical form, the listed entity may, announce dates of closure of its transfer books in place of record date for complying with requirements as specified in sub-regulations (1) to (4).

However, the listed entity shall ensure that there is a time gap of at least thirty days between two dates of closure of its transfer books.

OR (Alternate question to Q. No. 2)

Answer 2A(i)

SEBI has provided certain clarifications on aspects related to day count convention for debt securities issued under the SEBI(Issue and Listing of Non-Convertible Securities) Regulations, 2021 (read with the master circular) as follows:

1. If coupon payment date falls on a holiday, the payment may be made on the following working day. However, the dates of future coupon payments would be as per the schedule originally stipulated at the time of issuing the security. In other words, the subsequent coupon schedule would not be disturbed merely because the payment date in respect of one particular coupon was postponed earlier because it fell on a holiday.
2. In order to ensure consistency for interest calculation, a uniform methodology shall be followed for calculating interest payments in case of leap year, which shall be as follows:

   During a leap year, the number of days shall be reckoned as 366 for the whole one-year period irrespective of whether interest is payable annually, half yearly, quarterly or monthly. Hence if the periodicity is half yearly, 366 days would be reckoned twice as denominator, for quarterly interest, it would be four times and for monthly interest payment, twelve times.

   In the above example, since 2024 is a leap year and as the interest is payable quarterly, 366 would be reckoned four times as denominator.

Answer 2A(ii)

Invoice Amount = ₹ 2 Crore

Amount that can be received from Blue Ltd. as advance

= 80% of ₹ 2 Crore

= ₹ 1.6 Crore

Quoted discount rate: 2% flat discount Rate for the first 30 days and at 3% flat discount rate for next 30 days afterwards (Assuming factoring is allowed @ 3% discount for next 30 days)

The fee on ₹ 2 Crore invoice if it is paid in 60 days would be:

First 30 days	= ₹ 2 Crore x 2%	= ₹ 4 Lakh
The next 30 days	= ₹ 2 Crore x 3%	= ₹ 6 Lakh

Total factoring cost / fee for DAL Ltd. = ₹ 10 lakh

Answer 2A(iii)

Assessment of Limit of Bank Guarantee: -

Outstanding Bank Guarantee as per Audited Balance Sheet of March 31, 2023	₹ 325 Lakh
Add: Bank Guarantee availed during the year 2023-24	₹ 125 Lakh
Add: Additional Bank Guarantee required for December 2023	₹ 750 Lakh
Total	**₹ 1200 Lakh**
Less: Bank Guarantee Matured by December 2023	₹ 250 Lakh

Bank guarantee available	**₹ 950 Lakh**
Less: Bank Guarantee cancelled by December 2023	120 Lakh
Requirement of Bank Guarantee by December 2023	₹ 830 Lakh

Hence, in the given circumstances the requirement of Bank Guarantee by SCL Ltd. is ₹ 830 Lakh which is within the sanctioned Bank Guarantee ₹ 850 lakh. As a result, there is no necessity to increase the Bank Guarantee limit.

Question 3

(a) Briefly explain the following in relation to the issue of ADR (American Depository Receipts) & GDR (Global Depository Receipts) as per provision under companies (Issue of Global Depository Receipts) Rules, 2014 :

(i) Two-Way Fungibility Scheme

(ii) Sponsored ADR/GDR Issue.

(3+2=5 marks)

(b) Shark Ltd a company with an innovative business idea is in the process of raising funds for its upcoming new project. The management of the Company has proposed to raise funds through Banks and Financial institutions. The Company has a good track record in the past and has good credit worthiness.

Recognizing the importance of a well-prepared project report in this endeavor, the management has reached out to you for assistance.

Your task is to create a comprehensive template for the project report, ensuring that all necessary information is included to effectively communicate the potential of the project and attract required finance for the project.

(5 marks)

(c) Bhola Ltd a listed company would like to introduce a share-based employee welfare or employee benefit scheme as per SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021 for its employees. The company would like to implement the scheme through a separate trust named as Ganga Welfare Trust. The management has the following queries and seeks your advice :

(1) Explain Employee Stock Options Scheme (ESOS) and Employee Stock Purchase Scheme (ESPS) to the management.

(2) Bhola Ltd.'s management has decided to implement ESOS (Employee Stock Option Scheme) for its employees. Can Ganga Welfare Trust acquire 2% stake in Bhola Ltd during one financial year in order to facilitate the implementation of the ESOS scheme ? Is shareholders' approval required for such acquisition ?

(5 marks)

Answer 3(a)

(i) Two-Way Fungibility Scheme

Under two-way Fungibility Scheme, a stock broker in India, registered with SEBI, can purchase shares of an Indian company from the market for conversion into ADRs/GDRs based on

instructions received from overseas investors. Re-issuance of ADRs / GDRs would be permitted to the extent of ADRs / GDRs which have been redeemed into underlying shares and sold in the Indian market.

It means that the shares so released can be reconverted by the company into DRs for purchase by the overseas investors. It implies that the re-issuance of DRs would be permitted to the extent of DRs that have been redeemed and underlying shares are sold in domestic market.

(ii) Sponsored ADR/GDR Issue

An Indian company can also sponsor an issue of ADR / GDR. Under this mechanism, the company offers its resident shareholders a choice to tender their shares back to the company so that on the basis of such shares, ADRs/GDRs can be issued abroad. The proceeds of the ADR / GDR issue are remitted back to India and distributed among the resident investors who had offered their Rupee denominated shares for conversion.

These proceeds can be kept in Resident Foreign Currency (Domestic) accounts in India by the resident shareholders who have tendered such shares for the purpose of the issue of ADRs / GDRs.

Answer 3(b)

Comprehensive template of a Project Report - Shark Ltd.

Part -I

1. Background of company (Company Profile) and promoter's Background.
2. Aim of the project.
3. Profiles of key personnel in the organization.
4. Future plan of the company.
5. Strengths and achievements of the company like potential market for software products project developed by the company and in-house expertise in the area of specialization.
6. Financial arrangements means of finance, tie up of funds and feasibility of the proposed setup.
7. Marketing strategy, Marketing Arrangements, Marketing tie-up, if any.
8. Export performance for last three years in cases of existing firms & last year's Balance Sheet.
9. Export Orders in hand / in pipeline / under registration.
10. Export work
11. Brochures of the software products /services/ company or Annual Report for the previous year.
12. Space Requirement / Built up Land.
13. Manpower: Type of people working
    - Project Manager
    - Project Leader
    - Senior Programmer
    - Junior Programmer/Operators

14. Wage Bill.
15. Conclusion and pitch.

PART II

PROJECT COST AND MEANS OF FINANCE **Amount in ₹....**

PROJECT COST:

Premises:

Office Equipment:

Hardware:

Software:

Working Capital Requirements:

Total

MEANS OF FINANCE **Amount in ₹....**

Equity

- Promoters:
- Indian Public:

Working Capital Loan:

Term Loan from Bank:

Total :

BALANCE SHEET (for last 5 years)

PROFIT AND LOSS STATEMENT (for last 5 years)

CASH FLOW STATEMENT (for last 5 years)

Important Ratios (for last 5 years)

Break Even Point Calculations (for last 5 years)

Answer 3(c)

As per Regulation 2(1)(j) of the SEBI (Share based Employee Benefits and Sweat Equity) Regulations, 2021 "Employee stock option scheme or ESOS" means a scheme under which a company grants employee stock options to employees directly or through a trust whereas Regulation 2(1)(k) defines "Employee stock purchase scheme or ESPS" as a scheme under which a company offers shares to employees, as part of public issue or otherwise, or through a trust where the trust may undertake secondary acquisition for the purposes of the scheme.

As per Regulation 3(10) of the SEBI (Share based Employee Benefits and Sweat Equity) Regulations, 2021, Secondary acquisition in a financial year by the trust shall not exceed 2% of the paid-up equity capital of the company as at the end of the previous financial year. Hence, Ganga Welfare Trust can acquire 2% stake in Bhola Ltd. during one financial year in order to facilitate the implementation of the ESOS scheme.

Regulation 6(1) of the SEBI (Share based Employee Benefits and Sweat Equity) Regulations, 2021 provides that no scheme shall be offered to employees of a company unless the shareholders of the company approve it by passing a special resolution in the general meeting.

Question 4

(a) External Commercial Borrowing (ECB) can be made only for permitted purposes as per FEMA guidelines. What is ECB ? Also mention the negative list for which ECB proceeds cannot be utilized.

(3 marks)

(b) Mars Ltd a public Ltd company wants to grant intercorporate loan to its wholly owned subsidiary, Jupiter Ltd. What is the limit for granting loan under Section 186 of the Companies Act, 2013 ? Is there a need to pass a special resolution, if the loan amount exceeds the limits as prescribed under the said section ? Suppose one of the Director is against granting of such loan, can the company still give loan ?

(3 marks)

(c) Several agencies/intermediaries are involved in the issue of ADRs/GDRs. Prepare the list of the agencies normally involved in the said issue.

(3 marks)

(d) What is the objective of International Monetary Fund (IMF) ? What is the fundamental mission of IMF ?

(3 marks)

(e) What are the obligations of a Debenture Trustee of Non-Redeemable Preference Share under the SEBI (Issue and listing of Non-convertible Securities) Regulations, 2021 ?

(3 marks)

Answer 4(a)

External Commercial Borrowing (ECB) are commercial loans raised by eligible resident entities from recognised non- resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end uses, maximum ceiling etc. The parameters apply in totality and not on a standalone basis.

The ECB Policy issued by RBI stipulate the negative list for which the ECB proceeds cannot be utilized and includes the following:

a) Real estate activities

b) Investment in capital market

c) Equity investment

d) Working capital purposes and General corporate purposes except in the following cases:

   i) ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans for Minimum Average Maturity Period of 5 years

   ii) ECB raised for working capital purposes or general corporate purposes and on-lending by NBFCs for working capital purposes or general corporate purposes for Minimum Average Maturity Period of 10 years

e) Repayment of rupee loans except in the following cases:

   (i) repayment of Rupee loans availed domestically for capital expenditure and on-lending by NBFCs for the same purpose

(ii) repayment of Rupee loans availed domestically for purposes other than capital expenditure and on-lending by NBFCs for the same purpose

f) On-lending to entities for the above activities in case of ECB raised by NBFCs as given in point (d) (e) and (f) above.

Answer 4(b)

In pursuant to provisions of Section 186(2) of the Companies Act 2013, no company shall directly or indirectly:

- give any loan to any person or other body corporate,
- give any guarantee or provide security in connection with a loan to any other body corporate or person, and
- acquire by way of subscription, purchase or otherwise, the securities of any other body corporate

exceeding 60% of its paid-up share capital plus free reserves plus securities premium account or 100% of its free reserves plus securities premium account, whichever is more.

Section 186(3) of the Companies Act, 2013 states that where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under sub-section (2), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

However, where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, there is no need of passing a special resolution.

Further, in pursuant to provisions of Section 186(5) of the Companies Act 2013, every company shall take consent of all the directors present at the board meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained, before making any investment, giving loan or guarantee or security given by the company.

Hence, in the given case Mars Ltd. cannot grant loan to Jupiter Ltd. as one of the Director is against the granting of loan.

Answer 4(c)

The following agencies/intermediaries are normally involved in the issue of ADRs/GDRs.

(i) Lead Manager : The issues related to public or private placement, nature of investment, coupon rate on bonds and conversion price are to be decided in consultation with the lead manager.

(ii) Co-Lead/Co-Manager: In consultation with the lead manager, the company has to appoint co-lead/co-manager to coordinate with the issuing company/lead manager to make the smooth launching of the issue.

(iii) Overseas Depository Bank: It is the bank which is authorised by the issuing company to issue Depository Receipts against issue of ordinary shares or Foreign Currency Convertible Bonds of issuing company.

(iv) Domestic Custodian Bank: A banking company which acts as custodian for the ordinary

shares or Foreign Currency Convertible Bonds of an Indian company, which are issued by it. The function of the domestic custodian bank is to co-ordinate with the depository bank.

(v) Listing Agent: The appointment of listing agent is necessary to coordinate with issuing company for listing the securities on Overseas Stock Exchanges.

(vi) Legal Advisors: The issuing company should appoint legal advisors who will guide the company and the lead manager to prepare offer document, depository agreement, indemnity agreement and subscription agreement.

(vii) Printers: The issuing company should appoint printers of international repute for printing Offer Circular.

(viii) Auditors: The role of issuer company's auditors is to prepare the auditor's report for inclusion in the offer document, provide requisite comfort letters and reconciliation of the issuer company's accounts between Indian GAAP/UK GAAP/US GAAP and identify significant differences.

(ix) Underwriters : It is desirable to get the issue underwritten by banks and syndicates. Usually, the underwriters subscribe for a portion of the issue with arrangements for tie-up for the balance with their clients.

Answer 4(d)

International Monetary Fund (IMF) is an organisation working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth and reduce poverty around the world. The primary purpose of IMF is to ensure the stability of the international monetary system - the system of exchange rates and international payments that enable countries and their citizens to transact with each other.

The following are the fundamental mission of IMF:

(i) keeping track of the global economy and the economies of member countries;

(ii) lending to countries with balance of payments difficulties; and

(iii) Other assistance to members countries

Answer 4(e)

Regulation 24 of the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 deals with the Obligation of Debenture Trustee as under:

1. The debenture trustee shall be vested with the requisite powers for protecting the interest of holders of NCRPS including a right to appoint a nominee director on the Board of the issuer in consultation with holders of such securities and in accordance with applicable law.
2. The debenture trustees shall supervise the implementation of the conditions regarding creation of security for the securities, if secured .
3. The debenture trustee shall monitor the payment of dividend as well as the security cover in relation to secured NCRPS in the manner as specified by the Board (if secured).
4. The Debenture Trustee shall monitor disclosures made to shareholders by the company directly and on its website / websites of Stock Exchanges.
5. The Debenture Trustee shall ensure that any change in terms of issuance of the NCRPS is communicated to the holders and the same is approved by them as per the requirements of the SEBI LODR Regulations.

PART-B

Question 5

(a) BCD Ltd. a Listed Company falling under the top 500 listed companies list, currently has 8 directors which includes women Managing Director, 3 non-executive, non- independent woman directors and 4 independent directors, (all males) and one of the independent directors is a Chairperson of the company. The second 5-year tenure of the current Chairman is expiring in the next annual general meeting (AGM) which is due in the next 6 months. The management is planning to appoint one of the non-executives, non-independent woman Director as the Chairperson. The management has the following queries and seeks your advice ?

Is the company mandatorily required to appoint a new independent women director in order to fill the vacancy arising due to the expiration of the first term of the independent director ?

(*5 marks*)

(b) What are the principles, that a listed entity shall comply with as per SEBI (LODR) 2015 Regulations ?

Explain in brief the objectives of those principles.

(*5 marks*)

(c) What are the confirmations need to be obtained by SME Platform under Chapter IX of SEBI (ICDR) Regulations 2018 from the Issuer Company and BRLM(s) (Book Running Lead Manager/ Lead Manager(s) at in principal approval stage ?

(*5 marks*)

(d) SEBI has notified the SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2023 on June 14, 2023. Briefly explain amendments made on disclosure of material events in terms of value, information or event to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

(*5 marks*)

Answer 5(a)

As per the requirements of Regulation 17(1) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, the Board of directors shall have an optimum combination of executive and non-executive directors with at least one-woman director and not less than 50% of the Board of directors shall comprise of non-executive directors;

The Board of directors of the top 500 listed entities shall have at least one independent woman director by April 1, 2019 and the Board of directors of the top 1000 listed entities shall have at least one independent woman director.

In current situation, Company will be obligated to appoint a woman independent director, as it is listed among the top 500 entities.

Answer 5(b)

Regulation 4(1) of the SEBI (LODR) Regulations, 2015 provides the principles which a listed entity has to comply are as under:

a) To implement the applicable accounting standards in letter and spirit.

b) To conduct the annual audit by an independent, competent and qualified auditor.

c) To refrain from misrepresentation and provide adequate and timely information to recognized stock exchange(s) and investors and ensure that it is not misleading.

d) To ensure to disseminate information in adequate, accurate, explicit, timely and presented in a simple language.

e) To ensure that channels for disseminating information provide equal, timely and cost efficient access to relevant information by investors.

f) To abide by all the provisions of the applicable laws including the securities laws and also such other guidelines.

g) To make the specified disclosures and follow its obligations in letter and spirit.

h) Filings, reports, statements, documents and information which are event based or are filed periodically shall contain relevant information.

i) Periodic filings, reports, statements, documents and information reports shall contain information that shall enable investors to track the performance of a listed entity over regular intervals of time.

The objectives of the said principles are:

- **The rights of the shareholders:** The listed entity shall seek to protect and facilitate the exercise of the rights of shareholders inter alia covering the decisions concerning fundamental corporate changes, vote in general shareholder meetings, being informed of the rules, opportunity to ask questions, adequate mechanism to address the grievances of the shareholders etc.
- **Timely information:** The listed entity shall provide adequate and timely information to shareholders, inter alia including sufficient and timely information of meetings, Capital structures and arrangements etc.
- **Equitable treatment:** The listed entity shall ensure equitable treatment of all shareholders, including minority and foreign shareholders, in the manner comprising of effective shareholder participation, exercise of voting rights by foreign shareholders, devise a framework to avoid insider trading etc.
- **Role of stakeholders in corporate governance:** The listed entity shall recognise the rights of its stakeholders and encourage co-operation between listed entity and the stakeholders in the manner as prescribed by SEBI.
- **Disclosure and transparency in systems & procedures:** The listed entity shall ensure timely and accurate disclosure on all material matters including the financial situation, performance, ownership, and governance of the listed entity in the manner as prescribed by SEBI.
- **Duties and responsibilities of Board:** The board of directors of the listed entity shall have the responsibilities pertaining to Disclosure of Information, Key functions of the board of directors and other responsibilities.

Answer 5(c)

The SME Platform of a Stock Exchange need to obtain confirmation from the Issuer Company and BRLM (s)/ Lead Manager(s) that:

a) The Company is eligible to make an issue under SEBI (ICDR) Regulations, 2018 and is in compliance with Regulation 228 and 230 of said regulations.

b) For the proposed IPO, the Company is in compliance with the eligibility requirement for an SME to make an IPO as laid down under Regulation 229 of SEBI (ICDR) Regulations 2018.

c) The Company is in compliance with the eligibility criteria of the Exchange for listing on BSE/ NSE SME Platform. (Point wise compliance with Exchange requirement shall be given as separate Annexure to the application.)

d) There are no restrictive clauses in the Articles of Association (AoA) of the Company.

e) The provisions of the Memorandum and Articles of Association (MoA) are not inconsistent with the clauses of the Listing agreement or any other applicable law, Rules or Regulations.

f) For the proposed IPO, the company has complied with all the statutory requirements including requirements of the Companies Act, 2013, SEBI Act, RBI Guidelines, SEBI (ICDR) Regulations, 2018 etc. and no statutory authority has restrained the company from issuing its securities to public through IPO.

g) The company has appointed <name> as compliance officer in term of Regulation 244(8) of SEBI (ICDR) Regulations, 2018 and his/her contact details are provided.

Answer 5(d)

Disclosure of events or information:

In case of a listed entity, disclosure of material events is mandatory where the omission of an event or information, whose value or the expected impact in terms of value, exceeds the lower of the following:

- 2% of turnover, as per the last audited consolidated financial statements of the listed entity;
- 2% of net worth, as per the last audited consolidated financial statements of the listed entity, except in case the arithmetic value of the net worth is negative;
- 5% percent of the average of absolute value of profit or loss after tax, as per the last three audited consolidated financial statements of the listed entity. [Regulation 30(4)(i)(c)]

In case where the criteria specified is not applicable, an event or information may be treated as being material if in the opinion of the board of directors of the listed entity, the event or information is considered material. [Insertion: Regulation 30(4)(i)(d)]

The listed entity shall first disclose to the stock exchange all events or information which are material in terms of the provisions of this regulation as soon as reasonably possible and in any case not later than the following:

- 30 minutes from the closure of the meeting of the board of directors in which the decision pertaining to the event or information has been taken;
- 12 hours from the occurrence of the event or information, in case the event or information is emanating from within the listed entity;
- 24 hours from the occurrence of the event or information, in case the event or information is not emanating from within the listed entity.

However, the disclosure with respect to events for which timelines have been specified in Part A of Schedule III shall be made within such timelines, Further, in case the disclosure is made after the timelines specified under this regulation, the listed entity shall, along with such disclosure provide the explanation for the delay.

Attempt all parts of either Q. No. 6 or Q. No. 6A

Question 6

(a) A listed company has to inform the outcome of the board meeting to the stock exchanges within 30 minutes of the conclusion of the meeting. List out such items that are to be communicated to the stock exchange.

(*5 marks*)

(b) What is "Vigil Mechanism" ? Explain briefly the provision under SEBI Listing Obligations & Disclosure (LODR) Regulations 2015.

(*5 marks*)

(c) International listing enables companies to trade its shares in numerous time zones and multiple currencies. Do you agree with this statement ?

What are the benefits of international listing ?

(*5 marks*)

(d) Who is a NOMAD in the context of listing of securities in London Stock Exchange ? Explain the role of NOMADs.

(*5 marks*)

OR (Alternate question to Q. No. 6)

Question 6A

(*i*) Who is an insider and what is insider trading ? What is price sensitive information ? Answer with reference to SEBI (Prohibition of Insider Trading) Regulations, 2015.

(ii) Prepare a checklist of documents for listing of securities issued pursuant to the Rights issue.

(iii) Write a brief note on US Securities and Exchange Commission.

(iv) Explain the Mainstream media pursuant to SEBI (Listing Obligations and Disclosure Requirement) Regulations 2015.

Attempt all parts of either Q. No. 6 or Q. No. 6A

Answer 6(a)

A listed entity has to disclose the following important items of business to the stock exchanges within 30 minutes of closure of the board meeting:

1. Dividend/cash bonuses recommended or declared or the decision to pass any dividend and the date on which dividend shall be paid/dispatched;
2. Any cancellation of dividend with reasons thereof;
3. Decision on buyback of securities;
4. Decision with respect to fund raising proposed to be undertaken;
5. Increase in capital by issue of bonus shares through capitalization including the date on which such bonus shares shall be credited/dispatched ;
6. Reissue of forfeited shares or the issue of shares or securities held in reserve for future issue or the creation in any form or manner of new shares or securities or any other rights, privileges or benefits to subscribe to;

7. Short particulars of any alteration of capital, including calls;
8. Financial results;
9. Decision on voluntary delisting by the listed entity from stock exchange(s).

In case of board meetings being held for more than one day, the financial results shall be disclosed within 30 minutes of end of the meeting for the day on which it has been considered.

Answer 6(b)

Vigil Mechanism

The Vigil Mechanism is for elimination of malpractices in the system. This policy encourages all the employees, officers, consultants to come out with their complaints regarding any kind of misuse of Company's properties, mismanagement or wrongful conduct prevailing in the Company, if any.

Vigil Mechanism [Regulation 22 of SEBI (LODR) Regulations, 2015 read with Section 177(9) of the Companies Act, 2013]

- The listed entity shall devise an effective vigil mechanism/whistle blower policy enabling stakeholders, including directors, individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices
- The vigil mechanism shall provide for adequate safeguards against victimization of director(s) or employee(s) or any other person who avail the mechanism.
- The vigil mechanism shall also provide for direct access to the chairperson of the audit committee in appropriate or exceptional cases
- Details of establishment of vigil mechanism/ Whistle Blower policy disseminated by listed entity on its website.

Answer 6(c)

Yes. International listing enables a company to ensure trading of its shares in numerous time zones and multiple currencies This increases the issuer company's liquidity and gives it more flexibility to raise capital.

Some of the benefits of international listing are mentioned hereunder:

1. **Increased Market Liquidity**

   International listing enables companies to trade its shares in numerous time zones and multiple currencies. This increases the issuing company's liquidity and gives it more ability to raise capital.

2. **Market Segmentation**

   Market segmentation is the practice of dividing a large market into clear segments with similar needs. International listing enables firms to divide foreign investor markets into segments which are easy to access. Companies seek to list internationally because they anticipate gaining from a lesser cost of capital. This arises because their stocks become more available to foreign investors. Their access to these stocks may otherwise be restricted due to international investment barrier.

3. **Capital needs and growth opportunities**

   Companies in emerging markets need to use international listing to raise capital to continue to grow beyond their home market.

4. **Wider Investor base**

   International listing provides access to a larger pool of potential investors (both retail and institutional). Wider shareholder base is less risky.

5. **Better Investor Protection**

   Companies need to comply with the provisions of all the regulatory aspects of the listing of those countries, where sought to be listed. Investors will therefore find themselves more protected and comfortable to invest in these companies.

6. **Secure Clearing**

   A stock exchange provides a reliable and secure clearing mechanism. Listing on a foreign stock exchange is possible only after creating robust and advance clearing system.

7. **Other benefits**

   Higher visibility/brand awareness, increased opportunities for mergers and acquisitions, entering markets with better investment protection reduces costs and creates bonding (a signal of corporate governance).

Answer 6(d)

NOMADs or the Nominated Advisor, broker and other advisors play a central role in a company's admission to Alternate Investment Market (AIM). NOMADs are corporate finance advisers approved by the London Stock Exchange to act in this capacity. A NOMAD is responsible for advising and guiding a company on its responsibilities in relation to its admission to AIM as well as its continuing obligations once on market.

Role of Nominated Advisors (NOMADs)

NOMADs have to meet the eligibility criteria set out in the AIM rules for Nominated Advisers. The role of the NOMADs includes the following:

- undertakes extensive due diligence to ensure that the company is suitable for AIM
- provides the guidance throughout the floatation process
- help prepare the AIM admission document
- confirm appropriateness of the company to the exchange
- act as the primary regulator throughout the company's time on AIM.

OR (Alternate question to Q. No. 6)

Answer 6A(i)

As per Regulation 2(1) (g) of SEBI (Prohibition of Insider Trading) Regulations, 2015, an insider is a person who is a connected person or in possession of or having access to unpublished price sensitive information.

According to the provisions of Regulation 2(1)(d) of the SEBI (Prohibition of Insider Trading) Regulations, 2015, "Connected Person" means:

- any person who is or has during six months prior to the concerned act, has been associated with the company, directly or indirectly;
- in any capacity (including by reason of frequent communication with its officers or by being in any contractual, fiduciary or employment relation); or

– is a director, officer or an employee of the company or holds any position including a professional or business relationship between himself and the company, whether temporary or permanent,

– that allows such person, directly or indirectly, access to unpublished price-sensitive information or reasonably expected to allow such access.

SEBI has also prescribed a list of persons who are deemed to be connected person.

As per Regulation 2(1)(l) of SEBI (Prohibition of Insider Trading) Regulations, 2015 "trading" means and includes subscribing, redeeming, switching, buying, selling, dealing, or agreeing to subscribe, redeem, switch, buy, sell, deal in any securities, and "trade" shall be construed accordingly.

Thus, the Insider trading is buying or selling a publicly traded company's stock with someone with non-public price sensitive information which are material in nature and that can substantially impact an investors decision to buy or sell a security that has not been made available to the public.

The term 'price sensitive information' is not defined in the SEBI (Prohibition of Insider Trading) Regulations, 2015. However, as per Regulation 2(1)(n) of SEBI (Prohibition of Insider Trading) Regulations, 2015 "unpublished price sensitive information" means any information, relating to a company or its securities, directly or indirectly, that is not generally available which upon becoming generally available, is likely to materially affect the price of the securities and shall, ordinarily including but not restricted to, information relating to the following: –

i. financial results;
ii. dividends;
iii. change in capital structure;
iv. mergers, de-mergers, acquisitions, delistings, disposals and expansion of business and such other transactions;
v. changes in key managerial personnel

Answer 6A(ii)

The company should submit the letter of application along with the following documents / formalities:

1. Certified copy of the resolution passed by the Board of directors for issue of securities on Right Basis.
2. Shareholding pattern for pre and post issue as per the format prescribed under Regulation 31 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 for all types of securities issued on Rights basis.
3. A certified copy of Basis of Allotment as approved by Designated Stock Exchange should be filed.
4. Auditors/Practicing CA/CS certificate that allotment has been done as per basis of allotment approved by the designated stock exchange.
5. The total number of securities allotted in the physical category and in Demat (CDSL & NSDL Separately) with category wise distinctive numbers should be filed.
6. An undertaking from the Managing Director/Compliance Officer certifying that all the documents filed by the Company with the Exchange are same/similar/identical in all respect with the documents filed by the Company with Register of Companies/SEBI/RBI/FIPB in respect of the allotment/enlistment of the aforesaid rights share on the Exchange, and

that the company has complied with all the legal and statutory formalities and no statutory authority has restrained the company from issuing and allotting the securities on rights basis.

7. Undertaking from the Compliance Officer of the issuer that the company or its promoters or whole-time directors are not in violation of the provisions of the SEBI Delisting Regulations, 2021 and its promoters, its directors are not in violation of the restrictions imposed by SEBI.
8. Undertaking from the Compliance Officer of the issuer that the issuer or any of its promoters or directors or are not wailful defaulter as defined under SEBI (ICDR) Regulations, 2018";
9. Annual Listing fees.

Answer 6A(iii)

The mission of the U.S. Securities and Exchange Commission (SEC) is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. The SEC strives to promote a market environment that is worthy of the public's trust.

The SEC oversees the key participants in the securities world, including securities exchanges, securities brokers and dealers, investment advisors, and mutual funds. Here the SEC is concerned primarily with promoting the disclosure of important market-related information, maintaining fair dealing, and protecting against fraud.

Though it is the primary overseer and regulator of the U.S. securities markets, the SEC works closely with many other institutions, including Congress, other federal departments and agencies, the self-regulatory organizations (e.g., the stock exchanges), state securities regulators, and various private sector organizations. In addition, the Chairman of the SEC represents the agency as a member of the Financial Stability Oversight Council (FSOC).

The laws that govern the Securities Industry in US:

- Securities Act of 1933
- Securities Exchange Act of 1934
- Trust Indenture Act of 1939
- Investment Company Act of 1940
- Investment Advisers Act of 1940
- Sarbanes-Oxley Act of 2002
- Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
- Jumpstart Our Business Startups Act of 2012
- Rules and Regulations.

Answer 6 A(iv)

As per Regulation 2(1) (ra) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 'Mainstream media' includes print or electronic mode of the following:

i. Newspapers registered with the Registrar of Newspapers for India;
ii. News channels permitted by Ministry of Information and Broadcasting under Government of India;
iii. Content published by the publisher of news and current affairs content as defined under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021; and
iv. Newspapers or news channels or news and current affairs content similarly registered or permitted or regulated, as the case may be, in jurisdictions outside India.

MULTIDISCIPLINARY CASE STUDIES

MODULE 3 PAPER 8

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

Question 1

Read the following case study and answer the questions given at the end :

Mayukhar Cement Industries Limited ('MCIL/the Company'), a leading cement manufacturing company based in southern part of India was established in the year 1998. Its founder Mayanth, was an engineer having industry experience and was keen to be an entrepreneur. He established a full-fledged manufacturing entity to manufacture and supply cement at a reasonable cost, to develop the hinterland and provide job to local people. The Company was run by Mayanth and his relatives. Over a period, more than 8 factories were established in and around Karnataka and the Company had created a brand for itself.

Mayanth was a first-generation entrepreneur and he had come from an agrarian background. As the Company grew in its operations and revenue, he employed more people from local areas around the factories. Mayanth with his strong leadership skills and vision, expanded the business of the Company, which grew exponentially over few years. The Company had gone for an IPO in the year 2005 and its shares were listed at premium. It adopted all the necessary corporate governance policies in its functioning. It also had a risk management framework which provided for review of the risk assessment and mitigation procedures, including periodical review of the procedures to ensure the executive management mitigates the risks through a properly defined framework. The Audit Committee, which has been designated by the Board for this purpose, also reviewed the adequacy of the risk management framework of the Company, the key risks associated with the business operations and the measures in place to mitigate the same. The Company also had well qualified Audit Committee members, who usually asked questions in the audit committee meetings. Though the members of audit committee were well qualified independent directors, they were very close and well known to Mayanth. At the operational level, the Company had established all the necessary policies and procedures like risk management policy, whistle blower policy, etc.

Mayanth wanted to retire from business and he introduced this son Mahanth, as an executive director. Mahanth had done MBA from Standford University and was trained in finer aspects of management. He was aspirational and wanted to further expand the business of the Company to other industries as well. He diversified the manufacturing business into various other sectors like brick and motor, steel and other ancillary industries relating to cement and its products. Initially, it required huge capital outlay, which they raised by way of borrowings and loans. The diversification of business took couple of years, but it did not yield the expected returns or growth.

Meanwhile, MCIL had developed a complex governance structure to accommodate its diversification aspirations and it had grown way too much to simplify. Each vertical had its own Finance manager who would report to a central Finance team headed by the CFO. Each Financial Manager was unaware of the performance of other vertical. The top management consisted of a few professionals and family members. In this process, many relatives and close associates of Mahanth were also given jobs in the Company to take care of the multiple verticals. Being promoter's relatives, they had easy access to information and decision-making, which they used for personal purposes. All top executives were allotted large number of ESOPs to ensure that they

work hard for the Company and thereby aiding the boost in the share price. Mahanth, was greedy and wanted to increase the share value of the Company by showing results and did not mind to opt for any path, even though it may not be appropriate. The present directors of the Company and Committees of the Board, were well known to Mahanth and were aligned to his ideas and ideologies.

Whilst things seemed going fine apparently, but all was not well within the Company. The complex structure of verticals, allowed the MCIL to manage accounting in a way to conceal the performance of some verticals without impacting the profit numbers. The Financial reporting and accounting team of the Company, though aware about these matters but never dared to speak about it. Ghirya, a new employee in the team, noticed that the accounting of transactions was getting circumvented and was not appropriate. She informed the same to her manager, who nudged her to be silent for the sake of her job. Later, the independent directors of the Company also received an anonymous letter stating that the Company's financial records were being fudged. Though it was brought to notice of all the Directors, it was not acted upon.

The statutory auditors of the Company had rotated out in the year 2016 and Mahanth proposed to appoint, T & P LLP (one of the largest audit firms in the country), as the statutory auditors of the Company. Incidentally, the Director and Partner of the firm, were very well known to Mahanth. During the statutory audit, the audit team did raise few points regarding the controls and accounting policies of the Company. As the Partner of the firm and Mahanth, were close friends now, those points were not pursued, rather the audit fee was increased and new consultancy assignments were given to the audit firm. It could be easily deciphered that T & P LLP had compromised its independence with a large audit fee and also consultancy income worth several times the audit fee. MCIL was such an important and large client for statutory auditor firm, that they could not go against the management. It was aware about the deficiencies in the financial records and signed off the financial statements to protect the management of the Company. It was also aware that, there were several significant internal control deficiencies including no effective management oversight of the external reporting process and a disregard of the relevant accounting standards.

Gradually, over the next four years, the situation of the Company went from bad to worse and the Company was running into losses and eroded its entire networth. The Company which was a leading manufacturer of cement, went into immense losses due to mismanagement. It had no option but to declare itself bankrupt, the Company issued a press statement that there were deviations between actual and reported results due to accounting errors. The obvious question which arose was, why the auditors, who were the first line of defense had not spotted and flagged off the issues in accounting & reporting by the Company. The independent directors of the Company and Mahanth, resigned from their positions.

Meanwhile MCIL, also had an impact on its market reputation and credibility. From a valued stock, MCIL was now a penny stock. Suraksha Materials Private Limited (SMPL) was supplying materials to MCIL since last many years. Due to operational issues and cash crunch, MCIL failed to pay SCPL's total outstanding amount of ₹ 1.75 Crore. The amount remained unpaid for more than a year. MCIL has been incurring losses for the last many years and it was expected that within the next 3 months, there might be a major financial crisis. The Company may not be able to pay its outstanding debts to many of its creditors, as its financial position could deteriorate further.

The operational creditors with long over dues were worried, demand notices along with the photo copies of relevant invoices and outstanding statements as per the ledgers were officially sent to MCIL. The Company tried to convince SCPL and other operational creditors about the future plans of the business. Neither they were able to clear their dues, nor were they able to make any future commitments. After having meetings with the operational and financial creditors of MCIL, the Board of Directors of SCPL finally took a firm decision to file an application along with the required

documents for initiation of the Corporate Insolvency Resolution Process (CIRP) against MCIL before the National Company Law Tribunal (NCLT) under Insolvency and Bankruptcy Code, 2016 ('IBC'). SCPL proposed the name of Vihaan, a Chartered Accountant and a leading Insolvency Professional as an Interim Resolution Professional (IRP).

NCLT admitted the application filed by financial creditors, operational creditors, and SCPL. The CIRP, commenced on the scheduled date, following the process under the provisions of the IBC. NCLT by an order issued a moratorium. As an IRP, Vihaan started managing all the Company's affairs. The powers of the Board of Directors of MCIL were suspended. The officers and managers of MCIL, started acting on the instructions issued by Vihaan and provided him with all the necessary information and documents. After receiving all the claims against MCIL and determining its financial position, Vihaan constituted a Committee of Creditors. In the first meeting of the Committee of Creditors, the committee approved to appoint Vihaan as the Resolution Professional. He took prior approval of the Committee of Creditors, whenever required. Vihaan prepared the required Memorandum for the Resolution Plan and invited prospective lenders, investors, and other persons to prepare Resolution Plans.

In consultation with various stakeholders, Vihaan prepared a Resolution Plan. MCIL and all the stakeholders agreed with the resolution plan submitted during the Meetings of the Committee of Creditors. Vihaan had a firm belief that liquidation of MCIL is not at all necessary. Finally, all the stakeholders agreed with MCIL revival possibilities. Vihaan then submitted the Resolution Plan to the Committee of Creditors for approval. The Committee discussed it in detail and approved the Resolution Plan to revive MCIL with the required majority. The Revival Plan also approved the payments of debts due to SCPL and other Creditors. Vihaan submitted a Resolution Plan, approved by the Committee of Creditors to NCLT, which approved the Resolution Plan. MCIL was likely to back on track in the next l-2 years and it could repay, its overdue debts to all of its Creditors. There has been a change in the present management of MCIL, and the Board is confident and is of the opinion that with certain financial decisions and concrete actions like the restructuring of some of the term loans MCIL had borrowed from banks, reduction in debtors' credit period for the faster realization to sort out liquidity issues, controlled inventory levels, certain other cost savings measurement, removal of some of the non-profitable items from the product mix, etc. might positively help the Company.

With reference to the above case study, answer the following :

(a) Prepare a detailed note indicating the types of risks faced by a manufacturing entity like MCIL, which should form part of the risk management framework.

(10 marks)

(b) 'The financial deterioration could have been averted, had those charged with governance acted upon the whistle blower complaints in a timely manner.' Why do you think the whistle blowing mechanism failed in case of MCIL ? Explain in detail, the pertinent aspects which Board of Directors/Committees should consider to ensure that whistle blower mechanism works effectively.

(10 marks)

(c) Assuming MCIL is under moratorium, in the background of IBC, analyse the validity of following transactions :

(i) MCIL signed a lease deed with Anom, for the warehouse a year ago. MCIL has been in possession of such warehouse property since then. But now Anom terminated the lease and recovered his property.

(ii) MCIL sold its property worth ₹ l0 crore to Krish & Co, so that it can repay its creditors.

(iii) The licence of MCIL with some sector regulators was suspended, regarding which license fee is already paid by MCIL in advance.

(10 marks)

(d) "The legal and regulatory provisions emphasize the importance of auditor's independence. However, it is seen that the auditor's independence is at times compromised." In this background :

(i) With reference to the Companies Act, 2013, explain the provisions which underscore the importance of auditor's independence.

(ii) Can any action be taken by regulators against such auditors who are found to have compromised on independence ?

(iii) What can the Company do to ensure efficacy and independence of the statutory auditor function ?

(10 marks)

Answer 1(a)

Various financial risk and non-financial risk are present in any situations which need to be managed and understood. The risk which has some direct financial impact on the entity is treated as financial risk. This risk may be Market risk, Credit risk, and Liquidity risk, Operational Risk, Legal Risk and Country Risk.

Non-financial risk do not usually have direct and immediate financial impact on the business, but the consequences are very serious and later do have significant financial impact if these risks are not controlled at the initial stage. This type of risk may include, Business/Industry & Service Risk, Strategic Risk, Compliance Risk, Industry Fraud Risk, Reputation Risk, Transaction risk, Disaster Risk.

Various types of risks faced by the Company can be broadly outlined as follows:

1. **Strategic Risk**

   Risks associated with brand management, strategy development, strategic alliance, R&D, business planning and performance targets.

2. **Business Development Risk**

   Risks associated with developing, implementing and managing new and existing products, customer service, pricing, marketing and feasibility of new business opportunities.

3. **Operations Risks**

   These risks are associated with operations, both internal and external, including procurement of raw materials, safety, lack of defined processes, etc.

4. **Human Resource Risks**

   Risks associated with organizational structure, recruitment, remuneration, industrial relations, communication, support systems, processes and procedures.

5. **Entity Risks**

   Risks associated with lack of defined policies, processes, procedures and delegation.

6. **Information Technology Risks**

   Risks associated with data management, system migrations, interfaces, data integrity, network architecture not supporting business functions and requirements.

7. **Financial Risks**

   Risks related to liquidity, cash management, collection of dues from debtors, foreign currency fluctuations, interest rate fluctuations, etc.

8. **Asset Management Risks**

   Risks related to management or maintenance of Company's key assets including property, plant, equipment and environment

9. **Legal Risks**

   Risks related to non-compliance with legislations, regulatory issues impacting the company, adverse impact of new laws, etc.

Risk Mitigation Measures

To enable every individual to perform his role on risk assessment and mitigation the Company –

a) Has documented Standard Operating Procedures.

b) Regularly conducts training and development programmes at all levels.

c) Conducts periodic review of all functional areas.

d) Created favourable environment for audits, communication, clarity and compliances.

Answer 1(b)

Reasons for failure of whistle blower mechanism

MCIL had developed a complex governance structure leading to difficulties in its effective implementation and operation. This not only allowed accounting anomalies to exist, it also created gaps between verticals to understand the operations and the compliance mechanism.

The governance mechanism and various systems put in place such as policies, independent directors, auditors etc. were compiled as a box ticking exercise and not in true spirit. In reality there was total absence of independence and professionalism.

Since the entire management and board was flocked with family members, relatives and friends, who were all acting hands in gloves, there was no independent exercise of judgment and employees had no sense of job security and other safety to utilise the whistle blower mechanism. The attempt of the junior employee to highlight the matter was nipped in the bud by her manager owing to fear of losing the job which reveals the failure of whistle blower mechanism wherein the basic idea is to provide protection to the whistle blower.

Anonymous letter received by the independent directors was merely forwarded to all other directors where it was neglected which show failure on their part to discharge their duties effectively. Ideally it should have been brought to the audit committee who should have seriously acted upon it. However, since the board itself is compromised, even audit committee would have failed to address the issue.

The whistle blower mechanism failed mainly because the employee did not have access to those charged with governance, which indicates that the whistle blower would not be protected in case of any issues. Further, though the independent directors received anonymous complaints, they did not act upon it to verify the veracity.

Thus, having a whistle blower mechanism in true letter and spirit may provide some red flags to the Directors and investors.

The following pointers can be considered by companies to wake make the whistle blowing mechanism effective:

- Are whistle-blowing policies and procedures documented and communicated across the organisation?
- Does the whistle-blowing policy ensure that it is both safe and acceptable for employees to raise concerns about wrongdoing?
- Were the whistle-blowing procedures arrived at through a consultative process?
- Do management and employees "buy into "the process? Are success stories publicised?
- Are concerns raised by employees responded to within a reasonable time frame?
- Are procedures in place to ensure that all reasonable steps are taken to prevent the victimisation of whistle blowers and to keep the identity of whistle- blowers confidential?
- Has a dedicated person been identified to whom confidential concerns can be disclosed?
- Does this person have the authority and statute to act if concerns are not raised with,or properly dealt with, by line management and other responsible individuals?
- Does management understand how to act if a concern is raised?
- Do they understand that employees (and others) have the right to blow the whistle?
- Has consideration been given to the use of an independent advice centre as part of the whistleblowing procedures?
- In cases where no instances are being reported though the whistle-blowing channel did management reassess the effectiveness of the procedures?

Answer 1(c)

Section 14(1) of the Insolvency & Bankruptcy Code,2016 provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare the moratorium for prohibiting all of the following, namely:

a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree, or order in any court of law, tribunal, arbitration panel, or other authority:

b) Transferring, encumbering, alienating, or disposing-off by the corporate debtor any of its assets or any legal right or beneficial interest therein:

c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002):

d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Further, explanation reads as for the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during the moratorium period.

Thus, from the above discussion, we can conclude that:

(i) Action of Anom to terminate the lease and recover his property is prohibited under clause (d) of sub-section (1) to section 14 stated above.

(ii) Action of MCIL to sell its property worth 10 crores to Krish & Co so that it can repay its creditors is prohibited under clause (b) of sub-section (1) to section 14 stated above.

(iii) Action of the sectoral regulator to suspend the licence of MCIL despite the fact that license fee is already paid by MCIL is not legally valid due to explanation to sub-section (1) to section 14 stated above.

Answer 1(d)

(i) Yes, the given case very much highlights the importance of independence of auditors. If auditor had been independent and not under the influence of the client, they would have performed their duties more diligently rather than signing inaccurate accounts statements.

To maintain independence of the auditors Section 141 of the Companies Act 2013 provides that the following cannot be appointed Auditors –

(a) A body corporate except LLP

(b) An officer or employee of the company.

(c) A person who is partner or who in the employment, of an officer or employee of the company.

(d) A person who or his relative or partner:

(i) is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company: Provided that the relative may hold security or interest in the company of face value not exceeding one thousand rupees or such sum as may be prescribed;(which is at present rupees one lakh). Corrective action to be taken by auditor in 60 days whenever such limit is crossed.

(ii) is indebted to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of such amount as may be prescribed (Rs five lakh at present); or

(iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company for such sum as may be prescribed (in excess of one lakh rupees at present)

(e) A person or a firm who (whether directly or indirectly) has business relationship with the company, or its subsidiary. or its holding or associate company or subsidiary of such holding company or associate company".

(f) A person whose relative is a director or is in the employment of the company as a director or any other key managerial post.

(g) A person who is in full time employment elsewhere or a person or a partner of a firm holding employment as its auditor, if such person or partner is at the date of such appointment, holding appointment as auditor of more than 20 companies.

(h) A person who has been convicted by the court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction.

(i) Any person who, directly or indirectly, renders any service referred to in section 144 to the company or its holding company or its subsidiary company.

Non Audit Services may affect the independence of the auditor hence the following are prohibited under Section 144 of the Companies Act.

- accounting and book keeping services;
- internal audit;
- design and implementation of any financial information system;
- actuarial services;
- investment advisory services;
- investment banking services;
- rendering of outsourced financial services;
- management services; and
- any other kind of services as may be prescribed

(ii) Since auditors are guilty of signing false accounts statement, there should be some authority to take action against defaulting auditors. The National Financial Reporting Authority (NFRA) is an independent regulator established under Section 132 of the Companies Act, 2013 to oversee the auditing profession. NFRA has the investigative and disciplinary powers. The NFRA have the power to investigate, either suo moto or on a reference made to it by the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of chartered accountants.

Section 132 (4) provides that notwithstanding anything contained in any other law for the time being in force, the National Financial Reporting Authority shall–

(c) where professional or other misconduct is proved, have the power to make order for–

(A) imposing penalty of–

(I) not less than one lakh rupees, but which may extend to five times of the fees received, in case of individuals; and not less than five lakh rupees, but which may extend to ten times of the fees received, in case of firms;

(B) debarring the member or the firm from–

I. being appointed as an auditor or internal auditor or undertaking any audit in respect of financial statements or internal audit of the functions and activities of any company or body corporate; or

II. performing any valuation as provided under section 247, for a minimum period of six months or such higher period not exceeding ten years as may be determined by the National Financial Reporting Authority.

(iii) Rotation of auditor is one important step that Company can take to ensure efficacy and independency of statutory auditor function. If the auditors have been changed after 4- 5 years, they would have different opinion on the financial statements. Since same auditors were continuing for a long time, the company was able to mis-report financial statement for such a long time.

A mandatory audit rotation rule which sets a limit on the maximum number of years an audit firm can audit a given company's financial statements is a means to preserve auditor independence and possibly to increase investors' confidence in financial reports.

Mandatory audit firm rotation is defined in the Sarbanes-Oxley (SOX) Act as the imposition of a limit on the period of years during which an accounting firm may be the auditor of record. Mandatory audit firm rotation is often discussed as a potential way to improve audit quality – typically gaining attention when public confidence in the audit function has been eroded by events such as corporate scandals or audit failures.

When the same auditors continue in the same company for years and years, it results in a close relationship between management and auditors which increases the chances of fraud.

To ensure independency and effectiveness of statutory auditor the audit committee will review and monitor the auditor's independence, the audit scope and process, and performance of the audit team and accordingly recommend appointment, remuneration and terms of appointment of auditors of the company. The Company must ensure that it complies in true letter and spirit all provisions of the Companies Act, 2013 and and it must select auditors diligently based on the requirements and profile of the business.

Question 2

(a) An application was filed in the National Company Law Tribunal (NCLT) under oppression and mismanagement against the Managing Director of Jhalak Industries Private Ltd (JIPL). In the application, it was alleged that Jayna, the Managing Director of the Company siphoned off the money for his personal use and had purchased huge properties in the name of his family members out of the Company's funds. It was also alleged that Jayna had indulged in fiaudulent sale transactions, thereby fudging the books of accounts of the Company. It was appealed that a forensic audit be conducted for the Company since March 3l, 2018 and a petition was filed under sections 59, 241 and 242 of the Companies Act, 2013 alleging oppression and mismanagement against Jayna. It was also alleged that, he has been operating the finances of the Company in an arbitrary and whimsical manner and has siphoned off crores of rupees belonging to the Company without accounting for the same. The adjudication authority allowed the application and directed that forensic audit of JIPL be conducted since March 31, 2018. The Company had filed the appeal against the order passed by the adjudication authority.

In the background of above facts :

(i) With reference to a decided case-law, evaluate whether the forensic audit ordered by the NCLT is tenable.

(ii) Comment whether the Company will succeed in its appeal.

(6 marks)

(b) Keyol, a post graduate in Mine engineering, was appointed in Brihat India Ltd (BIL) in June, 2020 in B-2 Grade and joined the same in July 2020 at Chhattisgarh. On a personal request made by Keyol, the HR Manager of the Company issued a transfer order dated 23rd September, 2020 transferring Keyol from BIL to Create India Ltd (CIL), a subsidiary of the BIL, in his existing capacity i.e. B-2 Grade. It was clearly mentioned in the transfer notice that, since the transfer had been made at the instance of Keyol himself, his seniority in the E-2 Grade would be reckoned from the date he jointed CIL. Keyol claimed that in December 2023, the Company held its departmental promotion committee, after which several employees were

promoted from B-2 Grade to B-3 Grade but he was overlooked for promotion. The reason given to him was that his transfer to CIL was done at his own request and his promotion would be considered only after he completed three years of work experience at CIL, which was the requisite period for promotion from B-2 to B-3. Keyol challenged the Company's decision by filing a writ petition before the High Court.

In the background of a judicial pronouncement, explain whether Keyol will succeed.

(*6 marks*)

Answer 2(a)

(i) The facts of the GIVEN case are similar to the appeal filed by Vijay Sai Poultries PVT. Ltd. against order of NCLT dated 16th September, 2019.

The appeal was filed against the order of National Company Law Tribunal, Amaravati Bench, the Adjudicating Authority, which allowed the application filed by Petitioners (Respondents in the appeal before NCLAT) and directed that forensic audit be conducted of the Appellant company since 31.03.2004.

In passing the order, NCLAT referred to the principles laid down by the Hon'ble Supreme Court in the *Case of Kranti Associates*. NCLAT held that "There is nothing in the order to justify the directions for conducting forensic audit of accounts of the Company that too for more than 15 years. The Adjudicating Authority must record reasons in support of conclusions. However, in the Impugned Order no reasons are mentioned for the said directions. The order is cryptic and non-speaking; therefore, it cannot be sustained. With the aforesaid discussions, we have no option but to set aside the Impugned Order."

In the case presented to us for evaluation, whether NCLT's order is tenable or not will depend on the facts presented in the petition filed. If the petition is well supported by evidences for the claims made and if the NCLT is satisfied on the perusal of same and if in the NCLT order the reasons for directing forensic audit are specified, then the order may be deemed tenable. Also, in the given case, the forensic audit period is not as long as in the case of *Vijay Sai Poultries*.

The Company may succeed in the appeal if the NCLT order directing the forensic audit is similar to that of *Vijay Sai Poultries* – i.e., the order is order is cryptic and non-speaking. It has been held that adequate and intelligent reasons must be given for judicial decisions and if the NCLT order does not satisfy this, it may be set aside on appeal filed.

The Appellant 'Vijaya Sai Poultries Pvt. Ltd.' has filed this Appeal against the order dated September 16, 2019 passed by the NCLT, Amaravati Bench, whereby the Adjudicating Authority allowed the application filed by Petitioners (Respondents herein) and directed that forensic audit be conducted of the Appellant company since March 31, 2004. Petitioners (Respondents herein) have filed Petition under Sections 59, 241 and 242 of the Companies Act, 2013 alleging oppression and mismanagement against the Managing Director of the Company.

It was alleged that he has been operating the finances of the Appellant Company in an arbitrary and whimsical manner and has siphoned off Crores of Rupees belonging to the Appellant Company without accounting for the same. The Appellant submitted that there is no prima facie finding of oppression or mismanagement as required under Section 242(4) and 241/242 of the Companies Act, 2013.

The Impugned Order is without reasoning or finding of fact and in fact, contains a one-line order directing that forensic audit be conducted.

It is settled law that there must be a recording of reasons in the order in support of conclusion arrived at. The giving of reasons in support of their conclusions by the judicial or quasi-judicial authority is essential to prevent unfairness or arbitrariness in reaching the conclusions.

For this proposition, Appellant relied on the judgments rendered by the Hon'ble Supreme Court in the matters of *Karanti Associates Pvt. Ltd. & Ors. Vs. Masood Ahmad Khan & ORS*. It was further submitted that the application has been filed under Rule 131 of NCLT Rules 2016 which relates to production of documents and form of summons. An order of directing that a forensic audit to be conducted could not have been passed in such an application.

(ii) The NCLAT based on the principles laid down by the Hon'ble Supreme Court in the case of *Karanti Associates Pvt. Ltd. & Ors. Vs. Masood Ahmad Khan & Ors* has observed that, in India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially. A quasi-judicial authority must record reasons in support of its conclusions. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well. In light of the principles laid down by the Hon'ble Supreme Court, it is held that there is nothing in the order to justify the directions given by the NCLT for conducting forensic audit of accounts of the Company that too for more than 15 years. The Adjudicating Authority must record reasons in support of conclusions. Hence, the impugned order is set aside.

Therefore, company will succeed in appeal in the given case.

Answer 2(b)

The facts of the case are similar to that of *Navin Kumar Singh V. Coal India Limited*. Hon,ble Supreme Court in this case observed that on a fair reading of clause 11 of the policy, there is nothing to indicate that the transferee would lose his past service rendered in the parent company for all purposes.

The policy of forfeiture of seniority in the parent company, however, is limited to the executives who seek inter-company transfer on personal grounds. That is to ensure that no prejudice is caused to the executives already working in the transferred company. For that reason, the seniority of the executives seeking inter-company transfer on personal request is fixed as if he had entered the concerned Grade on the date of assumption of charge in the transferred company.

It has been made explicitly clear that the executive seeking inter- company transfer on personal grounds will lose his past seniority in the Grade. No more and no less. In the present case, there is no dispute that the respondent had rendered service in E-2 Grade on regular basis in DCC from where he was transferred to CMPDIL, on personal grounds. The service rendered by him in DCC can be and ought to be taken into account for all other purposes, other than for determination of his seniority in E-2 Grade in the new company i.e., CMPDIL.

Indeed, his seniority in CMPDIL in E-2 Grade will have to be reckoned from the date of his assumption of charge on 15th May, 1991, but that can have no bearing while determining his eligibility criterion of length of service in E-2 Grade for promotion to E-3 Grade. For determining the eligibility for promotion to E-3 Grade, the service rendered by him in DCC in E-2 Grade with effect from 4th August, 1990, ought to be reckoned. The view so taken by the High Court commends to us. Hence, no fault can be found with the direction given by the High Court to assign notional date of promotion to the respondent in E-3 Grade with effect from 12th November, 1993. As regards the Office Memorandum dated 5th June, 1985, the same does not militate against the respondent. It is a different matter that it addresses the difficulty expressed about the denial of opportunity of promotion to the executives who opted for inter-company transfer. On a fair reading of this Office Memorandum, it is discernible that the department has clarified the position that if the concerned

excutive has already completed service for a specified period including the period of service with the old company, would become entitled to be considered for promotion to the higher Grade. If so, not granting similar advantage to the executive who opted for inter-company transfer on personal request and who incidentally enters at number one position in the seniority in the new company would be anomalous.

Concededly, what is affected in terms of the policy for intercompany transfer on personal request, is only the seniority position in the new (transferred) company — which would commence from the date of assuming office thereat. By no stretch of imagination, it can affect the length of service in E-2 Grade in the parent company.

The two being distinct factors, neither the policy nor the office memorandum would be any impediment for reckoning the period of service rendered by the respondent from August, 1990 in DCC, albeit a case of inter-company transfer on personal request. As a result, these appeals may fail.

Question 3

(a) Gajam Private Limited, is company duly registered and incorporated under the provisions of the Companies Act, 1956, having its registered office at Bangalore. It is mainly engaged in manufacturing of automobile and allied products for export. The Company wanted to expand its footprint globally and needed funds for this purpose. After detailed evaluation and approval by the Board of Directors, the Company availed consortium credit facilities from various banks by mortgaging its properties. During 2019-20, there was a slump in the automobile market and was followed by Covid-19, resulting in a huge crisis and slowdown in the automobile business. This resulted in the Company defaulting on its loan repayment to bank and its account was declared as NPA, (on account of its borrowing being classified as non-performing asset).

The bank had initiated proceedings of e-auction of Company properties under SARFAESI Act, for recovery of its funds. In e-auction proceedings, only two bidders had participated and assets of the Company were sold to the highest bidder. The Company alleged that arbitrary practicess adopted by the bank officials in e-auction proceedings were anti-competitive in nature as the bank officials abused their dominant position by restricting access to market to the other players to make the bid.

With reference to a settled case law, examine whether the bank officials have violated the provisions of the Competition Act, 2002.

(6 marks)

(b) Bhoomi Finance Ltd (BFL) is a Non-Deposit Accepting Core Investment Company registered with RBI and lends and invests in its Group Companies. BFL group had consolidated borrowing of over ₹ 1,000 crore in its balance sheet as on 31st March, 2023.

BFL defaulted on their obligations in respect of commercial paper (CP), inter-corporate deposits (ICDs) as well as on interest payments related to non-convertible debentures (NCDs) issued to various institutional investors, which were given the highest rating by the Rating Agencies and which continued till August, 2023, were abruptly downgraded to default grade in September, 2023. Its steep downgrade by the rating agencies in a matter of 25-40 days had completely changed the risk perception of the corporate bond market, investors' confidence and the securities markets as a whole.

During investigation, it was come to light that, Kron India Limited, (KIL) a leading credit rating agency of India, had major lapses while assigning ratings on these instruments.

The matter was filed with SEBI, wherein Adjudicating Officer (AO), by the impugned order had imposed a penalty of ₹ 25 lakh upon KIL for violating the Code of Conduct, as per Securities and Exchange Board of India (Credit Rating Agencies) regulation, 1999 while granting credit ratings to BFL.

Further, the market regulator, SEBI, observed that the penalty levied by AO was not appropriate and issued show cause notices to rating agency, "calling upon the reasons why the penalty amount should not be enhanced".

Discuss the regulatory prescription in the above matter and explain whether SEBI can enhance the quantum of penalty.

(*6 marks*)

Answer 3(a)

The facts of the case are similar to that of *M/s. Rh Agro Private Limited vs State Bank Of India And Others.*

The information was filed by M/s R.H. Agro Overseas Pvt. Ltd. through its authorized Director under Section 19(1)(a) of the Competition Act, 2002 ('Act') against State Bank of India ('SBI'/ 'OP-1'), M/s Patanjali Ayurveda ('Patanjali'/ 'OP-2'), M/s International Trader ('International Trader'/ 'OP-3') alleging contravention of the provisions of Section 3 and 4 of the Act.

The Informant is engaged in Basmati Manufacturing and was availing cash credit limit. During 2012-13, there was a huge crisis in the export business of basmati rice.

In the event of such financial crisis, the Informant attempted to convince the banks to sell its one unit, but the bank officials did not accpe this request. AfterwardsM/s RH Agro was declared NPA. Later, the Informant received a notice issued by the SBI wherein it was stated that an e-auction was going to be held in respect of the mortgaged property of the Informant. The auction was held on and the Informant sought information on the e-auction. The bank replied that there were two bidders who participated in the auction and that assets of the Informant had been sold to the highest bidder.

The Informant prayed to the Commission to take up the matter and order appropriate actions as per the provisions of the Act against the officials of State Bank of India for abusing their dominant position and denying market access to the other players by rigging the biding process in connivance with the highest bidder. Commission directed bank to file their reply.

Bank in its reply raised a preliminary objection as to the jurisdiction of the Commission to entertain the present information as account of the Informant was declared as Non-Performing Asset (NPA) and the proceedings under The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ('SARFAESI Act') were initiated. Bank made a number of other submissions as well.

The Competition Commission of India in passing its order made the following important findings –

- Regarding jurisdiction of the Commission, it was observed that in respect of matters falling within the provisions of the Competition Act, 2002, the Commission's jurisdiction is never ousted.
- A bank acting as per the remedies available to it under the SARFAESI Act for recovery cannot be termed as a dominant entity when it acts in accordance with provision thereof as it is acting in recovery of its funds/money in order to mitigate losses in such transaction (where account has been declared NPA). It is also noted that auction of primary security by a secured debtor for realization of funds cannot be said to be a transaction done in ordinary

course of business. The sale of security of an account declared NPA is a remedy available to a secured creditor under the provisions of SARFAESI Act.

The Competition Commission of India opined that no competition concern can be said to have arisen in the present matter and the information is closed forthwith against the OPs under Section 26(2) of the Act.

Based on the facts of the above case, in the present matter – based on the limited information provided, it does not appear that Bank Officials have violated the provisions of Competition Act, 2002 as they have initiated action as per remedy provided to them under SARFAESI Act.

Answer 3(b)

The facts of the case are similar to in case of *India Ratings And Research Private Limited (IRRPL) and Infrastructure Leasing & Financial Services Limited*. In the said matter, SEBI had initiated adjudication proceedings against IRRPL for alleged violation of Regulation 24(7) and Clauses 4 and 8 of Code of Conduct for CRAs, read with Regulation 13 of SEBI (Credit Rating Agencies) Regulations, 1999 ("SEBI (CRA) Regulations").

The Adjudicating Officer(AO) passed order and imposed a penalty of Rs.25,00,000 under Section 15HB of the Securities and Exchange Board of India ("SEBI") Act, 1992.

SEBI examined the AO Order and observed that that the penalty imposed by AO appeared to be erroneous and not commensurate with the overall impact these violations had on the market and hence the penalty needs to be increased.

While passing order enhancing the penalty, SEBI observed as below:

Section 15 I-(3) of SEBI Act reads as follows: *"The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed by the adjudicating officer is erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify.*

Provided that no such order shall be passed unless the person concerned has been given an opportunity of being heard in the matter:

Provided further that nothing contained in this sub-section shall be applicable after an expiry of a period of three months from the date of the order passed by the adjudicating officer or disposal of the appeal under section 15T, whichever is earlier."

This was appealed against by the rating company but SEBI replied stating that" *I concur with the factual findings of the AO, with respect to the conduct of the Noticee, as reproduced in para 3 of the SCN. I am also in agreement with the fact that the AO has chosen to impose a monetary penalty on the Noticee. However, the AO has failed to grasp the gravity of the violation and its consequent impact on the securities market and has failed to gauge the severity of the hit on the investors. Given his backdrop, the AO has not come up with justifiable grounds to arrive at the quantum of penalty which looks very meagre in comparison to the gravity of the violation.*

SEBI in enhancing the penalty opined that *"in exercise of powers under Section 15 - I(3) of the SEBI Act, after taking into consideration all the facts and circumstances of the case and the breaches or lapses on the side of the Noticee, as mentioned above, and having found the AO Order dated December 26, 2019 as erroneous to the extent it is detrimental to the interests of securities market, hereby impose a monetary penalty of Rs.1,00,00,000/-(Rupees One Crore Only) upon the Noticee under Section 15HB of the SEBI Act."*

Under Section 15 I-(3) of SEBI Act, if SEBI considers that the order passed by the adjudicating officer

is erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary pass an order enhancing the quantum of penalty, if the circumstances of the case so justify.

Accordingly, SEBI has the power to enhance the penalty.

Question 4

(a) Aero Constructions Ltd (ACL), was a major market player in the infrastructure industry in Kochin. The Company was successful in bidding for several projects and handled multiple construction projects simultaneously. In one case, there was a disagreement with the client and the management of ACL was not ready to complete the project, pending such disagreements. This matter was referred to Court and the proceedings continued for some time. In the judicial proceedings, ACL filed an affidavit to Court, stating that nearly 75% of the work, awarded to them had been completed. The Court found the statement made in the affidavit to be false, after independent inspection by an advocate. The Court imposed a penalty on ACL for filing a false affidavit. In background of decided case law(s), examine whether the penalty imposed by the Court was justified.

(6 marks)

(b) Dronte India Private Ltd, is a subsidiary company of its Dronte Global Ventures Inc, which holds 95.99% shares of the Company. The company had received requests from the non-promoter shareholders to provide them with an opportunity to dispose of their shareholding in the Company. The clause 45 and 47 of the Company's Articles of Association stated that the Company, from time to time, by special resolution, reduce its capital and/or its securities premium in any manner permitted by law. Therefore, the Board of Directors decided to reduce the equity share capital of the Company by way of reduction of share capital, not by way of buy-back of shares, which was more beneficial to the Company.

Thereafter, member meeting was held for passing of special resolution in accordance with section 66(1) of the Companies Act, 2013. The application of reduction of share capital was filed with the Tribunal, was dismissed with the liberty to file appropriate application as per extant provisions of the Companies Act. Aggrieved by the said impugned order, Company filed an appeal.

Discuss and answer the following questions :

(i) Briefly indicate, the grounds of dismissal of the petition by NCLT.

(ii) In the background by judicial pronouncement, evaluate whether, appeal would be allowed.

(6 marks)

Answer 4(a)

The facts of the given question are similar to the case of M/s. Sciemed Overseas Inc (Appellant) vs. BOC India Limited & ORS (Respondent) decided by the Supreme Court.

In this case, the question for Supreme Court's consideration was whether the High Court was correct in imposing costs of Rs. 10 lakhs on the petitioner for filing a false or misleading affidavit in this Court. In our opinion, the imposition of costs, although somewhat steep, was fully justified given that the High Court also held that the contract in favour of the petitioner was awarded improperly and was of a commercial nature, the last two findings not being under challenge.

A global search of cases pertaining to the filing of a false affidavit indicates that the number of

such cases that are reported has shown an alarming increase in the last fifteen years as compared to the number of such cases prior to that. This is illustrative of the malaise that is slowly but surely creeping in. This 'trend' is certainly an unhealthy one that should be strongly discouraged, well before the filing of false affidavits gets to be treated as a routine and normal affair. While impugning the order passed by the High Court, it was submitted by Sciemed that in fact the statement made in the affidavit filed in this Court was not a false statement but was bona fide and not a deliberate attempt to mislead this Court. It was also submitted that the allegedly false or misleading statement had no impact on the decision taken by this Court and should, therefore, be ignored. We are unable to accept either contention raised.

The correctness of the statement made by Sciemed was examined threadbare not only by the learned Single Judge but also by the Division Bench and it was found that a considerable amount of work had still to be completed by Sciemed and it was not as if the work was nearing completion as represented to this Court. Additionally, the Report independently given by the learned advocate appointed to make an assessment, also clearly indicated that a considerable amount of work had still to be performed by Sciemed. The Report was not *ex parte* but was carefully prepared after an inspection of the site and discussing the matter with the proprietor of Sciemed and an engineer of Sciemed as well as officers from the RIMS.

In the first instance, the work order was issued to Sciemed on 25th July, 2007 but this was not disclosed to the High Court when it disposed of W.P. (C) No.4203 of 2007 on 31st July, 2007. Had the factual position been disclosed to the High Court, perhaps the outcome of the writ petition filed by BOC would have been different and the issue might not have even travelled up to this Court. Furthermore, apparently to ensure that work order goes through, a false or misleading statement was made before this Court on affidavit when the matter was taken up on 14th March, 2008 to the effect that the work was nearing completion. It is not possible to accept the view canvassed by learned counsel that the false or misleading statement had no impact on the decision rendered by this Court on 14th March, 2008. We cannot hypothesize on what transpired in the proceedings before this Court nor can we imagine what could or could not have weighed with this Court when it rendered its decision on 14th March, 2008. The fact of the matter is that a false or misleading statement was made before this Court and that by itself is enough to invite an adverse reaction. In *Muthu Karuppan v. Parithi Ilamvazhuthi (2001) 5 SCC 289* this Court expressed the view that the filing of a false affidavit should be effectively curbed with a strong hand. It is true that the observation was made in the context of contempt of Court proceedings, but the view expressed must be generally endorsed to preserve the purity of judicial proceedings. This is what was said: "Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be *a prima facie* case of "deliberate falsehood" on a matter of substance and the court should be satisfied that there is a reasonable foundation for the charge."

On the material before us and the material considered by the High Court, we are satisfied that the imposition of costs by the High Court was justified. We find no reason to interfere with the impugned judgment and order. The petition is dismissed.

In view of the above mentioned case, it can be said that Penalty imposed by the Court is justified.

Answer 4(b)

The facts of the given case were similar to the case decided in *Brillio Technologies Private Limited (Appellant) vs. Registrar of Companies & Anr (Respondent)*, in this case the Board of Directors of the Company resolved to reduce the equity share capital, by reducing 89,52,637/-equity shares of Re. 1/- each from non- promoter equity shareholders for a consideration of Rs. 5,61,33,034/-

being 89,52,637/- equity shares of Re. 1/- each with premium of Rs. 5.27/- per share paid out of the Securities Premium Account. The Security Premium Account of Rs. 15,24,81,955/- shall accordingly be reduced to Rs. 10,53,01,558/-. Thereafter, an Extraordinary General Meeting was held on 04.02.2019, wherein by special resolution duly passed in accordance Section 66 (1) read with Section 114 of the Act, the 100% members present, voted in favour of the resolution for reduction of share capital of the Company.

NCLT observed that no objections have been received from creditors and consent affidavits on their behalf has not been produced. Ld. Tribunal held that as per Section 52 (2) of the Act, Security Premium Account may be used only for the purpose specifically provided under Section 52 (2) of the Act. Selective reduction in equity share capital to a particular group involving non-promoter shareholders and bringing the company as a wholly owned subsidiary of its current holding company and also return excess of capital to them. This is an arrangement between the company and shareholders or a class of them and hence, it is not covered under Section 66 of the Act. However, the case may be covered under Sections 230-232 of the Act. Wherein compromise or arrangement between the Company and its creditors or any class of them or between a Company and its members or any class of them is permissible. Therefore, the Company failed to make out any case under Section 66 of the Act and thus, the petition is dismissed with the liberty to file appropriate application as per extant provisions of the Act.

The brief grounds of dismissal of the Petition and issues raised by the Respondents were answered by the Appellate Tribunal as under:

(i) No proper genuine reason has been given for reduction of share capital.

(ii) Consent affidavit from creditors has not been obtained.

(iii) Security Premium Account cannot be utilized for making payment to the non- promoter shareholders.

(iv) Selective reduction of shareholders is not permissible.

(v) The Petition for reduction of capital under Section 66 of the Act, is not maintainable.

However, it may be filed under Section 230-232 of the Act.

With the aforesaid we are of the view that the Tribunal has erroneously held that the Application for reduction of share is not maintainable under Section 66 of the Act, consent affidavits from the creditors is mandatory for reduction of share capital, SPA cannot be utilized for making payment to non- promoter shareholders, consent from 171 non- promoter shareholders who are not traceable is required, selective reduction of shareholders of non-promoter shareholders is not permissible. The Tribunal has dismissed the Application on untenable grounds.

Therefore, we hereby set aside the impugned order passed by the Tribunal and the reduction of equity share capital resolved by the special resolution set out in Paragraph 11 of the Petition is hereby confirmed. Appeal allowed.

In the light of aforesaid proposition of law, we can safely hold that selective reduction is permissible if the non-promoter shareholders are being paid fair value of their shares. In the present case, none of the non-promoter shareholders of the Company have raised objection about the valuation of their shares. It is nobody's case that the proposed reduction is unfair or inequitable. It is also made clear that the proposed reduction is for whole non-promoter shareholders of the company.

Question 5

(a) Anirban issues an open 'bearer' cheque for ₹ 11,50,000 in favour of Bhemin who strikes out the word 'bearer' and puts crossing across the cheque. The cheque is thereafter negotiated to Cherian and Dhruven. When it is finally presented by Dhruven's banker, it is returned with

remarks 'payment countermanded' by the drawer. In response to this legal notice from Dhruven, Anirban pleads that the cheque was altered after it had been issued and therefore, he is not bound to pay the cheque.

Referring to the provisions of the Negotiable Instruments Act, 1881 and settled case law :

(i) Examine the validity of Anirban's argument.

(ii) Dhruven presented the cheque twice and after being dishonoured, filed the complaint based on the second statutory notice. Is the appeal allowed ?

(6 marks)

(b) Tarak, is an engineer by qualification and is part of many start-ups. During the initial start-up days, he had been part of few companies, which were floated by his friends and close relatives. Currently he is a Director on the Board of four companies including Jay Grains Ltd (JGL) and Vijaya Tech Ltd (VTL). JGL did not file its financial statements for the year ended on 31st March, 2021, 2022 and 2023 respectively with the Registrar of Companies (ROC) as mandated by the Companies Act, 2013. JGL's name was struck-off from the ROC on 28th January, 2024 due to the non- filing of financial statements and annual returns. Tarak's DIN and DSC were also cancelled subsequently. Due to this, Tarak was unable to carry on the business and file returns etc., in other Companies wherein he was a director.

In view of above facts, answer the following :

(i) Whether Tarak is disqualified under the provisions of Companies Act, 2013 ?

(ii) Can Tarak file returns of the VTL ?

(6 marks)

Answer 5 (a)

(i) As per section Section138 of the Negotiable Instruments Act, 188l, where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for 4 [a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both.

Effects of striking off the word bearer: It amounts to a material alteration. However, such material alteration is authorized by the Act. Therefore, the cheque is not discharged; it remains valid.

Effects of crossing the cheque: It amounts to a material alteration. However, such material alteration is authorized by the Act. Therefore, the cheque is not discharged; it remains valid.

Anirban argument is not valid: Since the reason for dishonour of cheque is not 'material alteration' but' payment countermanded by drawer, therefore, Arihant is liable for the payment of the cheque and he shall also be liable for dishonour of cheque in accordance with the provisions of Section 138.

(ii) The facts of the case are similar to that of *M/s. Sicagen India Ltd. (Appellant) Vs. Mahindra Vadineni & Ors. (Respondent)*, where the court held that the complaint filed based on the

second statutory notice is not barred and the complaint filed on the same cause of action is maintainable. A 'Cheque Bounce' Complaint Filed, based on a Second Statutory Notice issued after re-presentation of cheques, is maintainable. Thus, Dhruven's appeal can be allowed.

Answer 5 (b)

(i) As per Sec 164(2) of the Companies Act, 2013,

No person who is or has been a director of a company which—

a) has not filed financial statements or annual returns for any continuous period of three financial years; or

b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Thus, from the above discussion it is clear that Tarak is disqualified as per Sec 164(2) of the Companies Act, 2013.

(ii) The facts of the given case are similar to that of *Sandeep Agarwal & Anr. vs Union of India & Anr. on 2 September, 2020.* In this case Hon'ble Court held that the Companies Fresh Start Scheme (CFSS) launched by the Government provides Directors of companies a fresh cause of action. In cases where a person is a director in two companies- one whose name has was struck-off and one which is still active, in such a situation, the disqualification and cancellation of DIN, would be a severe impediment for them in availing remedies under the scheme, in respect of the active company. The purpose and intent of the scheme to be effective, Directors of these companies ought to be given an opportunity to avail the scheme.

In view of the present case, Tarak is a director in an active company VTL in respect of which certain documents are to be filed and the said company is entitled to avail of the Scheme, the suspension of DINs would not only affect Tarak in JGL but also in VTL which is active.

In order to enable the Director of JGL., to continue the business of the active company VTL., in the fitness of things, the disqualification of Tarak is set aside. Thus, Tarak can file returns of the active company VTL.

Question 6

(a) Triaton Ltd is a software company specialising in software development for its clients. In the last decade, it has earned good name and fame. The main strength of the Company is the IT professional talent they hire and retain to serve the clients. The Company wanted to expand its base globally and was planning to start offices in other countries. The management of the Company hired Advisi Consultants LLP, a globally renowned firm to advise them on the matter of their business restructuring and enhancing their visibility. The consultants had preliminary discussions with the management and they suggested that the Company should evaluate about the 'environmental, social and governance' (ESG) metrics which would help in being a better corporate citizen and also enhance its brand value. They indicated that ESG considerations can create significant value for companies and their stakeholders. By

prioritizing sustainability, social responsibility, and ethical business practices, these companies are building strong reputations, attracting top talent and positioning themselves for long-term success in a rapidly changing business environment. The management of the Company was unsure, as it envisages that there are many challenges for implementation of ESG initiatives. In this background, prepare a brief note explaining the challenges in implementing ESG initiatives.

(6 marks)

(b) A significant example of strategic choices in Indian corporate scenario in recent times is the growth of Moon Cosmetics Ltd. Moon Cosmetics finalized a deal to enter into a strategic alliance with the Bright Group, as it attempts to establish a position in the Indian market. Moon Cosmetics Bright Private Ltd is the 50-50 joint venture between Moon Cosmetics Ltd and the Bright Cosmetic Company. Moon Cosmetics has opened its 60th Store in India recently. It had its first store at Phoenix Market City, Mumbai. The Company will continue to open more and more stores and grow thoughtfully in the market with a commitment to offer a unique products experience, unrivalled service, and extensive offerings with a wide range of cosmetics across the country. With 50 stores now operational across 5 cities, Moon Cosmetics Ltd continues to grow and nurture its brand in India in line with its promise to build a strong connection with Indian users. Perhaps, a little departure from the traditional practice, the stores will be rebranded as "Bright Moon Cosmetics." With the growing population and changing demographics the consumption of cosmetics in India is on a growing trend. 'We are going to move as fast as possible in opening as many stores as we can so long as we are successful and so long as we are embraced by the Indian consumers' said Peter, President of Moon Cosmetics, South Asia. The need to address and respect potential cultural issues seems to have been a key factor in deciding to use the joint ventures route rather than set up a separate Moon Cosmetics subsidiary in India. 'We never considered 51% when we looked at the opportunity to enter India, understanding the complexities of the market and the uniqueness that is India, we wanted to find a local business partner.' Oliver Grant, the CEO of Bright group said. In this background, explain the key components of a well-developed strategic plan.

(6 marks)

Answer 6(a)

Implementing ESG initiatives can present various challenges for companies. Some of the challenges include finding the right framework, measuring and tracking performance, accessing governance data and insights, tracking stakeholder sentiment and organizational reputation, and visualizing and controlling risk mitigation.

ESG issues are complex and involve a host of interrelated factors. This can make it difficult for managers to implement ESG goals meaningfully. Additionally, there is a lack of standardized metrics for evaluating companies' ESG performance. This can make it difficult for investors to evaluate companies and can lead to confusion and analysis paralysis.

Another challenge is that ESG issues are constantly evolving. This means that companies need to be flexible and adaptable in their approach to ESG. They need to be able to respond quickly to changing circumstances and emerging risks.

Also, implementing an ESG strategy requires a significant investment of time and resources. Companies need to be committed to sustainability and ethical business practices in order to successfully implement an ESG strategy.

Some of the most common challenges that businesses may face when trying to implement ESG strategies are as under:

- **Cost:** Implementing ESG initiatives can be costly, especially for small and medium- sized businesses. There may be significant upfront expenses for things like implementing sustainable technology, conducting impact assessments, and training employees on new practices. However, companies that successfully implement ESG strategies often find that the long-term benefits outweigh the initial costs.
- **Lack of Knowledge and Expertise:** Implementing ESG strategies requires specialized knowledge and expertise. Many companies may lack the in-house expertise needed to develop and implement effective ESG strategies, such as conducting environmental impact assessments or setting up sustainable supply chains. To overcome this challenge, companies may need to hire outside experts, collaborate with other organizations, or invest in training for their employees.
- **Defining clear and consistent criteria:** Establishing universally agreed-upon standards and guidelines for ESG goals can be difficult, as different stakeholders have varying priorities and interpretations of what constitutes good ESG practices.
- **Regulatory uncertainty:** The evolving regulatory landscape and varying requirements across jurisdictions challenge companies trying to implement ESG initiatives and comply with global standards.
- **Resistance from Stakeholders:** Implementing ESG initiatives may encounter resistance from various stakeholders, including investors, customers, suppliers, and employees. Some stakeholders may not fully understand the importance of ESG or may be resistant to change. It's essential for companies to communicate the benefits of ESG initiatives and involve stakeholders in the planning process to address these challenges.
- **Measuring Impact:** Measuring the impact of ESG initiatives can be challenging. Companies must develop appropriate metrics and methods for measuring the impact of their ESG initiatives. This involves collecting and analysing data to assess the effectiveness of their initiatives and make improvements where necessary. Companies that can effectively measure the impact of their ESG strategies can use their data to report on their progress and improve their strategies overtime.

Answer 6(b)

Strategic planning refers to the development of strategic plans that involve taking information from the environment and deciding upon an organizational mission and upon objectives, strategies and a portfolio plan. It involves establishing the overall identity of the company, deciding on the strategic alternatives the company will follow and choosing the tactics which the company will emphasize.

Simply put, strategic planning involves identifying the long-tern objectives and determining the action plans for the company. The objectives and action plans should be established only after careful assessment and prediction of the future states of relevant environmental factors. Strategic planning process involves the identification of alternatives, the collection of information, evaluation and selection of alternatives and finally formulation of strategic decisions. The components of a well-developed strategic planning is as under:

- **A Mission Statement:** An organization's mission statement states the company's purpose and the reasons why it exists. Although the management may have clarity on the mission statement, but its reiteration and linking it to the business objectives acts as a foundation for the formulation of strategic plans and strategies.

- **A Vision Statement**: A company's vision statement reveals the bigger objective that the company aspires to achieve. This may be as broad as making the world a better place through its product or service. Whatever may be vision of a company, it should be connected to its strategic plan. Aligning the company's mission and vision statements is the first crucial step towards strategic planning.
- **SWOT Analysis**: It involves an overall evaluation of the company's strengths, weaknesses, opportunities, and threats. Knowing these points will help the management of a company to leverage its resources, shore up gaps, and realistically plan its path and the ways to mitigate potential risks. SWOT analysis assist in ensuring that the strategic plan is based upon reality and plays an important role in strategic management process.
- **Goals & Objectives**: Goals and objectives needs to be specific, measurable, achievable, and time-bound. In view of this, a business organisation must ensure that its goals are achievable, measurable, and can be clearly communicated as part of its strategic planning. The objectives set by the top management should be in synchronisation with the objectives of various divisions and teams. Further, the strategic plans of each division and team should map directly to broader company goals and methods.
- **Strategies**: The specific courses of action that the company will take to achieve its measurable goals and specific strategic issues.
- **Action Plans**: Detailed project plans outlining the specific steps that will be taken to implement the strategies.
- **Resource Allocation**: The allocation of financial, human, and other resources to implement the action plans.
- **Evaluation and Control**: Evaluation and control are based on measures and systems to monitor the company's progress toward achieving its organization's goals, objectives and financial plan, and to make necessary adjustments.

BANKING – LAWS & PRACTICE

MODULE 3 ELECTIVE PAPER 9.1

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

Question 1

Read the following and answer the questions that follow :

International Trade Settlement in Indian Rupees (INR)

Given the current Geo-Political and Economic Situation prevalent across the Globe, US Sanctions on use of US Dollar for Transactions with Iran & Russia and considering the continuous weakening of the Indian Rupee (INR), and to promote growth of global trade with emphasis on exports from India and to support the increasing interest of global trading community in INR, the Reserve Bank of India (RBI) vide A.P. (DIR Series) Circular No. 10, dated 11 July, 2022 has allowed International Settlement of Trade in INR for export and/or import of goods and services as an additional arrangement for Invoicing, Payment and Settlement of Exports/Imports in INR.

Exports or Imports	→	Invoice Payment Settlement	→	In INR

International Trade Settlement in Indian Rupees (INR) : It is a Right Step taken by the Government of India to Internationalization of the Indian Rupee.

The following are the benefits to the country :

- The Settlement in Indian Rupees (INR) is a right step aiming to internationalization of the Indian Rupee and to promote growth of global trade with emphasis on exports from India and to support the increasing interest of global trading community in INR.
- Specially keeping in view of the Restrictions for trade settlements in US Dollar for Transactions with Iran & Russia and to address strained situations like scarcity of Forex Reserves in case of Countries like Sri Lanka, the decision is an important step rightly taken to facilitate trade in INR.
- This would ease India's hard currency outflow substantially, reduce the dependency on US dollar requirements and strengthen Rupee. This mechanism also may Reduce Cost of Conversion Charges of Exporters and Importers.
- This is an additional arrangement for invoicing payment, and settlement of exports/ imports and would co-exist with the current practice of trade settlement in freely convertible foreign exchange (FOREX).

International Trade Settlement-Current Practices :

- At present, all export contracts and invoices shall be denominated either in freely convertible currency or Indian rupees but export proceeds shall be realized in freely convertible currency.
- The Practice of Export invoicing in INR is already existing. However, the payment must come through Vostro Accounts maintained by foreign banks with a bank in India.
- Trade with Nepal and Bhutan in INR is covered by special arrangements which is existing for a long time.
- Also, Asian Clearing Union (ACU) Transactions which shall be denominated in ACU Dollar are existing for promoting regional co-operation and with the objective to facilitate payments

among member countries (Bangladesh, Bhutan, India, Iran, Maldives, Myanmar, Nepal, Pakistan and Sri Lanka) for eligible transactions on a multilateral basis, thereby economizing on the use of foreign exchange reserves and transfer costs, as well as promoting trade among the participating countries.

- India had a barter-like mechanism for trade settlement with Iran, wherein Indian oil refiners were paying in Rupees to a local Iranian bank and the funds were used by Iran to pay for imports from India.

Salient Features of RBI Circular :

Reserve Bank of India (RBI) issued A.P. (DIR Series) Circular No. 10, dated 11 July, 2022, under Foreign Exchange Management Act, 1999 (FEMA). Some of the Salient Features of the said Circular are :

- All Exports and Imports under this arrangement may be denominated and invoiced in Rupee (INR).
- Exchange Rate between the currencies of the two trading partner countries may be market determined.
- The settlement of trade transactions under this arrangement shall take place in INR.
- An Authorized Bank would require an approval from the RBI to implement this arrangement.
- Indian Banks will be permitted to open a Special Vostro Account (SV Account) of the correspondent bank of the trading country.
- Indian Importers undertaking imports through this mechanism shall make payment in INR which shall be credited into the 'Special Vostro Account' of the correspondent bank of the partner country, against the invoices for the supply of goods or services from the overseas seller / supplier.
- Indian Exporters, undertaking exports of goods and services through this mechanism, shall be paid the export proceeds in INR from the balances in the designated Special Vostro account of the correspondent bank of the partner country.
- Payment towards advance for exports from SV Account is, however, subject to the availability of funds, executed export orders / export payments in the pipeline.
- Advance against export may also be received in INR.
- Set-off of Export Receivables shall also be permitted subject to existing RBI master directions.

Trade Settlement through INR Denominated Special Vostro Account (SV Account) by RBI is a welcome move that would facilitate trade with sanctioned countries like Iran and Russia wherein it has increasingly become difficult to use United States Dollar (US$) or Euro denominated correspondence account for Trade Settlement.

Rupee Settlement mechanism introduced amid a steadily falling rupee, would help India pay for its imports using rupees instead of U.S. dollars from its foreign exchange reserves. This will to some extent lessen draining of Forex and reduce the dependency on US Dollar requirements and strengthen Rupee. This mechanism also may Reduce Cost of Conversion Charges for Exporters and Importers.

India has received responses from four to five countries for its mechanism for international trade settlement in rupees, while other nations have also shown interest, according to Deputy Governor of Reserve Bank of India.

As per reliable sources, Russia is the only country that has shown interest in the new arrangement for now and Nine Russian Banks have been permitted to set up Vostro accounts to facilitate rupee-based trade. In 2021-22, India's Exports to Russia stood at $ 3,254.68 million, while imports from

Moscow were valued at $ 9,869.99 million. If Rupee Settlement mechanism goes well to convert trade with Russia under this route, it can potentially pay for a chunk of its oil and defence imports in INR. This would ease India's hard currency outflow substantially.

However, it is expected that Trade Settlement in INR with countries where India has trade surplus will be successful, but settlement with trade deficit countries would be difficult unless a strong line of credit mechanism is also put in place.

Several Asian economies such as Indonesia, Sri Lanka, Myanmar, and India are also in discussion with each other to settle trade in their domestic currencies. The United Arab Emirates (UAE) and India moved a step closer to increasing circulation of the rupee in the Gulf region with the signing of two memoranda of understanding (MoU) between the Reserve Bank of India and the Central Bank of the United Arab Emirates.

Though proper amendments are suitably made in respect of Export Incentives and Refunds, certain other Mandatory provisions of Achieving Positive Net Foreign Exchange Earnings (NFE) under Special Economic Zones — SEZ Act, 2005 & SEZ Rules, 2006 and also

corresponding provisions of Foreign Trade Agreement (FTA) in respect of EOU need to be suitably amended for allowing Export Proceeds Received through Special Vostro Account (SVA) in INR.

Based on the above information, answer the following questions :

(a) Whether RBI approval is required for opening Special Rupee Vostro Accounts ?

(6 marks)

(b) What is Correspondent Banking ?

(6 marks)

(c) What is the procedure for opening a Special Rupee Vostro Account with an Indian Authorized Dealer Bank ?

(10 marks)

(d) How would the Exchange Rate between INR and the Currency of the trading partner country be market-determined in the absence of Direct Quote for the pair of Currencies ?

(6 marks)

(e) Can balances in Special Rupee Vostro Account be repatriated ?

(6 marks)

(f) What are the different types of Investment where surplus balance can be invested ?

(6 marks)

Answer 1(a)

A Vostro Account is an account that a domestic bank holds on behalf of a foreign bank. In this case, it allows the foreign bank to act as an agent or facilitator for its customers to receive money in Indian rupees from domestic banks. Vostro Accounts are typically used to facilitate international trade and remittance transactions.

Special Rupee Vostro Accounts are specifically tailored for trade settlements and other transactions denominated in Indian Rupees.

Yes, for opening of Special Rupee Vostro Account, prior approval of RBI would be required. The bank is willing to open Special Rupee Vostro Account for the bank of the partner country should have a good level of business resilience and financial health. Second, they need to have experience

in facilitating trade/investment transactions and the capability to provide other financial services. Third, Authorized Dealer Banks should have good correspondent relationships with banks in partner countries.

The RBI issues guidelines detailing the procedures, documentation, and conditions for opening and operating Vostro accounts. Banks must adhere to these guidelines to ensure proper authorization and regulatory compliance. The RBI conducts a thorough review of the application and the accompanying documentation to ensure that the opening of the Vostro Account complies with Indian banking regulations, foreign exchange management laws, and Anti-Money Laundering (AML) standards. Based on the review, the RBI either grant or deny approval for opening the Vostro account. If approved, the domestic bank can proceed with the account opening and must ensure ongoing compliance with RBI regulations.

Answer 1(b)

Correspondent Banking refers to a banking arrangement where one bank (the correspondent bank) provides services on behalf of another bank (the respondent bank) in a different location or country. This relationship allows banks to access various financial services and conduct transactions efficiently across different jurisdictions.

The Term Correspondent Banking relationship acts as an intermediary or agent, facilitating wire transfers, conducting business transactions, accepting deposits and gathering documents on behalf of another bank. Correspondent Banks are most likely to be used by domestic banks to service transactions that either originate or are completed in foreign countries.

Domestic Banks also use Correspondent Banks to gain access to foreign financial markets and to serve international clients without having to open branches abroad. The correspondent bank offers a range of services to the respondent bank, including payment processing, foreign exchange, trade finance, and liquidity management. Services offered are clearing and settlement of payment transactions, Foreign Exchange, Trade Finance, Cash management etc. Correspondent banking relationships are subject to strict regulatory scrutiny, particularly regarding Anti-Money Laundering (AML), Combating the Financing of Terrorism (CFT), and sanctions compliance.

Answer 1(c)

The Authorised Dealer Bank approaching the Reserve Bank of India for seeking approval for opening of Special Rupee Vostro Account must submit the following information along with their proposal/request:

(i) The details of the arrangement between Authorised Dealer Bank and correspondent bank from the trading partner country along with the funds flow.

(ii) A brief write-up on the foreign banks seeking correspondent relationship tor Special Rupee Vostro Account.

(iii) Copy of the request letter of the correspondent bank to Authorised Dealer Bank.

(iv) Confirmation from Authorised Dealer Bank that the due diligence has been carried out by Authorised Dealer Bank which establishes correspondent banking relationship as per RBI extant guidelines.

(v) Confirmation from Authorised Dealer Bank stating that the Correspondent Bank is not from a country or jurisdiction in the updated Financial Action Task Force (FATF) Public Statement on High Risk & Non-Co-operative jurisdictions on which Financial Action Task Force (FATF) has called for counter measures.

(vi) Confirmation from Authorised Dealer Bank that they shall ensure that all the transactions taking place in the Special Rupee Vostro Account of the correspondent bank are strictly in adherence to the instructions issued by Reserve Bank of India.

(vii) Financial parameters pertaining to the Correspondent Bank as required for the proposal may be obtained beforehand by email to *fedcotrade@rbi.org.in* and the same may be furnished by Authorised Dealer Bank along with the proposal.

Answer 1(d)

The exchange rate for most currencies is determined in the Forex markets, typically against global currencies like the USD, EUR, JPY etc.

In the transition phase, when there is no market with direct exchange rates between two currencies (say INR and Sri Lankan Rupee), the exchange rate between the currencies of two trading partner countries, each of which has markets against global currencies, would be derived as a cross currency rate.

Answer 1(e)

Yes, balances in a Special Rupee Vostro Account can be repatriated under certain conditions and with compliance to regulatory requirements.

The balance in Special Rupee Vostro Account (SRVA) can be repatriated in freely convertible currency and/or currency of the beneficiary trading partner country depending on underlying transaction i.e., for which the account was credited.

A Special Rupee Vostro Account is a specific type of Vostro account maintained by a domestic bank on behalf of a foreign bank. It is used primarily for facilitating trade settlements and other transactions denominated in Indian Rupees (INR). These accounts are subject to regulatory oversight by the Reserve Bank of India (RBI) and must adhere to foreign exchange management regulations.

For example, for import payments through Special Rupee Vostro Account (SRVA) like any Rupee Vostro account the fund can be remitted to overseas exporter either in freely convertible currency or in domestic currency of the overseas exporter.

Balances in a Special Rupee Vostro Account can be repatriated to the foreign bank's home country to fulfil various purposes, such as:

- Settlement of trade transactions conducted in INR.
- Return of funds after completion of permissible transactions.
- Repayment of loans or investments made in compliance with Indian regulations.

Regulatory Compliance:

- Repatriation of funds from a Special Rupee Vostro Account must comply with RBI guidelines and foreign exchange management regulations.
- The foreign bank must provide documentation and justification for the repatriation, demonstrating that the funds originate from permissible transactions and comply with applicable laws.

The RBI may impose limits or restrictions on the repatriation of funds from Special Rupee Vostro Accounts, depending on prevailing foreign exchange regulations, economic conditions, and policy considerations.

Answer 1(f)

Surplus balances of banks and financial institutions can be invested in various types of instruments and assets based on their risk appetite, liquidity needs, and regulatory constraints:

(i) *Government Securities:* Securities issued by the Government, such as Treasury Bills (T-Bills), Government Bonds, and State Development Loans (SDLs).

(ii) *Corporate Bonds:* Debt securities issued by corporations to raise capital.

(iii) *Certificate of Deposits (CDs):* Time deposits issued by banks and financial institutions with fixed maturities and interest rates.

(iv) *Money Market Instruments:* Short-term financial instruments like Commercial Papers (CPs), Treasury Bills (T-Bills), and Repurchase Agreements (Repos).

(v) *Equity Shares:* Ownership shares in publicly traded companies.

(vi) *Mutual Funds:* Investment vehicles that pool money from investors to invest in diversified portfolios of securities.

(vii) *Real Estate:* Direct investment in physical properties such as land, residential, commercial, or industrial properties.

(viii) *Bank Deposits:* Deposits placed with other banks or financial institutions, including term deposits and savings deposits.

Question 2

(*a*) "As per the Reserve Bank of India (Financial Statements-Presentation and Disclosures) Directions, 2021, Commercial Banks have to report "Reverse Repos Transactions" on their Bank's Balance Sheet". Explain the relevant directions of RBI in this regard.

(*b*) Despite its disadvantages as compared to Forward Contracts as a Hedging instrument in International Transactions, why should firms use Futures Contracts in International Transactions ?

(*6 marks each*)

Answer 2(a)

In order to bring more clarity on the presentation of Reverse Repo Transactions Amount on the Bank's Balance Sheet, Reserve Bank of India on May 19, 2022 has issued an notification regarding reporting of reverse repos with Reserve Bank on the bank's balance sheet are as per the following guidelines to the Commercial Banks:

(i) All type of Reverse Repos with the Reserve Bank including those under Liquidity Adjustment Facility shall be presented under sub-item (ii) 'In Other Accounts' of item (II) 'Balances with Reserve Bank of India' under Schedule 6 'Cash and balances with Reserve Bank of India'.

(ii) Reverse Repos with Banks and other Institutions having original tenors up to and inclusive of 14 days shall be classified under item (ii) "Money at call and short notice" under Schedule 7 'Balances with banks and money at call and short notice'.

(iii) Reverse Repos with Banks and other institutions having original tenors more than 14 days shall be classified under Schedule 9 - 'Advances' under the following heads:

i. A.(ii)'Cash credits, over drafts and loans repayable on demand'.

ii. B.(i)'Secured by tangible assets.'

iii. C.(I).(iii) Banks (iv)'Others' (as the case may be)

Answer 2(b)

The Advantages of Future Contracts are:

(i) *Hedging against Exchange Rate Risk:* International transactions often involve dealing with multiple currencies. Exchange rate fluctuations can significantly impact the value of receivables and payables. Futures contracts allow firms to lock in exchange rates for future dates, thereby stabilizing their cash flows.

(ii) *Managing Commodity Price Risk:* Firms dealing with international trade in commodities (like oil, metals, and agricultural products) face the risk of price fluctuations. Futures contracts enable firms to lock in prices for future purchases or sales of commodities, thus protecting them against adverse price movements.

(iii) *Interest Rate Risk Management:* Firms with international financial transactions often face interest rate risk. Futures contracts on interest rates can be used to hedge against fluctuations, ensuring more predictable borrowing or investment costs.

(iv) *Speculation and Arbitrage Opportunities:* While the primary use of futures contracts is for hedging, firms can also engage in speculative activities to profit from their expectations of future price movements. This can provide an additional revenue stream.

(v) *Liquidity and Standardization:* Futures contracts are traded on exchanges with high liquidity, making it easy for firms to enter and exit positions.

(vi) *Cost Efficiency:* Compared to other financial instruments, futures contracts generally have lower transaction costs due to their standardized nature and the efficiency of the futures markets.

(vii) *Regulatory Oversight and Transparency:* Futures contracts are traded on regulated exchanges, providing a level of transparency and security that reduces counterparty risk.

Question 3

(a) A Bank's exposures to its counterparties may result in concentration of its assets to a Single Counterparty or a Group of connected Counterparties. As a first step to address the Concentration Risk, Reserve Bank, in March 1989, fixed limits on Bank Exposures to an Individual Business concern and to Business concerns of a Group. RBI's Prudential exposure norms have evolved since then and a Bank's exposure to a Single Borrower and a Borrower Group was restricted to 15 percent and 40 percent of Capital Funds respectively".

In this connection, explain the definition of a 'Large Exposure of Banks', 'Single Counterparty' and 'Groups of Connected Counterparties' and its reporting system to the Reserve Bank of India.

(*6 marks*)

(b) "Reserve Bank of India will initiate certain Structured Actions in respect of the Banks which have hit the 'Trigger Points' in terms of Capital to Risk Assets Ratio (CRAR), Net NPA and Return on Assets (ROA) etc." The PCA (Prompt Corrective Action) framework is an RBI initiative with which it can intervene with the Banks that are getting financially weaker. It is also meant for the banks that are vulnerable due to loss of profitability or are undercapitalized due to poor asset quality. Under the PCA Regulations, numerous restrictions are put on the Banks in terms of Lending, Management Compensation, Directors' Fees, and more. As such, the Prompt Corrective Action is intended to improve the 'Financial Health of the Banks' that have weak financial metrics. It is done by keeping a watch on such banks".

Explain RBI's Common menu for selection of 'Discretionary Corrective Actions' in respect of the following areas :

(i) Governance related Actions.

(ii) Capital related Actions.

(iii) Credit Risk related Actions.

(3×2=6 *marks*)

Answer 3(a)

According to the Basel Committee on Banking Supervision (BCBS) and adopted by various regulators including the Reserve Bank of India (RBI). A large exposure is defined as the sum of all exposures of a bank to a single counterparty or a group of connected counterparties that is equal to or exceeds 10% of the bank's eligible capital base (Tier 1 capital). The Reserve Bank of India (RBI) has adopted the Basel guidelines and issued detailed directives for Indian banks regarding large exposures, including definitions, limits, and reporting requirements.

Basel III Large Exposures Framework: Provides international guidelines for large exposures, focusing on measuring, controlling, and reporting large exposures to ensure banks maintain adequate diversification in their portfolios.

Single Counterparty Exposure: It refers to the total exposure a bank has to a single entity or individual. This includes all forms of on-balance sheet and off-balance sheet exposures, such as loans, advances, credit equivalents of derivatives, and investments. Banks must identify exposures that qualify as large exposures (≥10% of Tier 1 capital) and quantify these exposures accurately. The report should include detailed information on the counterparty, the nature and amount of the exposure, any collateral or guarantees, and the risk mitigation measures in place. Reporting is generally required on a quarterly basis, though it might be more frequent depending on specific regulatory requirements or the bank's internal policies.

Groups of Connected Counterparties: Entities that are economically linked or have relationships that could pose a higher risk of default due to their interconnectedness. The exposure to a group of connected counterparties is capped at 25% of the bank's eligible capital base (Tier 1 capital). For exposures to groups of connected counterparties engaged in infrastructure or core industries, the limit may be extended to 30% of the bank's eligible capital base. This extension acknowledges the strategic importance of these sectors.

By setting limits on exposures to these groups, the RBI aims to reduce the risk of significant losses arising from interconnected entities. Banks are required to identify, monitor, and report their exposures to connected counterparties, implementing robust risk management practices to ensure financial stability and compliance with regulatory standards.

The Large Exposure limits:

1. *Single Counterparty:* The sum of all the exposure values of a bank to a single counterparty must not be higher than 20 percent of the Bank›s available eligible Capital Base at all times. In exceptional cases, Board of Banks may allow an Additional 5 percent exposure of the Bank›s available Eligible Capital Base. Banks shall lay down a Board Approved Policy in this regard.
2. *Groups of Connected Counterparties:* The Sum of all the Exposure Values of a Bank to a Group of connected Counterparties must not be higher than 25 percent of the Bank›s available eligible Capital Base at all times.

3. *Eligible Capital Base:* Typically refers to the banks Tier 1 capital, which consists of the core capital including equity capital and disclosed reserves.

The Exposures must be measured as specified. It may be noted that the LE Limits will be modulated in case of certain counterparties. Any breach of the above Large Exposure (LE) limits shall be under exceptional conditions beyond the control of the Bank, shall be reported to RBI (DBS, CO) immediately and rapidly rectified. Under the Large Exposures Framework (LEF), the sun of all Exposure values of a Bank to a Counterparty or a Group of connected Counterparties is defined as a Large Exposure (LE), if it is equal to or above 10 percent of the Bank's eligible Capital Base (i.e., Tier 1 Capital).

Banks shall report their Large Exposures to the Reserve Bank of India (RBI), Department of Banking Supervision, Central Office, (DBS, CO), as per the reporting template. The reporting, inter-alia, will include the following:

i. All Exposures, measured as specified of this framework, with values equal to or above 10 percent of the Bank's eligible Capital (i.e., meeting the definition of a Large Exposure);

ii. All other Exposures, measured as specified of this framework without the effect of Credit Risk Mitigation (CRM), with values equal to or above 10 percent of the Bank's Eligible Capital Base;

iii. All the Exempted Exposures (Except Intraday Inter-Bank Exposures) with values Equal to or above 10 percent of the Bank's eligible Capital Base;

iv. 20 Largest Exposures included in the scope of application, ii respective of the values of these exposures relative to the Bank's eligible Capital Base.

Answer 3(b)

The Prompt Corrective Action (PCA) Norm is a supervisory tool and is imposed when a bank breaches certain regulatory thresholds on Capital to Risk Weighted Assets Ratio (CRAR), Net NPAs and Return on Assets (RoA) etc. Prompt Corrective Action (PCA) is a framework under which Financial Institutions with Weak Financial Metrics are put under watch by the Reserve bank of India (RBI). Earlier, the RBI had imposed PCA only on Banks. Now, PCA framework is extended to NBFCs also.

RBI's common menu for selection of Discretionary Corrective Actions' in respect of the following areas are:

(i) Governance related Actions:

(a) RBI to actively engage with the bank's Board on various aspects as considered appropriate.

(b) RBI to recommend to Owners (Government/ Promoters/ Parent of Foreign Bank Branch) to bring in New Management / Board.

(c) RBI to remove managerial persons under Section 36AA of the Banking Regulation Act, 1949 as applicable.

(d) RBI to supersede the Board under Section 36ACA of the Banking Regulation Act, 1949 / recommend supersession of the Board as applicable.

(e) RBI to require bank to invoke claw back and malus clauses and other actions as available in regulatory guidelines, and impose other restrictions or conditions permissible under the Banking Regulation Act, 1949.

(f) Impose restrictions on directors' or management compensation, as applicable.

(g) Strengthening the audit committee functions to ensure better internal controls and risk management.

(ii) Capital related Actions:

(a) Detailed Board level review of capital planning.

(b) Submission of plans and proposals for raising additional capital. Requiring the bank to bolster reserves through retained profits. Restriction on investment in subsidiaries/ associates.

(c) Restriction in expansion of high risk-weighted assets to conserve capital. Reduction in exposure to high-risk sectors to conserve capital.

(d) Restrictions on increasing stake in subsidiaries and other group companies.

(e) Adjusting the risk weights on certain assets to ensure better capital adequacy ratios.

(iii) Credit Risk related Actions:

(a) Preparation of time bound plan and commitment for reduction of stock of NPAs. Preparation of and commitment to plan for containing generation of fresh NPAs. Higher provisions for NPAs/NPIs and as part of the coverage regime.

(b) Strengthening of loan review mechanism.

(c) Restrictions/reduction in total credit risk weight density (example: restriction/reduction in credit for borrowers below certain rating grades, restriction/reduction in unsecured exposures, etc.).

(d) Reduction in loan concentrations; in identified sectors, industries or borrowers.

(e) Sale of assets.

(f) Action plan for recovery of assets through identification of areas (geography wise, industry segment-wise, borrower-wise, etc.) and setting up of dedicated Recovery Task Forces, Adalats etc.

(g) Prohibition on expansion of credit/ investment portfolios other than investment in government securities / other High-Quality Liquid Investments.

(h) Intensifying efforts on the recovery of non-performing assets (NPAs) through legal and strategic measures.

Question 4

(a) From the following information, calculate the Yield Rate of 'Commercial Paper'.

Face Value	₹ 6,00,000
Sale Price	₹ 5,70,000
Maturity Period-	120 days
Brokerage and other Charges-	4%

Assume that Number of Days per annum is 360 days.

(4 marks)

(b) "Leverage Ratio, Loan to Value Ratio and Debt Service Coverage Ratio are the three important Ratios while analysing "Term Loan Proposals" of Business Firms by the Banks. Explain the importance of these Three Ratios.

(4 marks)

(c) "An offline payment means a transaction which does not require internet or telecom connectivity to take effect. Authorised Payment System Operators (PSOs) and Payment System participants (PSPs)-Acquirers and Issuers (Banks and Non-banks)-desirous to provide / enable payment solutions that facilitate Small Value Digital Payments in offline mode".

To popularise the offline payment transactions under Financial Inclusion, Reserve Bank of India issued guidelines to the Service Providers. Explain RBI Guidelines in this regard.

(*4 marks*)

Answer 4(a)

Calculation of Yield Rate of Commercial Paper:

Face Value Rs. 6,00,000/-

Brokerage and other Charges - 4%.

Sale Price Rs. 5,70,000/-

Brokerage = 5,70,000X0.04 = 22,800

Adjusted Sales Price = 5,70,000+22,800 = 5,92,800

Maturity Period =120 days.

Yield = 6,00,000-5,92,800 = 7,200

$$\text{Yield Rate of Commercial Paper} = \frac{(\text{Face Value} - \text{Adjusted Sale Price})}{\text{Adjusted Sale Price}} \times \frac{360}{\text{Maturity Period}} \times 100$$

$$= \frac{(6,00,000-5,92,800)}{5,92,800} \times \frac{360}{120} \times 100$$

Therefore, the Yield Rate of Commercial Paper is 3.644%

Answer 4(b)

The Banks rely on three Ratios while sanction Term Loans to know a viability of Business Firm. They are:

(i) *Leverage Ratio:* Leverage ratio is calculated by dividing Total Business Liabilities by Total Business Equity. Leverage Ratio over 4 to 1 would significantly reduce the chances of securing a Bank Term Loan. The Basic idea is that lender doesn't want to simply Borrow in order to grow the Business.

- A high leverage ratio indicates that a firm relies heavily on debt financing, which increases financial risk. Banks prefer firms with moderate leverage as it suggests a balance between debt and equity financing.
- This ratio helps assess a firm's long-term solvency and its ability to meet long-term obligations. A lower leverage ratio implies greater financial stability and lower default risk.
- It indicates the firm's capacity to take on additional debt. Firms with lower leverage are often in a better position to obtain new loans as they have more room to accommodate new debt.

(ii) *Loan to Value Ratio (LTV):* Loan to Value Ratio is calculated by the Total amount of the loan divided by the appraised value of Collateral. Most Banks require the appraised value of

Collateral to be higher than the loan amount. The lender is looking at this Ratio to see how much breathing room they have. If the business is to default on the loan and the bank ends up with the Collateral, the bank wants to make sure they can sell the collateral for a value high enough to recover the entire balance of the loan.

- A lower LTV ratio indicates that the loan is well-collateralized. It provides the bank with a buffer against potential declines in asset value, reducing the risk of loss if the borrower defaults.
- Higher LTV ratios are associated with higher credit risk as they suggest that the borrower has less equity in the asset. Banks typically prefer lower LTV ratios to minimize risk exposure.
- LTV ratios can influence the terms of the loan, including interest rates. Lower LTV ratios often qualify borrowers for more favorable loan terms and lower interest rates because the risk to the lender is lower.

(iii) *Debt Service Coverage Ratio (DSCR):* This Ratio is important when applying for a Term Loan. Calculate Debt Service Coverage Ratio by Dividing Annual Net Income by Annual Debt Service. Debt Service is a way of saying Term Loan Instalment Payments. This Ratio tells the lender, how many times could make the loan payment with Net Income. If firm could make the loan payment 10 times with firm Net Income each year, firm have plenty of Leverage. If only wake the loan payments 1.25 times per year, the bank is going to be nervous that if there is any negative downtrend with firm business, firm won't be able to make firm's loan instalment payments.

- A higher DSCR indicates that the firm generates sufficient income to cover its debt payments, signifying strong repayment capacity. Banks typically look for a DSCR greater than 1, meaning the firm has more income than is required to service its debt.
- This ratio provides insight into the overall financial health and operational efficiency of the firm. It indicates whether the firm's core business operations are profitable enough to support debt payments.
- A low DSCR suggests higher risk, as the firm may struggle to meet its debt obligations. This could lead to loan default. Banks use the DSCR to ensure that the firm's cash flow is stable and sufficient to cover future debt payments.

Answer 4(c)

The Service Providers are to comply with the following requirements of the Reserve Bank of India:

(i) Offline payments may be made using any channel or instrument like cards, wallets, mobile devices, etc.

(ii) Offline payments shall be wade in proximity (face to face) mode only.

(iii) Offline payment transactions may be offered without an Additional Factor of Authentication (AFA).

(iv) Payment instructions shall be enabled for offline transactions based on explicit consent of the customer. Such transactions using cards shall be allowed without a requirement to switch on the contactless transaction channel.

(v) The upper limit of an offline payment transaction shall be Rs.200. The total limit for off-line transactions on a payment instrument shall be Rs.2,000 at any point in time. Replenishment of the used limit shall be allowed only in online mode with AFA.

(vi) The issuer shall send transaction alerts to users as soon as transaction details are received. There is no compulsion to send an alert for each transaction; however, details of each transaction shall be adequately conveyed.

(vii) The acquirer shall incur all liabilities arising out of technical or transaction security issues at merchant's end.

(viii) Offline payments shall be covered under the provisions of RBI's limited customer liability circulars of Master Direction on Prepaid Payment Instruments dated August 27, 2021.

(ix) The customers shall have recourse to the Reserve Bank-Integrated Ombudsman Scheme, as applicable, for grievance redressal.

(x) Reserve Bank retains the right to stop or modify the operations of any such payment solution that enables small value digital payments in offline mode.

Question 5

(a) Reserve Bank of India introduced the Digital Rupee-Wholesale Segment (e₹-W) on November 1, 2022 and Retail digital Rupee (e₹-R) on December 01, 2022. "Digital Rupee" or "e₹" is a legal tender, similar to sovereign paper currency and is issued in digital form by the Reserve Bank of India. e₹ will offer features of physical cash like trust, safety and settlement finality with atomicity (i.e., immediate settlement of transactions) in digital mode. e₹ represents a direct claim on the central bank. It can be used to carry out transactions or store value digitally, similar to the manner in which currency notes can be used in physical form. e₹ can be held in an e₹ wallet issued by banks. This wallet can be linked to customers' existing Bank (Savings / Current) account. The wallet is a digital representation of Customer physical wallet and e₹ can be withdrawn / deposited from customers' existing bank account into this wallet.

Based on the above information, answer the following questions :

(i) How e₹ is different from UPI or other fund transfer mode (NEFT/RTGS/ IMPS) ?

(3 marks)

(ii) Is e₹ same as Cryptocurrency such as Bitcoin ?

(3 marks)

(b) "On August 10, 2022, the RBI issued a press release on implementation of the recommendations of the Working Group (WG) on Digital Lending. The press release contains three annexures that are either applicable immediately or may be applicable in due course. Further, the RBI has issued the Guidelines on Digital Lending on September 2, 2022. The text of the Guidelines is largely similar to the press release, with certain modifications and insertions of footnotes."

Based on the above information, answer the following questions.

(i) What exactly is the meaning of "Digital Lending" for the purposes of the regulatory framework ?

(ii) Are all types of financial facilities of the Banks are covered under Digital Lending ?

(4+2=6 marks)

Answer 5(a)

(i) e₹ is a form of money, a digital representation of physical currency, whereas UPI or other fund transfer modes (NEFT/RTGS/IMPS) are forms of payment. Therefore, usage of e₹ is not limited to payments. e₹ also serves the purpose of 'unit of account' and importantly, 'Store

of Value' as it represents a claim on the Reserve Bank's balance sheet. Moreover, e₹ will have additional attributes specific to currency which will be tested in future pilots by the Reserve Bank of India.

(ii) No, e₹ is digital form of currency notes and has intrinsic value as it represents a claim on the Reserve Bank's balance sheet. e₹ is issued by the Reserve Bank and is a legal tender. Crypto products such as bitcoin on the other hand do not exhibit any features of a currency, do not have any intrinsic value, are not backed by assets and are not issued by a central trusted authority, such as RBI.

The e-Rupee may use Distributed Ledger Technology (DLT) or traditional centralized databases, depending on the design chosen by the RBI. Bitcoin uses blockchain technology, a decentralized ledger that records all transactions across a network of computers.

The e₹ value is stable and directly linked to the fiat currency (the Indian Rupee). The e-Rupee is not subject to the same volatility as cryptocurrencies. Bitcoin's value is highly volatile, influenced by market demand, investor sentiment, regulatory news, and other factors.

Answer 5(b)

(i) A remote and automated lending process, largely by use of seam less digital technologies for customer acquisition, credit assessment, loan approval, disbursement, recovery, and associated customer service.

Digital lending refers to the process of providing credit or loans through digital platforms and channels, utilizing technology to facilitate the entire lending lifecycle, from application to disbursement and repayment. This concept encompasses a variety of financial products and services offered by traditional banks, non-banking financial companies (NBFCs), and fintech firms. The regulatory framework for digital lending ensures that these activities are conducted in a transparent, secure, and fair manner, protecting both consumers and the financial system.

The regulatory framework for digital lending is designed to ensure that digital lending practices adhere to established financial standards, promote consumer protection, and maintain the integrity of the financial system

a. *Licensing and Registration:* Digital lending entities, whether traditional banks, NBFCs, or fintech firms, must obtain the necessary licenses and registrations from relevant regulatory authorities.

b. *Consumer Protection:* Regulations mandate clear disclosure of loan terms, interest rates, fees, and repayment schedules to borrowers.

c. *Fair Lending Practices:* Lenders must adhere to fair lending practices, avoiding predatory lending, discrimination, and unfair treatment of borrowers.

d. *Risk Management:* Digital lenders are required to implement robust risk management frameworks to handle credit, operational, and cybersecurity risks.

e. *Technology and Security Standards:* Regulations emphasize the use of secure and reliable technology platforms for digital lending operations.

f. *Transparency and Reporting:* Lenders must maintain transparency in their operations and provide regular reports to regulatory authorities.

(ii) The parts of a lending transaction that need to be digital or contactless in order to be called digital lending is subjective but must involve, at least to a significant extent, the use of digital technologies as part of lending processes involving customer procurement, credit assessment

and loan approval, loan disbursement, loan repayment, and customer service., Financial Facilities typically covered under digital lending are Personal Loans, Consumer Loans, Small Business Loans, Credit Lines, Peer-to-Peer (P2P) Lending, Payday Loans, Education Loans.

Question 6

The emergence of New Models of governing the enterprises, a subtle shift towards controls and strategic decision making, identification and Assessment of Risk has become one focal point. In recent times, the Risk-based Internal Audit is being viewed by the Banks as an important Tool to assess the management of the Risks that are barriers to the objectives and success of the Banks. Risk-based Internal Audit involves the assessment of the risks' maturity level, expressing opinion on adequacy of the policies and processes established by the management to manage the risks. Risk-based Internal Audit mainly reports on the risk management that includes identification, evaluation, control and monitoring of the risk. A risk- based internal audit mainly focuses on the objectives rather than looking at the controls and transactions.

In view of the above, answer the following questions :

(a) Explain the eligibility criteria to implement Risk Based Internal Audit (RBIA) of NBFCs, UCBs and HFCs.

(b) Explain in detail the objectives and scope of Risk Based Internal Audit of NBFCs, UCBs and HFCs.

(c) "Board of Directors, Audit Committee of Board" play a Key Role in implementation of Risk Based Internal Audit of NBFCs / UCBs / HFCs". Explain the statement.

(4 marks each)

Answer 6(a)

Reserve Bank of India mandated Risk Based Internal Audit (RBIA) framework for the following Non-Banking Financial Companies (NBFCs), Primary (Urban) Co-operative Banks (UCBs) and Housing Finance Companies (HFCs):

(1) All deposit taking NBFCs, irrespective of their size;

(2) All non-deposit taking NBFCs (including Core Investment Companies) with asset size of Rs. 5,000 crore and above; and

(3) All UCBs having asset size of Rs. 500 crore and above

In addition to the above, Housing Finance Companies (HFCs) fulfil the following stipulations are also required to implement Risk Based Internal Audit (RBIA):

(1) All deposit taking HFCs, irrespective of their size

(2) Non-deposit taking HFCs with asset size of Rs. 5,000 crore and above.

Answer 6(b)

Objectives and Scope of RBIA in NBFCs, UCBs and HFCs:

(i) An effective Risk-Based Internal Audit (RBIA) is an audit methodology that links an organisation's overall risk management framework and provides an assurance to the Board of Directors and the Senior Management on the quality and effectiveness of the organisation's internal controls, risk management and governance related systems and processes.

(ii) The internal audit function should broadly assess and contribute to the overall improvement of the organization's governance, risk management, and control processes using a systematic

and disciplined approach. The function is an integral part of sound corporate governance and is considered as the third line of defence.

(iii) Historically, the internal audit system in NBFCs / UCBs / HFCs has generally been concentrating on transaction testing, testing of accuracy and reliability of accounting records and financial reports, adherence to legal and regulatory requirements, etc. However, in the changing scenario, such testing by itself might not be sufficient. Therefore, Supervised Entities (SEs) will have to move towards a framework which will include, in addition to selective transaction testing, an evaluation of the risk management systems and control procedures in various areas of operations. This will also help in anticipating areas of potential risks and mitigating such risks.

(iv) While the Risk Management Function should focus on Identification, Measurement, Monitoring, and Management of Risks, Development of Risk Policies and Procedures, use of Risk Management Models, etc., RBIA should undertake an independent risk assessment for the purpose of formulating a risk-based audit plan which considers the inherent business risks emanating from an activity / location and the effectiveness of the control systems for monitoring such inherent risks.

Answer 6(c)

The Board of Directors (the Board) / Audit Committee of Board (ACB) of NBFCs and the Board of UCBs are primarily responsible for overseeing the internal audit function in the organization. The RBIA policy shall be formulated with the approval of the Board and disseminated widely within the organization. The policy shall clearly document the purpose, authority, and responsibility of the internal audit activity, with a clear demarcation of the role and expectations from Risk Management Function and Risk Based Internal Audit Function. The policy should be consistent with the size and nature of the business undertaken, the complexity of operations and should factor in the key attributes of internal audit function relating to independence, objectivity, professional ethics, accountability, etc. The RBIA policy must be reviewed periodically.

The internal audit function shall be carried out effectively so as to ensure that it adds value to the organization. For the purpose, the ACB/Board shall approve a RBIA plan to determine the priorities of the internal audit function based on the level and direction of risk, as consistent with the entity's goals. The risk assessment of business and other functions of the organization shall at the minimum be conducted on an annual basis. Every activity / location, including the risk management and compliance functions, shall be subjected to risk assessment by the RBIA. The policy should also lay down the maximum time period beyond which even the low risk business activities / locations would not remain excluded for audit.

The ACB/Board is expected to review the performance of RBIA. The ACB/Board should formulate and maintain a quality assurance and improvement program that covers all aspects of the internal audit function. The quality assurance program may include assessment of the internal audit function at least once in a year for adherence to the internal audit policy, objectives and expected outcomes. Further, ACB/Board shall promote the use of new audit tools/ new technologies for reducing the extent of manual monitoring / transaction testing / compliance monitoring, etc.

INSURANCE – LAW & PRACTICE

MODULE 3 ELECTIVE PAPER 9.2

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

Question 1

Mr. Anand, when he was celebrating his 36th birthday on 2nd January in the year 2020 with his friends', discussions went on protecting their families with insurance coverages. Later he decided to take Insurance Policies for the protection of his family including wife Mrs. Rama, home maker aged 32 years and one daughter aged 10 and one son aged 6 years. He consulted a financial planner and explained his financial background and his objectives of providing family income in his absence and to accumulate fund for children education and other expenses. After a lot of discussions, the financial planner suggested two insurance policies. One is a whole life insurance Policy to meet the requirement of family income in his absence and a Unit Linked Insurance Policy to accumulate the fund for his children education and other expenses. His decision was finalized in the month of August, 2020.

Before finalizing these insurance policies, he never visited a doctor for any major ailments and he answered positive for one of the questions in the whole life insurance application form to the best of his knowledge, he believes that he is in 'good health condition'. And while taking the whole Life Insurance Policy he did not inform in his proposal form to M/s XYZ Insurance Company that he is a smoker.

While purchasing the Unit Linked Insurance Policy, the Agent of the M/s XYZ Insurance Company assured 20% of guaranteed returns on the investment in that policy. He is satisfied with the projected amount with guaranteed returns on his investment in that Insurance Policy, which is sufficient to his expected obligation of children responsibilities of their education and other expenses.

Both the proposals were accepted on 21st August, 2020. He is happy and informed his family members that he has taken two insurance policies and the document numbers saved in his mobile phone and kept the original documents in his safe custody. Continuing those two policies with prompt payment of premiums, suddenly on 10th September, 2023 he was hospitalized and died due to massive heart attack. As per the death certificate by the doctors the heart attack was due to severe damage of the blood vessels.

The family went into shock with untimely death of Mr. Anand. With the financial distress, slowly his wife remembered the insurance policies which he mentioned earlier. She could not find the documents where her husband kept.

She approached an employee of the Insurance Company with the policy document numbers which is available from the deceased mobile phone. After listening her, the immediate reaction of that employee is that without Insurance Policy Documents, Policy amount cannot be paid. And also with further chit chat, the employee realized that her Husband was a Smoker and died with heart attack and the fact of his 'Smoking Habit' was not mentioned in the application form. Hence on the suppression or concealment of material fact also policy money is not payable, because Insurance Companies believe concealment of material fact mostly coincided with an element of fraud from the Policyholder.

On the basis of the above facts, answer the following questions :

(a) Mr. Anand did not mention his smoking habit in the application form. 'Smoking' is one of the main reasons for the cause of damage of blood vessels and he died with massive heart

attack due to damage of blood vessels. As per the Insurance Company, the Policyholder concealed or suppressed the material fact that he is a smoker. On this ground in this case, can an Insurance Company repudiate the Claim ? Can it be considered as a fraud or concealment ? What is the difference between Misrepresentation and Concealment ?

(2+2+4=8 *marks*)

(b) Is there any relevance of implications of section 45 of the Insurance Act (As amended by the Insurance Laws (Amendment) Act, 2015 related to this case ?

(8 *marks*)

(c) In the present case does the loss of policy document absolve the insurer from the liability of payment of policy proceeds ? Is there any way to resolve the loss of document and what is the procedure ?

(8 *marks*)

(d) Whether Mr. Anand is entitled to receive the bonus amounts on any of the two policies ? What is the difference between interim bonus and terminal bonus ?

(8 *marks*)

(e) Whether Mr. Anand gets guaranteed returns as assured by Insurance Agent in Unit Linked Insurance Policy ?

(8 *marks*)

Answer 1(a)

Yes, the insurance company can repudiate the claim if it proves that Mr. Anand intentionally concealed or misrepresented a material fact, such as his smoking habit. Since smoking is a known risk factor for heart disease and related health issues, failing to disclose this information on the application form is considered significant. The insurance contract relies on the principle of utmost good faith (uberrima fides), meaning all parties must fully disclose all material facts.

This is the intentional withholding of a material fact that the insured knows and is obligated to disclose. In this case, Mr. Anand's failure to disclose his smoking habit can be seen as concealment, especially if it can be shown that he did so intentionally to avoid higher premiums or rejection.

- *Misrepresentation*: This occurs when a false statement is made by the insured, either intentionally or unintentionally. There are two types:
  - Innocent Misrepresentation: The insured provides incorrect information believing it to be true.
  - Fraudulent Misrepresentation: The insured knowingly provides false information.

  If Mr. Anand filled out the application form and provided incorrect information about his smoking status (e.g., stating he is a non-smoker), it could be misrepresentation.
- Concealment: This specifically involves the failure to disclose a material fact. It is always intentional, as it requires the insured to know the fact and choose not to disclose it.

If Mr. Anand intentionally left out his smoking habit knowing that it could affect his insurance coverage or premiums, this would be concealment.

The difference between misrepresentation and concealment is that the misrepresentation is a statement, whether written or oral, that is false. In order for an Insurance Company to void a contract because of misrepresented information, the information in question must be material to the decision to extend coverage.

Concealment on the other hand, is the failure to disclose information that one clearly knows about. To void a contract on the grounds of concealment, the insurer typically must prove that the applicant willfully and intentionally concealed information that was a material nature.

Answer 1(b)

Yes, there is a relevance. Section 45 of the Insurance Act, 1938 provides the remedy to a Life Insurer for breach of the condition of utmost good faith on the part of the life assured. It gives the right to the Life insurer to repudiate a claim under a Life Insurance policy if there was a misstatement, concealment or misrepresentation on any fact which was material to consideration of the risk by a Life insurer.

The amended Section 45 outlines conditions under which an insurance company can repudiate a policy:

1. Within the First Three Years:
   (i) An insurance company can repudiate a policy within the first three years from the date of issuance if there is evidence of misrepresentation, fraud, or non-disclosure of material facts by the policyholder.
   (ii) The onus is on the insurer to prove that the policyholder had the intention to suppress facts or mislead the insurer.
2. After Three Years:
   (i) After three years from the issuance of the policy, the insurance policy cannot be called into question on any ground whatsoever.
   (ii) This means that if the policy has been in force for more than three years, the insurer cannot repudiate the claim on the grounds of misrepresentation, fraud, or non-disclosure.

As per section 45 (Insurance Laws Amendment Ordinance on 26 December, 2014) by the above amendment act, a 3-year time limit has been fixed for any cancellation of policy or repudiation of claim on the above grounds.

The policy in this case was taken in the year August, 2020 and death took place in the year September, 2023. As per this amendment Insurance policies cannot be repudiated after three years of the commencement of the policy. The policy is more than three years old, the insurer is generally prohibited from repudiating the claim based on non-disclosure or misrepresentation, and must honor the policy regardless of the smoking habit disclosure.

Answer 1(c)

No, the claim can be settled on the claimants, furnishing an indemnity bond jointly with one surety.

If a policy is irrevocably lost, a duplicate policy can be issued, after following a certain procedure. The insurer satisfies itself of the circumstances leading to loss. Being so satisfied the insurer insists upon an advertisement in a newspaper, production of an indemnity bond and payment of policy preparation charges and there after a Duplicate Policy is issued with a Stamp "Duplicate Policy".

An outline of how to resolve the loss of a policy document and the procedure involved:

1. *Inform the Insurance Company*: The first step is to inform the insurance company about the loss of the policy document. The policyholder or the nominee should provide details such as the policy number, name of the policyholder, and other relevant information to identify the policy.

2. *Application for Duplicate Policy:* The policyholder or the nominee will need to apply for a duplicate policy document. This usually involves filling out a specific form provided by the insurance company, often called a "Request for Duplicate Policy" form. The form may require the following information:
    - Policy number,
    - Name of the policyholder,
    - Details of the lost policy,
    - Circumstances under which the policy was lost,
3. *Indemnity Bond:* The insurance company typically requires an indemnity bond to be executed by the policyholder or the nominee. An indemnity bond is a legal document that protects the insurer from any claims arising from the issuance of the duplicate policy. It essentially states that the policyholder will indemnify the insurer against any future claims if the original policy is found and misused.
4. *Fees and Charges:* The insurance company may charge a nominal fee for issuing a duplicate policy document. This fee can vary between companies and policies.
5. *Issuance of Duplicate Policy Document:* Once the insurance company receives the completed application, indemnity bond, proof of advertisement (if required), and the applicable fees, they will process the request. After verification, they will issue a duplicate policy document.
6. *Filing a Claim:* If the policyholder has passed away and the nominee needs to file a claim without the original policy document, the nominee should:
    - Notify the insurance company of the policyholder's death.
    - Provide all required documents for claim processing, such as the death certificate, identity proof, and relationship proof with the deceased.
    - Submit the application for a duplicate policy along with the claim form, if not already done.
    - Legal and Practical Implications

Answer 1(d)

Yes, Mr. Anand is entitled to receive both Interim and Terminal Bonus amounts in whole Life Insurance Policy.

Interim bonus will be entitled for two valuation dates in a year and Terminal Bonus is Final Bonus declared on maturity. In this case, with death of Mr. Anand terminal bonus is also added.

Interim Bonus declaration is to be done by the end of a financial year, however in this case where the death of the insured Mr. Anand happens the life insurance company declares an interim bonus. This is because while the policy might have accrued a bonus from the last financial year, the maturity or claim date falls between two bonus declaration dates. Hence there may be a short duration for which the policy may miss out on the bonus. To ensure that the policyholder or their beneficiaries are not at a disadvantage, a bonus is added on a pro rata basis as per interim bonus rates announced by the insurer.

Terminal Bonus is paid only when the policy matures or upon the death of the insured. In this case Mr. Anand is entitled to receive terminal bonus. This bonus is dependent on the performance of the policy over the years and is subject to the insurer declaring it, in order to benefit policyholders.

Difference between Interim Bonus and Terminal Bonus:

	Interim Bonus	Terminal Bonus
Purpose	Compensates for the period from the last bonus declaration date to the date of claim (death or maturity).	Provides an additional reward to policyholders who have held the policy until its maturity or to the beneficiaries if the policyholder dies.
Timing	Paid during the interim period when the policyholder dies or the policy matures before the next regular bonus declaration	Paid at the end of the policy term or upon death.
Calculation	Typically calculated on a pro-rata basis for the period since the last declared bonus.	Based on the insurer's performance over the entire term of the policy and is usually a percentage of the sum assured or accrued bonuses.

Answer 1(e)

Unit Linked Insurance Policies (ULIPs) generally do not offer guaranteed returns because their performance is tied to the market value of the underlying investment funds (equity, debt, or hybrid). Returns fluctuate based on market conditions, and therefore, guarantees are not typically associated with ULIPs.

He gets the fund value or fund accumulated in his account. It is not guaranteed. The fund value is subject to the market conditions like Mutual funds. Upon his death there are two typical benefit options are available to the Policyholder family:

(i) Sum Assured + Fund value (Marked-To-Market Value of the Units) and

(ii) Higher of Sum Assured or Fund Value.

Some ULIPs might offer capital protection or minimum guaranteed benefits, but these features would be explicitly mentioned in the policy document.

If an insurance agent assured Mr. Anand of a 20% return on a ULIP, this could be misleading unless the specific policy documentation explicitly guarantees such a return.

Mr. Anand was misled by the agent, he can file a complaint with the insurance company. He can escalate the issue to the Insurance Regulatory and Development Authority of India (IRDAI) if the company does not resolve the complaint satisfactorily.

Question 2

(a) Mr. Karan, a 45 years old who smokes and has a history of Hypertension, is applying for a Term Life Insurance Policy at "Secure Life" Insurance Company. He is also exposed to occupational hazards as a Chemical Engineer but maintains an active Lifestyle.

(i) Identify the most significant Risk Factor in Mr. Karan's Profile affecting his morality.

(3 *marks*)

(ii) Recommend one Underwriting adjustment to address this risk while ensuring the Policy remains fair.

(3 *marks*)

(*b*) Time value of money is different in different time periods. It may be due to inflation, uncertainty, opportunity cost and effect of tax etc. It is very important to understand accumulation of future values of our present investments specially for retirement planning. Find out the Future values of present investment of ₹ 10,000 for 10 years @ 10% with Simple and Compound interests. If the Average Rate of inflation is 6%, how do you find out the Real Return (Explain the Formulae).

(*6 marks*)

Answer 2(a)

(i) Most Significant Risk Factor: Peering into Karan's health history, it's his smoking habit that jumps out as the biggest worry. There's strong evidence that smoking significantly raises the chances of getting hit with severe health issues, like heart disease and lung cancer. And when we toss his high blood pressure into the mix, the concern only deepens. His Job's Risks and his commitment to staying active also play roles in his overall health picture, but it's smoking that's blaring the loudest warning siren. This habit is a major red flag because of its well-documented connection to a whole host of health problems and an increased risk of passing away prematurely.

The below are the significant Risk factor in Mr. Karan Profile are:

(a) *Smoking:* Smoking is a major risk factor for numerous health issues, including cardiovascular diseases, respiratory conditions, and various types of cancer. It significantly increases mortality risk.

(b) *History of Hypertension:* Hypertension, or high blood pressure, is a critical risk factor for heart disease, stroke, kidney disease, and other serious health conditions. It is particularly concerning because it often coexists with other risk factors like smoking, compounding the overall risk.

(c) *Occupational Hazards:* As a Chemical Engineer, Mr. Karan is exposed to potential occupational hazards such as exposure to toxic chemicals, which can contribute to long-term health issues and increase the risk of accidents.

(d) *Active Lifestyle:* Maintaining an active lifestyle is a positive factor that can mitigate some health risks. Regular physical activity can help manage hypertension, reduce the risk of heart disease, and improve overall health.

(ii) Underwriting Adjustment Recommendation: Of course, it is not about penalizing him, it is about bringing his premiums in accordance with the actual risks that his smoking creates. At the same time, it is hard not to be confused because it is entirely possible that in a few years, when Mr. Karan establishes his well-being after proper medical evidence and cessation of smoking, we may have a unique and golden opportunity to recalculate his premiums. Thus, it is clearly not just a matter of numbers; it is a matter of the soul that does everything to make Mr. Karan feel the need to follow a healthier path.

In this case, the offer is placed in such a way that Mr. Karan himself would feel the desire to quit smoking, at the same time, it has personal benefits and falls entirely in line with the idea of an Insurance Company, forced to do everything possible for its customers to lead healthier lives.

Apply an additional premium loading factor due to his history of hypertension. The exact loading would depend on the severity and management of his hypertension, as well as any associated health complications.

Adjustment:

- Base Premium: Determine the base premium for a 45-year-old non-smoker with no significant health issues.
- Smoker's Surcharge: Add a premium increase (e.g., 30-50%) to account for the smoking risk.
- Health Loading: Add an additional loading (e.g., 20-30%) for the hypertension risk.

By combining these adjustments, the policy remains actuarially sound and fair, reflecting Mr. Karan's individual risk profile while still providing him with the necessary coverage.

Answer 2(b)

At the End of the Year	Future Value with Simple Interest Rate (Rs.)	Future Value with Compound Interest Rate (Rs.)
1	11,000	11,000
2	12,000	12,100
3	13,000	13,310
4	14,000	14,641
5	15,000	16,105
6	16,000	17,716
7	17,000	19,487
8	18,000	21,436
9	19,000	23,580
10	20,000	25,937

(a) **Simple Interest Formula: A=P×(1+r×t)**

(b) **Compound Interest Formula: A=P×(1+r)^t**

Where:

A = Future Value

P = Principal amount (Present investment)

r = Interest rate per period (in decimal)

t = Number of years

$$\text{Real Return} = \frac{(1+r)}{(1+i)} - 1$$

where r = Rate of interest & i = Rate of Inflation

Here Rate of Interest = 10% & Inflation Rate= 6%

$$\text{Real Return} = \frac{(1+0.10)}{(1+0.06)} - 1 = 3.77\%$$

Question 3

(*a*) "Life Secure Insurance Company" aims to overhaul its Anti-Money Laundering (AML) Practices. Considering the importance of Customer Due Diligence, Ongoing Monitoring, Suspicious Activity reporting, Internal Controls and Compliance Management, and Employee Training in an effective AML Regime.

Analyze how you can spearhead the enhancement of these Five Critical Areas to Bolster "Life Secure Insurance Companies" AML Framework in line with Regulatory Expectations.

(*6 marks*)

(*b*) There are so many Standard Clauses or Policy wordings to protect the Health Insurance Policyholder. Is there any specific clause which allow Policy Holder to Transfer from one insurer to another insurer or from one plan to another plan of the same insurer ? If there is such clause, discuss briefly about that clause.

(*6 marks*)

Answer 3(a)

As a result, through ensuring that the Core Pillars of a robust Anti Money Laundering (AML) regime have been fortified, "Life Secure Insurance Company" can guarantee that it operates in line with all relevant standards. This goes as follows:

(i) *Customer Due Diligence:* By making sure that proper verification measures are in place, this can eliminate the risk of fraudulent or otherwise illegal activity from the very beginning. This involves updates Know Your Customer (KYC) Processes as well as Technology reinforcing origin ID Checks. Apply enhanced due diligence for high-risk customers, including more detailed verification processes and more frequent updates of customer information. Conduct regular reviews and updates of customer information to ensure it remains accurate and up-to-date.

(ii) *Ongoing Monitoring:* Automated tracking of all transactions allows for identifying abnormal patterns in behavior indicative of suspicious activities. Level-setting provisions must be put in place. Conduct periodic reviews of transaction data and customer behavior to ensure ongoing compliance and detection of potential AML risks. Third party premium payment need to be prohibited and premium payment in cash should be within limit prescribed under Income Tax Act.

(iii) *Suspicious Activity Reporting (SAR):* Singular reporting channels, making sure that employees understand when how to report, in conjunction with whistleblower protection.

Implement a centralized system for tracking and managing SARs to ensure consistency and accountability. Ensure all SARs comply with regulatory requirements, including timely filing and detailed documentation.

(iv) *Internal Controls and Compliance:* Regarding Internal Controls, environmental and compliance management, a compliance unit centralized in pursuit of AML Polities and regulatory requirements and supervised directly by the Management will facilitate regular audit checks and reviews. Establish a comprehensive compliance program that includes regular risk assessments, policy updates, and oversight by senior management and the board of directors.

(v) *Employee Training Programs:* The Management should also propose employee training programs that are responsive to promoting a General understanding of AML Policies, Procedures, and changes in regulations. The programs will entail employee training tailored to future compliance and vigilance. Track training completion and assess employee understanding through tests and certifications.

Answer 3(b)

Yes, there is a Portability Clause which gives right to the Policy Holder to transfer from One Insurer to another Insurer or from One Plan to another Plan of the same insurer. Under this Clause the Policy Holder gets:

(i) Right to transfer the credit gained for pre-existing conditions and time bound exclusions.

(ii) Not applicable to fixed benefits payable under Health Insurance Policies issued by a Life Insurer.

(iii) Portability form shall be submitted to the Old Insurer who shall send it through a portal to the New Insurer. Old insurer has to give all the details within 7 days to New Insurer.

(iv) No commission need to be paid to any Agent or intermediary for the process.

(v) New Insurer is obligated to accept or reject within 15 days from the date of receipt of the Policy Holder form.

(vi) If the New Insurer does not Convey any Decision within 15 days the New Insurer is deemed to have accepted the request.

(vii) No Charges for Portability.

(viii) The policyholder must apply for portability at least 45 days before the renewal date of the existing policy.

(ix) The existing policy must be in force without any breaks to be eligible for portability.

(x) Ensures that the benefits like waiting periods and no-claim bonuses are not lost when switching insurers.

Question 4

(a) (i) Explain "Average Clause" term in Insurance Agreements.

(*ii*) A Commercial Building which has been insured for ₹ 6 crores, but Insurance Premium has been paid on a Sum Insured of ₹ 3 crores only. There is a Loss of ₹ 2 Crores Worth of Property due to some Fire Accident. Calculate the Claim amount based on the Average Clause.

(*2+4=6 marks*)

(b) (i) Explain Insurable Interest in Insurance Agreements.

(*ii*) Mr. Anupam is the owner of the Commercial Building. He Insured that Building on 1st May, 2023. He sold that building to Mr. Kartik on 25th September, 2023. The fire took place on 21st January, 2024. As the Insurance Documents are with Mr. Anupam and as the present owner of the Building Mr. Kartik, both Mr. Anupam and Mr. Kartik approached Insurance Company to Claim the Policy monies.

Who will get the Policy Monies ? Discuss the Insurance Principle which is relevant to decide the Policy monies either to Mr. Anupam or Mr. Kartik

(*2+4=6 marks*)

Answer 4(a)

(i) The Average Clause in insurance is a provision that applies when your property is undervalued or underinsured at the time of policy purchase. It affects the claim settlement in case of a partial loss due to fire. A partial loss is when your property is not destroyed by fire but only

partially damaged. The insured knows best about the property which he would like to insure. Hence, in his own best interest, while completing the proposal form, he must declare the full value of the property. In the event of a partial loss, the value to the extent it is underinsured would have to be borne by the insured. He would be his own insurer for that portion of the property damaged, which has not been insured because of inadequacy in value insured Average clause enumerates - If the property hereby insured shall at the breaking out of any insured peril be collectively of greater than the sum insured thereon, then the insured shall be considered as being his own insurer for the difference, and shall bear a rateable proportion of the loss accordingly.

(ii) This is a case of Under Insurance. The Consequences of Underinsurance increases out of pocket expenses. In this case under the Average Clause, Policyholders agree to maintain a Specific Percentage of Insurance Coverage based on the Property's Actual Value.

The Average Clause operates on a proportional basis. Here's the typical formula used to calculate the insurer's liability:

Claim Payout= (Insured Amount/Actual Value)×Loss Amount

The Average Clause is an essential provision in insurance agreements designed to mitigate the risk of underinsurance. It ensures that policyholders share the financial responsibility proportionately if they choose to underinsure their property.

Actual Value of Property (V): Rs. 6 crores

Insured Amount (I): Rs. 3 crores

Loss Amount (L): Rs. 2 crores

Claim Amount = (Insured Amount/Actual Value) x Loss Amount

= (Rs. 3 Crores/Rs.6 Crores) x Rs. 2 Crores

= Rs. 1 Crore.

Answer 4(b)

(i) Insurable Interest refers to the legal or financial interest that a person or entity has in the subject matter of an insurance policy. This interest must exist at the time the insurance policy is purchased and throughout the policy term. Insurable interest is a basic requirement of any contract of insurance whether life, fire, marine, etc. unless it can be and is, lawfully waived. As a general rule, this means that the party to the insurance contract who is insured or policy-holder must have a particular relationship with the subject matter of the insurance whether that be a life or property or a liability to which he might be exposed. The absence of the required relationship will render the contract illegal or void depending on the type of insurance.

An example of insurable interest is a policyholder buying property insurance for their own house but not for their neighbour's house. The person does not have an insurable interest in any financial loss arising from damage to their neighbour's house.

For example, if an individual wanted to purchase a home for Rs. 40,00,000 with a down payment of Rs.7,50,000 and took out a mortgage for the rest, the bank would then have an insurable interest in the house of Rs.32,50,000. If the borrower pays down the mortgage to Rs.10,00,000 and then the home is destroyed in a fire, they would have 75% insurable interest in the home, and the bank would have 25%.

(ii) The relevant insurance principle that determines who will receive the policy monies is the principle of insurable interest. Insurable interest stipulates that the policyholder must have a

legitimate financial interest in the insured property at the time of purchasing the insurance policy and at the time of the loss.

- Mr. Anupam no longer owned the building, as he sold it to Mr. Kartik on 25th September, 2023. Therefore, he no longer has insurable interest in the property at the time of the loss, as the fire took place on 21st January, 2024.
- Mr. Kartik did not own the building at the time the insurance policy was purchased. Therefore, he did not have insurable interest in the property when the policy was initiated.

Mr. Kartik, in order to claim the monies from insurance company should endorse the policy in his favour after the building being bought by him and before the loss.

Question 5

(*a*) Analyze a scenario where "Global Marine Limited" is vulnerable to different types of Maritime Fraud. Suggest how varied fraudulent activities could affect the company and recommend a corresponding preventive action for each type to safeguard "Global Maritime Limited".

(*b*) As a Company Secretary for "Green Harvest Insurance Company" you are tasked with designing a New Crop Insurance Scheme to better protect farmers against the unpredictable nature of Agricultural Risks, such a weather anomalies, pests, and diseases. Considering India's diverse Agricultural landscape and the historical context of crop insurance in the country, your challenge is to develop a scheme that not only address these risks but also incorporates modern underwriting practices based on yield index and weather data.

Outline a Crop Insurance Scheme with Yield Index Underwriting and Weather-Based Claims for India's diverse Zones, and describe its improvements and benefits for farmers and "Green Harvest Insurance Company".

(*6 marks each*)

Answer 5(a)

Global Maritime Limited's potential threats refer to all previously mentioned maritime frauds that can negatively affect the business operations and financial standing of the Company.

(i) The first risk is mis-declaration of Cargo. It means that the cargo has been declared less than shipped. Global pays a fine and receives a bad reputation in the market. The preventive measure is to verify the cargo sufficiently before shipping. Conduct regular audits of shipping processes and inventory. Collaborate only with verified and reputable logistics partners and carriers.

(ii) The second risk is a Bill of Lading fraud. Someone legally took the cargo of the business.

(iii) The Company has no assets, and the preventive measure is an eBL System. Train employees to recognize signs of document forgery and implement procedures for reporting suspicious documents.

(iv) The third risk is charter party fraud. The charter violates the contract and does not make the payment. Global loses money. The preventive measure is a security bond in the contract and detailed screening of the charters. The third risk of charter party fraud due to the non-repayment by charters entails the loss of revenue. The prevention measure is a detailed background of charterers acquisitions, including financial guarantees. Obtain comprehensive insurance that covers potential discrepancies in cargo details.

(v) The fourth and last risk is scuttling, involuntary sinking of ships for rece1vmg compensations from insurances, threatens financial and human assets. Preventative action includes the installation of constant surveillance systems on ships.

Through focused measures in eBL adaptation, strict Charter Party evaluation, cargo verification and ship surveillance, Global Maritime Limited can decrease its exposure to maritime fraud and protect its possessions, image, and financial sustainability.

Answer 5(b)

Crop or Agriculture Insurance covers risks of anticipated loss in yield of various crops. Almost the entire of Crop Insurance business comes from 'Schemes' or 'Programme'. These Schemes operate on principles of 'Area Approach'. Coverage is compulsory for farmers taking crop loans from Rural Financial Institutions (RFIs) for cultivation of crops, i.e., loanee farmers. Non-loanee farmers can also insure their crops under the same schemes.

This New Crop Insurance Scheme from "Green Harvest Insurance Company'', needs to account for the unique challenges and opportunities of the Indian Agriculture Sector. The basis of the scheme is to protect farmers from unpredictable risk such as weather abnormalities, pests, and diseases. These factors play a critical role in crop yield and, subsequently, the farmers' income. Innovative crop insurance will utilize advances underwriting incorporating yield index and weather data to provide a precise assessment of risk and, consequently, tailored insurance protection. We will also utilize satellite imagery and other agronomic data in underwriting to monitor crop health and environment permitting a non-static pricing model that can specifically gauge the risk to crops in different regions.

The Key Features of yield Index Underwriting are:

(i) *Index-Based Coverage:* Compensation would be determined based on specific indexes such as amount of rainfall, the average percentage of yield loss, etc. to facilitate prompt and reliable compensation exchange.

(ii) *Flexible Premiums:* The premium rates would be determined based on the crop type and the region so that the prices reflect the crop specific risk reality and neglected so it's easy for the smallholders to afford the premium .

(iii) *Technological Implementation:* By implementing the use of technology in estimating data and settling claims, efficiency and the lack of corruption will help uplift the poor farmers.

The Key Features of Weather Based Crop Insurance Scheme are:

(i) The Scheme covers all food, oilseeds and annual commercial / horticultural crops. All crops for which historical yield data is not available can also be covered.

(ii) Available to all Farmers - compulsory for borrowing farmers and optional for non-borrowing farmers -who have to fill-up a simple Proposal Form and submit the same with premium amount in a nearest branch of bank or Primary Agricultural Credit Society.

(iii) Major perils covered are deficit, excess and deviation of rainfall, relative humidity, temperature (high and low), wind speed and combination of above. Risks of hail-storm and cloud burst can also be covered as add-on covers.

(iv) Sum Insured is pre-defined and is based on cost of cultivation, and is decided by the state for each crop and district. Premium rates can be a maximum of 10% for Kharif and 8% for Rabi season with 12% for commercial / horticultural crops. The premium subsidy available ranges from 25% to 50%.

(v) Network of financial institutions viz., commercial banks, regional rural banks and cooperative banks, spread across length and breadth of country plays the role of intermediaries. Insurance intermediaries licensed by IRDAI are also allowed to insure non-loanee farmers.

(vi) If observed weather index value falls below or above (as the case may be) the notified

trigger value, then claims, then claims shall be calculated per unit area. Claims are assessed and settled solely based on weather data of automated stations installed in Reference Unit Area for the purpose. Calculation is done based on term sheets published in notifications. Procedure of assessment and settlement of claims are automated processes. No paper work is required to be done by insured farmers or intermediaries. Losses for Add-on covers are assessed on individual basis for which farmers have to intimate the insurance company within 48 hours of the occurrence of the insured peril.

Taking into consideration all these factors, coupled with beginner data analysis and modem technology, the farmer's scheme provides a safety net for them and throws in a much-needed promotional element in India's rather ever smaller and unstable farming communities.

Improvements and benefits for farmers and "Green Harvest Insurance Company":

(i) Yield Index Underwriting provides coverage against yield shortfalls due to various factors, including adverse weather, pests, and diseases.

(ii) Farmers receive payouts quickly in the event of yield losses or weather-related damages, reducing financial stress during difficult periods.

(iii) Access to crop insurance encourages adoption of modern farming practices, improved seed varieties, and better water management techniques.

(iv) Reduced risk of financial losses encourages farmers to invest in productivity-enhancing technologies and inputs.

(v) Green Harvest Insurance Company establishes itself as a socially responsible insurer, fostering trust and loyalty among farmers and stakeholders.

(vi) Collaboration with government agencies ensures widespread adoption of the scheme and support for its implementation, including premium subsidies and regulatory frameworks

(vii) Continuous monitoring and analysis of crop yields and weather patterns generate valuable insights for policymakers, agricultural researchers, and insurers, enabling informed decision-making and targeted interventions.

Question 6

(a) In all Liability Claims "Negligence is the Root Cause". Do you Agree ? What are the Liabilities which require Compulsory Insurance for Third Party Risks ?

(b) Aviation Insurance is a Specialized Insurance, Gaining Popularity these days. Do you know what are the usual covers offered under Aviation Insurance ?

(*6 marks each*)

Answer 6(a)

Negligence is indeed a significant cause of many liability claims, but it is not the sole cause. Liability claims can arise from various reasons:

(i) *Negligence:* Failure to exercise reasonable care, resulting in harm to others.

(ii) *Strict Liability:* Liability without fault, often applicable in cases involving inherently dangerous activities or defective products.

(iii) *Vicarious Liability:* Employers being held responsible for the actions of their employees.

(iv) *Intentional Torts:* Deliberate actions causing harm.

(v) *Breach of Contract:* Failing to fulfill contractual obligations.

The liabilities which require compulsory insurance for Third Party Risks are: Certain liabilities require compulsory insurance to protect third parties. These insurances are mandated by law in many jurisdictions to ensure that victims are compensated in case of injury, damage, or loss.

(i) *Motor Vehicle Insurance:* Third-party liability insurance is required for all motor vehicle owners to cover bodily injury or property damage caused to others in an accident.

(ii) *Employer's Liability Insurance*: Required in many jurisdictions to protect employees from workplace injuries or occupational diseases.

(iii) *Marine Insurance:* Required for shipowners to cover liabilities arising from collisions, environmental damage, and other maritime risks.

(iv) *Aviation Insurance:* Required for airlines and aircraft operators to cover liabilities to passengers, third parties, and cargo owners.

Answer 6(b)

Aviation insurance policies typically provide coverage for a wide range of risks associated with aircraft operations

Aviation Insurance Policy Covers:

(i) Aircraft Policy related to Flight and Ground Risk

(ii) Aircraft Hull Policy Comprehensive

(iii) Aircraft Hull War Risks Policy

(iv) Aviation Personal Accident Policy (Crew)

(v) Breach of Warranty Insurance

(vi) Confiscation Endorsement

(vii) Hijacking Endorsement

(viii) Loss of License Insurance

(ix) Product Legal Liability Insurance

(x) Random Indemnity Cover

(xi) Environmental Liability

(xii) Airport Premises Liability

(xiii) Public liability insurance

(xiv) Passenger liability insurance

(xv) Combined Single Limit (CSL)

(xvi) In-flight insurance

(xvii) Ground risk hull insurance not in motion

(xviii) Ground risk hull insurance in motion (taxiing)

INTELLECTUAL PROPERTY RIGHTS – LAWS & PRACTICES

MODULE 3 ELECTIVE PAPER 9.3

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

PART-I

Questions 1

Read the following case study and answer the questions given at the end :

During 1901, the first Royal Enfield motorcycle was produced by The Enfield Cycle Company Limited at Redditch, England. The motorcycle was designed by Bob Walker Smith and Frenchman Jules Gobiet and was launched at the famous Stanley Cycle Show in London in November, 1901. The motorcycle was advertised in the newspapers including in The Autocar newspaper dated 21st December, 1901. In 1913, the first India Tourist Trophy race, Royal Enfield had won the first prize. After first Indo Pakistan war and considering the continued hostilities along the Cease-Fire Line (now known as Line of Control ('LOC'), the Government of India ('GOI') during 1951 looked out for the 'seize-proof motorcycles for Indian army to carry out patrolling at the inaccessible tracts along the Cease-Fire Line. The Plaintiff's Royal Enfield Bullet 350 was chosen as the most suitable bike for the job. Immediately, during 1952, 500 of such bikes were ordered by the GOI. The Royal Enfield Bullets gave a sterling service on the tough terrain of Kashmir and in scorching desert of Rajasthan. Thereafter, subsequent orders were issued by GOI, with requirement to manufacture such bikes in India. An industrial license was granted with provision for the company to manufacture upto 5000 units per annum provided it followed a phased programme of making an ever-increasing number of components in India. This was the beginning of a relationship of paramount importance to Royal Enfield-with Indian Army and other armed forces. In 1955, the Redditch company partnered with Madras Motors in India to form 'Enfield India' to assemble, under licence, the 350 cc Royal Enfield Bullet motorcycle in Madras and The Enfield India Limited ('The Enfield India') was incorporated. Initially, it started with the assembling of Royal Enfield Bullets shipped from the Enfield Cycle Co. Ltd. of Redditch, at its plant in Madras, India. By 1962, all components were made in India. From 1977, Enfield India begins exporting the 350cc Bullet to the UK and Europe, since the year 1955, the plaintiff has been continuously, extensively and widely manufacturing and marketing their motorcycles in India under the distinctive trademark ROYAL ENFIELD. All plaintiff's products bear the house mark ROYAL ENFIELD and are sold across India and the globe. The plaintiff's ROYAL ENFIELD motorcycles are sold under several well-known brands like Royal Enfield, Bullet, Enfield, Royal Enfield Continental GT, Royal Enfield Thunderbird, Classic, Royal Enfield Himalayan, Royal Enfield Interceptor, Royal Enfield Hunter, Royal Enfield Meteor etc. The plaintiff's ROYAL ENFIELD motorcycles and accessories are sold extensively all over India and are also exported to over 70 countries viz. USA, Europe, Brazil, Thailand, Nepal, Australia, Colombia, etc. The plaintiff's motorcycles sold under the mark ROYAL ENFIELD by reason of their excellent quality and volume of sales have garnered enviable reputation and goodwill amongst the members of the trade and public and the mark ROYAL ENFIELD is always associated with that of the plaintiff only and to this day its Royal Enfield motorcycles stand as a symbol of power, toughness, elegance and to put it in a few words it still represents the legacy

of ''Royal Enfield-Made Like A Gun!''. The plaintiff's manufacturing operations go through a series of modernization and improvement efforts, with a number of automated processes. Its products are known for their reliability, quality and toughness. The plaintiff has a state-of-the-art infrastructure to manufacture its vehicles and has an active in-house research and development wing (one in India and another one in United Kingdom) constantly at work to meet the changing customer/ market preferences. At present, the plaintiff operates via various subsidiaries across multiple countries namely in the United Kingdom, Thailand, North America, Brazil and Canada. It operates through its dealers and distributors and by means of more than 1088 large format stores and 1024 studio format stores in major cities and towns across India and exports to multiple countries worldwide. Through its distribution network, the plaintiff has 187 exclusive stores in 22 countries and sells through about 724 multi-brand outlets and has over 1000 dealers/retainers around the world. The plaintiff has more than 1088 authorized dealers in India, all maintaining a similar Brand Retail Identity (BRI) and are operating outlets that are uniquely designed with distinguishing features which include distinctive interiors, exteriors, colour scheme and get-up which has become inalienably associated with the goods and business of the plaintiff apart from using the trademarks vesting with the plaintiff. This is an exercise done at considerable cost and effort, and with a uniform standard across the country and abroad, it was further claimed by the plaintiff that apart from selling the motorcycles, it also sells ''bike care products, apparels and other products such as riding gear, rain suits, caps, T-shirts, readymade garments, jeans, trousers, jackets, gloves, helmets, head gears, boots and shoes, mugs, key-chains, bike covers etc.'' under its various trademarks.

The plaintiff came to know that the defendant is using the identical name ''ROYAL ENFIELD'' for selling cosmetic items. This act of defendant is creating deception, confusion in the minds of the general public and creates an assumption that the products are those of the plaintiff company. The plaintiff thus, filed the suit for restraining the defendant from using the mark.

The defendant put forth his defence by stating that plaintiff mark is not registered for cosmetic items under Trademark Act and hence the plaintiff is not entitled to restrain them for using the mark of ROYAL ENFIELD.

Based on the above facts answer the following :

(a) Will the plaintiff succeed ? Substantiate your argument with the help of decided cases.

(b) How infringement of trademark by comparative advertising is dealt under Trademark Act, 1999 ? Explain with the help of decided cases.

(c) Refusals of registration are criteria or conditions set by the trademark office that, if not met, can result in the rejection of a trademark application. Explain.

(d) Discuss the doctrine of prior use under the Indian Trademark Act, 1999.

(*10 marks each*)

Answer 1(a)

Well-known Trademark plays an important role in global markets and in identifying symbols and sign that are widely known to the significant general public and enjoys a fairly high reputation. All the countries globally have accepted the significance of Well-known Trademark including India. It has given well-known Trademark exceptional rights over registration of identical or deceptively similar marks and also against their abuse. The law makers in India have made specific provisions for safeguarding the well-known trademarks in the Trade Marks Act of l919. Well known trademark is defined under section 2 (1) (zg) of Trade Marks Act, 1999 as:

In relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

There are many cases in India for protection of Well-known Trademark and one of the most famous cases was of ***Daimler Benz Aktiegesellschaft & Anr v. Hybo Hindustan*** AIR 1994 Del 2369

In this case, the plaintiff was a manufacturer of Mercedes Benz cars, and the defendant was using the mark BENZ for selling its undergarments. The Court in deciding the case acknowledged the logo of the plaintiff as a well-known trademark and hence restrained the defendant from using the impugned mark by stating that there was no valid reason as to why the defendant would adopt the name "Benz", which is associated with one of the finest engineered cars in the world and has a trans-border reputation and good will.

In another case of ***Rolex Sa*** *v* ***Alex Jewellery Pvt Ltd. & Ors,*** 2009 (41) PTC 284 (Del.) The plaintiff filed a case against the defendants who were dealing with artificial jewellery, and using the trade name "Rolex" associated with the plaintiff. The court held that the plaintiff's trade mark was a well-known trademark since the general public using watches recognize the trade name Rolex and the defendant using the same name for dealing with artificial jewellery would create confusion in the minds of the general public and might create an assumption that the products are those of the plaintiff company. Hence, the court granted injunction against the use of the trade name Rolex by the defendants.

In ***Microsoft Corporation & Anr.*** *v* ***Kurapati Venkata Jagdeesh Babu & Anr.,*** 2014 (57) PTC Delhi High Court held that the mark MICROSOFT was a well-known mark since it is being used and known to most of the public throughout the world, while also considering extensive evidence in relation to advertising and publicity for the mark in India. The court held that the defendants were not allowed to use the same mark "either as a trademark or part of its trading style/corporate name in relation to similar or dissimilar business as the said trademark has got a unique good will and reputation".

To determine whether the mark is Well- known or not, the registrar will consider the following points:

a) That the general public has knowledge about the said mark and are able to recognize the alleged well-known marks and the recognition obtained by way of promotions.

b) The duration, extent and geographical area of any use or promotion of that trademark.

c) The record of successful enforcements of the rights in that trademark, in particular the extent to which the trademark has been recognized as a well-known trademark by any Court or Registrar under that record.

d) The number of actual or potential consumers of the goods or services.

e) The number of persons involved in the channels of distribution of the goods or services.

f) The business circle dealing with the goods and devices to which the trademark applies.

g) Wherein a trademark has been determined to be well known in at least one relevant section of the public in India by any court or Registrar, the Registrar shall consider that trademark as a well-known trademark for registration under this Act.

Section 11(6) & 11(7) of the Trademark Act, 1999 provide protection of Well- Known Trade mark and protection for the marks which are registered in good faith.

In view of the above the plaintiff will succeed.

Answer 1(b)

Section 29(8) and Section 30(1) of the Trademarks Act, are adequate to address issues related to trademark infringement, made in the garb of comparative advertising. Judicial pronouncements on the issue have also made it clear that there is no harm in comparing your goods with those of a competitor, but the comparison should be fair and should not bring disrepute to the competitors' products or trademark, i.e., comparative advertising leading to product disparagement is not permissible.

A very famous case on this point decided by Delhi High Court in **'Pepsi Co. Inc. and Ors. V/s Hindustan Coca Cola Ltd. and Ors.'** 2003 (Delhi High Court) wherein the appellant is registered trademark owner of mark PEPSI, PEPSI COLA, GLOBE DEVICE Appellant's contention that respondent while promoting their product "Thums Up" and "Sprite" launched series of television commercials in which the word PAPPI was written on the bottle shown in comparison and also, it was indicated that liquid in that bottle is "Bacchon wala drink" and this is disparagement of the product of appellant and thereby infringing its trademark. Respondent defense that they are just puffing up their claim to promote their product which is healthy competition in the market. The division bench of Hon'ble Delhi Court while granting injunction against the respondent for publication and screening of impugned advertisement observed that the comparison in the advertisement was with PEPSI. The word PAPPI written on the bottle shown in respondent's advertisement was fairly indicating the trademark PEPSI of the appellant.

Reckitt & Colman of India Ltd v. Kiwi TTK Ltd. is among the earliest instances wherein the Delhi High Court investigated the extent of comparable advertising. The case was about advertisement depicting two shoe polish bottles, one with the Kiwi brand name that did not leak and the other with the X brand name that was dripping. A product of Reckitt & Colman India, the second bottle featured a crimson glob in the shape of a cherry. In addition, the advertisement presented through electronic media, the defendant also circulated 'point-of-sale' poster materials in stores and retail outlets offering similar products. In the aforementioned post material distributed by the defendant, it is alleged that the bottle displayed 'OTHERS' with a malfunctioning applicator that resembled the plaintiff's applicator. The court ordered the defendants to remove the red item from the advertisement and withdraw the posters.

Answer 1(c)

The Trade Marks Act, 1999 defines a "trademark" under Section 2(1)(zb) as – "a mark capable of being represented graphically and which is capable of distinguishing the goods and services of one person from those of others and may include the shape of goods, their packaging and combination of colours." The Trade Marks Act, 1999 mentions two grounds for refusal of a trademark registration in India, and those are:

Absolute grounds for refusal of registration (Section 9)

Relative Grounds for refusal of registration (Section 11)

Section 9 of the Trade Marks Act, 1999 lays down various conditions, which make it a hard stop for getting a Trademark grant if the proposed mark is found to fulfil those conditions. The grounds are:

- Marks which are devoid of any distinctive character,
- Marks that are indications or marks that are used in commerce to define the quantity, quality, type, values, intended purpose, or geographical origin of goods or services rendered,
- Marks or indications which have become customary in the current language or in the bona fide and established practices of the trade, shall not be registered,

- Nature of the marks is such that it can deceive the public or cause confusion,
- The mark it contains or comprises of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India,
- If the mark comprises or contains scandalous or obscene matter,
- If the use of the mark is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950,
- Marks resulting from the nature of the goods themselves,
- Marks that add significant value to the goods,
- Marks whose shape adds significant value to the goods.

These absolute grounds of refusal are related to the benefit of public policy with the legislative intent to protect the legitimate interest of the traders as well as the public who are genuine and bona fide users of various marks in relation to their goods/services.

Answer 1(d)

The 'previous/prior use' theory is addressed in the Trade Marks Act, 1999, in Section 34 which acts as an exception to Section 28. Section 34 of the Trade Marks Act, 1999, stipulates that a registered user cannot prevent a third party from making use of his or her registered brand if the third party has been making consistent use of the trademark from an earlier date/prior date.

In **Kamat Hotels (India) Ltd. and Royal Orchid Hotels Ltd.** the court reaffirmed the principles of prior use. The following is a list of the requirements that need to be met in order for prior usage to be considered against a trademark that has been registered in India:

- The trademark and the subsequently registered mark may be identical or similar.
- The trademark must be applied to the same category of goods as the mark that was subsequently registered. If it falls under a different category, further rules would need to be applied, such as the need that the mark be well-known in India and that its use be harmful to the prior user's goodwill.
- The prior use must involve a brand registered on Indian territory. A trademark registered in India cannot be invalidated by prior usage in other countries.
- The trademark must be used consistently. In other words, it shouldn't be a short-term use.
- It is crucial that the trademark has some reputation and link with the owner.
- The trademark must have been in use prior to the date of registration or the usage of the trademark whose registration is being challenged.

In **Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Ltd. and Ors,** the Supreme Court of India ruled that prior use cannot be asserted if it did not occur in the same region as the Defendant and the jurisdiction of the passing off action. Having been the first to adopt and utilize the mark PRIUS in 1997, Toyota sued Prius Auto Industries Ltd. for trademark infringement in the aforementioned case. Nevertheless, evidence presented by Toyota showed that the company did not begin using the mark PRIUS in India until 2010, well after Prius Auto Industries had begun doing so in 2006. Hence, the Court ruled that Prius Auto Industries had unrestricted use of the PRIUS trademark in India.

This provision safeguards the legitimate interests of third parties who use trademarks that are identical to or confusingly similar to those of registered trademark owners.

Question 2

Read the following case and answer the questions given at the end :

The plaintiff, Polymer India Ltd., is a leading manufacturer and distributor of quality products made using plastic moulding technology. Its products include toys, school furniture and playground equipment. The plaintiff is also the registered proprietor of the trademark 'PLAY' since 25th August, 2005.

The plaintiff sued eight defendants namely Playwell Impex Pvt. Ltd., Mayank, Ms. Meenakshi, Pawan, Vishal, Darshan, R.P. Associates and Funko India who are involved in manufacture and distribution of similar products. The plaintiff claimed relief of permanent injunction to restrain the defendants from infringing its copyright, common law rights in designs and passing off of deceptively similar products.

An ex parte ad interim injunction was granted to the plaintiff by a Court vide its order dated 7th August, 2015 and the goods of the defendants were seized by the Court Commissioner appointed vide the same order.

The plaintiff's contentions are :

- That the products of plaintiff are unique and conceptualised individually, which involves study of the market, preparation of the drawings, drawing a feasibility report, preparation of a new colour scheme, finalisation of dimensions, etc.
- That the defendant Playwell Impex Private Ltd. is engaged in the business of manufacture, distribution and sale of toys in collusion with the other defendants including R.P. Associates who was earlier the distributor of plaintiff's products and Darshan, who is an ex-employee of the plaintiff. The defendant Playwell Impex Pvt. Ltd. has launched a range of toys which are identical and deceptively similar to the toys made by the plaintiff and is thereby passing off its goods as those of the plaintiff, infringing the bundle of intellectual property rights of the plaintiff in its products.
- That the toys manufactured and sold by the defendants under the brand FUNKID are a substantial re-production and colorable imitation of the products of the plaintiff.
- That there is a clear distinction between an original artistic work and a design derived from it for industrial application on a product. The original artistic work which may be used to industrially produce the designed article would fall within the meaning of artistic work defined under section 2(c) of the Copyright Act, 1957 and would be entitled to copyright protection as defined under sction 2(d) of the Designs Act, 2000.
- That the defendants in their written statement have admitted the e-mail of the defendant Darshan to the defendant Playwell Impex Pvt. Ltd. forwarding the brochure of the toys of the plaintiff and therefrom it is evident that the defendant Playwell Impex Pvt. Ltd. is replicating from the brochure of the plaintiff.

The defendants' contentions are :

- That the drawing in which the plaintiff claims a copyright does not constitute a design within the meaning of section 2(d) of the Designs Act, 2000 and is thus, not capable of being registered under the Act.
- That the plaintiff has no right to claim protection of design without any registration.
- That the plaintiff's toys which are being manufactured since the year 1992, are not novel and similar products are available in the market for a long time.

– That the plaintiff's products to which the design has been applied have been reproduced by it, more than 50 times by an industrial process.

– That the interim injunction granted is not justified when infringement is not proved.

(a) Discuss in the light of the above case the relation between the Copyright Act, 1957 and the Designs Act, 2000.

(b) Explain the copyright protection to foreign works in India. What are the conditions for such copyright protection in India ?

(6 marks each)

Answer 2(a)

Section 2 (d) of the Designs Act, 2000 defines the term 'Design' and expressly excludes "any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 from its scope.

Section 2 (c) of the Copyright Act defines an "Artistic Work" to include any work of artistic workmanship. Therefore, an artistic work does not fall within the definition of a Design under the Design Act, 2000.

Section 15 of the Copyright Act declares that a copyright does not subsist under the Act in any design which is registered under the Designs Act. Furthermore, the said section declares that "Copyright in any design, which is capable of being registered under the Designs Act, 2000, but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than 50 times by an industrial process by the owner of the copyright, or, with his license, by any other person."

Reading together the aforesaid provisions in the Copyright Act and the Designs Act, it may be concluded that an artistic work will not fall within the definition of a Design under the Designs Act, 2000, but if it is related to a Design, then they can be protected under the Designs Act and not under the Copyright Act.

Answer 2(b)

Copyright Protection to Foreign Works

The Copyright Act applies only to works first published in India, irrespective of the nationality of the author. However, Section 40 of the Copyright Act empowers the Government of India to extend the benefits of all or any of the provisions of the Act to works first published in any foreign country. The benefits granted to foreign works will not extend beyond what is available to the works in the home country and that too on a reciprocal basis, i.e., the foreign country must grant similar protection to works entitled to copyright under the Act. The term of Copyright in India to the foreign work, will not exceed that conferred by the foreign country. Government of India has passed the International Copyright Order, 1958. According to this order any work first published in any country which is a member of the Berne Convention or the Universal Copyright Convention will be accorded the same treatment as if it was first published in India.

Conditions of Copyright Protection

The following are the requisites for conferring copyright protection to works of international organisations:

a) The work must be made or first published by or under the direction or control of the International Organisation.

b) There should be no copyright in the work in India at the time of making or on the first publication of the work.

c) If the work is published in pursuance of an agreement with the author, such agreement should not reserve to the author any copyright in the work or any copyright in the work should belong to the organisation.

Question 3

(*a*) Critically analyse the background and controversial cases for enacting the Geographical Indications of Goods (Registration and Protection) Act, 1999 in Indian scenario.

(*b*) An Indian automobile company is interested in joint venture arrangement with a foreign company. It has, however, little knowledge about Due-diligence of intellectual property rights in a corporate transaction. Advise the company.

(*6 marks each*)

Answer 3(a)

Geographical Indications (GI) serve to recognize the essential role geographic and climatic factors and/or human know-how can play in the end quality of a product. Like trademarks or commercial names GIs are also Intellectual Property Rights, which are used to identify products and to develop their reputation and goodwill in the market. The Agreement on Trade Related Aspects of intellectual Property (TRIPS), prescribes minimum standards of protection of GIs and additional protection for wines and spirits. Articles 22 to 24 of Part II Section III of the TRIPS prescribe minimum standards of protection to the geographical indications that WTO members must provide.

Under the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), countries are under no obligation to extend protection to a particular geographical indication unless that geographical indication is protected in the country of its origin. India did not have such a specific law governing geographical indications of goods which could adequately protect the interest of producers of such goods.

This resulted into controversial cases like basmati and rasgulla.

1) Basmati is a variety of rice grown in India and is internationally famous for its taste, flavour, smell and texture. Farmers from Madhya Pradesh who grew the variety made attempts to have themselves registered as growers of Basmati rice and take advantage of the GI by accessing the international market. After a long-drawn battle, in 2018 Madhya Pradesh was excluded from the territory which could claim the GI tag of Basmati by an order of the IPAB.

2) The states of West Bengal and Odisha found themselves involved in a tussle over GI of Rasgulla. Finally, West Bengal was granted "Banglar Rosgolla" and Odisha is in the process of getting "Jagannath Rasgulla" registered for their version of the roshgolla which emanates from the Jagannath Temple tradition.

To prevent such unfair exploitation, it became necessary to have a comprehensive legislation for registration and for providing adequate legal protection to geographical indications. Accordingly, the Parliament enacted a legislation titled the Geographical Indications of Goods (Registration and Protection) Act, 1999 which came into force with effect from l5th September, 2003.

The objectives of the Act are three-fold. They are:

- To protect the interest of producers,
- To exclude unauthorized persons from misusing GI, and
- To promote Indian goods for export.

Answer 3(b)

The strength of a company's intellectual property portfolio often drives the value of corporate transactions. Regardless of whether you are the target company or the buyer in a business transaction involving Intellectual Property, the due diligence process should be designed to reveal the value of the intangible assets–patents, trademarks, copyrights and trade secrets. IP due diligence should ideally be conducted at the onset of negotiations. this not only allows a more reasoned value of the IP to be determined, but also enables proactive corrective action if any legal concerns are identified that may affect the value of the IP.

Due diligence typically begins with a fact-based investigation to answer two questions.

1) What are the products or services involved with this transaction?
2) Does the existing IP cover those products or services?

To answer the initial questions, the various products or services must be inventoried and the IP must be carefully reviewed to determine whether it includes those assets. by keeping the investigation focused on the relationship between the products of interest and the relevant IP, the investigation should remain on a path that parallels the goals and objectives of the transaction.

After documenting the IP, the investigation turns to focus on one or a combination of the following legal analyses:

1. Freedom-to-operate consideration
2. Scope-of-protection, validity and enforceability concerns
3. Ownership issues

Question 4

(*a*) Decisions of the Supreme Court of India relating to patents clearly indicate that the framework of Patent Law in India is utilitarian. Explain.

(*b*) ''The doctrine of equivalents has been accepted in the jurisprudence to protect patent rights from being infringed by infringers.'' Elucidate the statement.

(*6 marks each*)

Answer to Q No.4 (a)

Novartis AG v Union of India is the landmark judgment given by the two-judge bench of the Hon'ble Supreme Court of India. In this case Novartis challenged the rejection of its patent application by IPAB for Beta crystalline form of "Imatinib mesylate" wherein such challenge was rejected by the Supreme Court of India on the ground that the said drug did not produce an enhanced or superior therapeutic efficacy as compared to the known substance i.e., "Imatinib mesylate" means that the said drug did not involve an inventive step.

The judgment given by the Hon'ble Supreme Court is to prevent the ever-greening of patented products and gives relief to those who can't afford the lifesaving drug as these pharmaceutical companies sell such lifesaving drugs at a very high price hence unaffordable for the common man.

In **BAYER CORP. V. UNION OF INDIA** first compulsory license was issued to create a balance between the welfare of the people and also the economic interests of the country. Following justifications may be culled out from the above analysis of judicial decisions:

(i) The object of patent law is to encourage scientific research, new technology and industrial progress patent right is justified mainly for reasons of utility;

(ii) Grant of patent to the inventor in exchange of disclosure of invention to the society to enrich public domain of knowledge and technology – Natural Right justification of patent right is a means to achieve the end of social purpose; and

(iii) Patent systems are not created in the interest of the inventor but in the interest of national economy.

Answer 4(b)

Patent infringement generally falls into two categories: literal infringement and infringement under the doctrine of equivalents. The term "literal infringement" means that each and every element recited in a claim has identical correspondence in the allegedly infringing device or process. However, even if there is no literal infringement, a claim may be infringed under the doctrine of equivalents if some other element of the accused device or process performs substantially the same function, in substantially the same way, to achieve substantially the same result.

The doctrine of equivalents is a legal rule in most of the world's patent systems that allows a Court to hold a party liable for patent infringement even though the infringing device or process does not fall within the literal scope of a patent claim, but nevertheless is equivalent to the claimed invention.

This "expansion" of claim coverage permitted by the doctrine of equivalents, however, is not unbounded. Instead, the scope of coverage which is afforded to the patent owner is limited by (i) the doctrine of "prosecution history estoppel" and (ii) the prior art. An infringement analysis determines whether a claim in a patent literally "reads on" an accused infringer's device or process, or covers the allegedly infringing device under the doctrine of equiva1ents. The steps in the analysis are:

- Construe the scope of the "literal" language of the claims.
- Compare the claims, as properly construed, with the accused device or process, to determine whether there is literal infringement.
- If there is no literal infringement, construe the scope of the claims under the doctrine of equivalents.

Question 5

The block printing craft of Bagru is unique and has its own distinct character. This kind of art is said to have started around 450 years ago. The village Chippa or traditional community used these fabrics by hand. These traditional people came from Alwar, Madhopur, Jhunjhunu and some other districts of Rajasthan to permanently settle at Bagru. Bagru was historically recognized as producing more upscale products for royal clientele and for use in temples. The Print designs and colour are such that these are ideal for the rural folk. The design and colours of Bagru prints have been greatly improved and diversified to meet the requirement of the designers and export market. The Production requires high degree of coordination of eyes, hands and allied pressure on the blocks. The main tools of the printer are wooden blocks in different shapes–square, rectangle, oval, round and semicircular or crescent – and sizes called bunta. Blocks are hand-carved of seasoned teak wood and on the botton face the motifs are engraved with steel chisels of different widths and cutting surface by the carver. Each block has a wooden handle and two to three cylindrical holes drilled into the block for free air passage and also to allow release of excess printing paste. The new blocks are soaked in oil for 10-15 days to soften the grains in the timber. These blocks sometimes have metal over the wood. The community approached you asking to protect their unique art.

(a) Advice how this art can be protected under IPR to save the community artist of this region.

(b) What is meant by legal auditing of Intellectual Property ?

(6 marks each)

Answer 5(a)

Geographica1 Indication Registration

Section 8 of the Geographical Indications of Goods (Registration & Protection) Act, 1999 provides that a Geographical Indication(GI) may be registered regarding any or all of the goods, included in such types of goods as may be listed by the registrar. Moreover, regarding a particular area of a country, or a region or locality in that territory, as the case may be. According to the prescribed manner, the registrar may also classify the goods according to the international division of goods to register geographical indications and publish in an alphabetical index of various goods.

Who can apply for G.I.?

Any union of persons or producers or any organisation or authority established by or under any law expressing the concern of the producers of the concerned goods can apply for registration of a geographical indication.

A producer will apply for the registration as an approved user of a registered geographical indication and collectively by the registered proprietor of the said G.I. The 'producer' means in G.I. Act-

- anyone who provides the goods in case of agricultural goods, and involves the person who prepares or packages such goods;
- anyone who utilises the goods in case of natural goods;
- anyone who creates or produces the handiwork or manufactured goods,
- anyone who purchases or trades in such production, exploitation, building or manufacturing of the goods.

Answer 5(b)

Intellectual Property (IP) audit has been defined as a systematic review of the IP owned, used or acquired by a business so as to assess and manage risk, remedy problems and implement best practices in IP asset management. IP Audit is a tool which is mostly used by the companies to take into account the intangible assets which they have generated / developed in the certain span of time. Though the IP is intangible in nature, but it contributes to a very crucial core value of the company, i.e. the goodwill which the brand have in the market.

Tentatively speaking the goodwill of the IP is one of the crucial reasons for which the industries acquire protection. This goodwill thus generated is then represented as the consumer preference and the acceptability of the brand in the market which is now a major reason for generating revenue. Keeping in mind the changing times and given the digital society we live in, the companies have never been more aggressive regarding their promotion, advertisements and collaborations regarding their products.

This has thus made them to start delving into the wilderness of the market which makes them susceptible to damage/threats and other legal challenges. The scenario thus has presented an alarming need, which needs the IP owners to be more aggressive and well prepared before an actual impact is caused.

IP Audit follows the SWOT analysis process as below:

1. **S – Strength:** To assess the strongest and safest points of the IP of the owner. This could range

from the goodwill of the product to the tall framed legal and comprehensive protection which would be the best asset of the owner.

2. **W – Weakness:** One of the major aims of the IP Audit is to identify the weak spots and loose ends which would be the possible breeding grounds to future legal disputes. The Audit would help the owner, to prepare well in advance and also help them to device a full proof mechanism to overcome such abnormalities.
3. **O – Opportunities:** IP audit can also be seen as preparation which the owner carries out to assess the present situation before proceeding to take any further actions. The owner of an IP could also undertake such preparatory measures before proceedings to use their IP to generate revenues, like licensing, tech – transfer and leasing.
4. **T - Threats:** The intangible rights being vulnerable and frail are always defenseless without proper protection and legal enforcements. Given the highly digital and technologically advanced competitive market threats to the IP have been imminent and thus the IP Audit at timely intervals serves the owner to entail and trace the source of possible conflict and take adequate measures to avert it.

Question 6

(*a*) Sane Aztec Ltd. was in business of electroplating the internal surface of cylinders of internal combustion engines with a thin layer of nickel silicon carbide. The company employed Mr Rahul as a sales engineer from March, 2017 to September, 2018. Rahul, after resigning, started similar business under the name of Ultra Cylinders. Sane Aztec instituted a law suit against Rahul for breach of trade secrets and related it to the use of similar type of electroplating apparatus and list of customers. Rahul pleaded that electroplating process and apparatus was not a novel one and that the contract with the company was very vague about the confidentiality of information. Will Mr Rahul succeed ? Give reasons in support of your answer.

(*6 marks*)

(*b*) Cediff Communications registered the domain name ''Cediff.com'' with Net Solution on 15th February, 2017. On 31st January, 2018 Syberboot registered the domain name ''Cardiff.com'' with Net Solutions. Cediff communications (plaintiffs) incited proceedings under the Trade Marks Act, 1999 alleging that the Syberboot (defendants) had adopted the word ''Cardiff'' as part of their trading style deliberately to pass off their business services as that of the plaintiffs'.

Defendants pleaded that the word ''Cadiff'' is coined by taking the first three letters of the words catch, information and free. They further contended that the ''look and feel '' of the plaintiff's website was totally different from that of the defendants' website. They added that the users of the internet can never connect to a website by mistake as users of the website are persons skilled in the use of computer and hence there could be no possibility of confusion between the two names. Is the contention of the defendants valid ?

Can plaintiffs claim trade mark protection of domain names ? Give reasons in support of your answer.

(*6 marks*)

Answer 6(a)

Trade secrets are just as other intellectual property rights, can be extremely valuable to a company's growth and sometimes even critical for its survival. Businesses must ensure that they adequately protect their business processes, technical know-how and confidential information from competitors.

A trade secret may refer to a practice, process, design, instrument or a compilation of data or information relating to the business which is not generally known to the public and which the owner reasonably attempts to keep secret and confidential. Such data or information may also involve an economic interest of the owner in obtaining an economic advantage over competitors.

Trade secrets are not protected by law in the same manner as trademarks and patents. There is no statute or legislation that governs the protection of trade secrets in India. However, rights in respect of trade secrets are enforced through contract law (Indian Contract Act, 1872), principles of equity or by way of a common law action for breach of confidence.

The test for a cause of action for breach of confidence in the common law is that:

1. The information must itself have the necessary quality of confidence about it;
2. The information must have been imparted in circumstances importing an obligation of confidence; and
3. There must be an unauthorised use of that information to the detriment of the party communicating it.

In case to prove violation of trade secret, there is the need for the following criteria:

1. Existence: the trade secret must be proved to exist.
2. Ownership: it must be proved that the plaintiff had ownership rights to the trade secret information.
3. Access: it must be proved that the defendant had access to the trade secret information.
4. Notice: it must be proved that the defendant knew or should have known that the information was a trade secret of the plaintiff.
5. Use: it must be proved that the trade secret information was actually used by the defendant.
6. Damages: it must be proved that a remedy exists within the power of the court to apply. There is no specific legislation in India to protect trade secrets and confidential information.

Nevertheless, Indian Courts have upheld trade secret protection on the basis of principles of equity, and at times, upon a common law action of breach of confidence, which in effect amounts to a breach of contractual obligation. In the present case, it was found that:

a) Electroplating process and apparatus was not a novel one as the information is available in Literature.

b) Contract did not mention clearly about the confidentiality of information about the electroplating process and the apparatus.

c) Company could not prove that Rahul knew it to be a trade secret.

d) Company could not prove that it was a trade secret.

Rahul would thus succeed.

Answer 6(b)

Domain names are the human friendly form of internet addresses. A domain name is the unique name that identifies a website. Domain names are used to establish a unique identity. Organizations can choose a domain name that corresponds to their name, helping Internet users to reach them easily. Each website has a domain name that serves as an address which is used to access the website.

It is common place for traders to have their e-mail address and use the same in respect of their goods or services as trade names. The Registrar of Trademarks will permit domain names to be registered as trademarks if otherwise registrable. In India, domain names may be granted protection as a trademark or service mark under the provisions of Trade Marks Act, 1999 provided that the domain name fulfils all requirements to be properly registered under this Act.

Once registered, the registered proprietor of a domain name will have all those legitimate rights and authorities which are commonly availed by the owners of registered trademarks or service marks in India. This also includes the right to sue for infringement or passing off.

1. For infringement: Any person violating a domain name which is registered as a valid and subsisting trademark under the Indian Trademark Law will be held liable for infringement of Trademark under section 29 of the Trade Marks Act, 1999.
2. For passing off an owner of a trademark who has not registered his mark is also entitled to protection of his mark if he is the prior user, his mark has acquired distinctiveness and there is misrepresentation by anyone else with regard to his goods which is likely to deceive the relevant public.

In the instant case, it can be said that the internet is undoubtedly one of the important features of the information revolution. It is increasingly used by commercial organisations to promote themselves and their product and in some cases to buy and sell. The domain name enables them to have an email address and website address.

In the instant case, both the plaintiff and the defendant have a common field of activity. Both operated on the net and provided information of a similar nature, both offered a chat line. Both the marks and domain names are almost similar. There is every possibility of the internet user getting confused and deceived in believing that both domain names belong to one common source and connection although the two belong to two different enterprises. it can be said that the defendants have adopted the domain name "cadiff" with the intention to trade on the plaintiff's reputation.

The plaintiff is entitled to trademark protection of its domain name.

LABOUR LAWS & PRACTICE

MODULE 3 ELECTIVE PAPER 9.6

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

Question 1

Case Study :

Kiran, the Petitioner (hereinafter referred to as the workman), was appointed in 2011 as a helper in TVS Auto Ltd. (hereinafter referred to as the Company). The case of the workman is that he was on medical leave with effect from 29th September 2018 to 1st October 2018 and he had furnished ESI Doctor's Certificate. According to the workman, he was arrested by the police on 2nd October 2018 for an offence punishable under Section 380 of the Indian Penal Code for committing theft outside the factory premises and he was in police custody up to 13th October 2018 and he was subsequently acquitted of the charge of theft. When he went to the factory on 14th October 2018 to resume his work, he was not allowed to do so. He submitted his written explanation on 16th October 2018 for his absence. The services of the workman were terminated by the Company on 24th October 2018. The order of termination reads as under :

'Since you have deserted your post with effect from 2nd October 2018, your name has been removed from the company's muster roll with immediate effect.'

The workman raised a reference before the Labour Court at Nagpur. However, it was rejected by a judgement and award dated 25th October 2019. He therefore, filed a written petition in the High Court, which was allowed but the matter was remanded back to the Labour Court permitting him to amend the date of termination. A statement of cliam thereafter was filed by the workman.

In the written statement, it was contended by the company that the workman had deserted his employment and therefore, the company has removed his name from the muster roll. It was stated that though the workman presented himself on 14th October 2018, he did not produce sufficient evidence to show that he was arrested by the police. It was also contended that the workman had remained absent without leave on earlier occasions also and he was previously warned for such irregularities. It was contended by the company that, therefore, the workman had committed misconduct as per the Standing Orders and hence it was not necessary to hold any enquiry since the action was taken on undisputed facts. The Labour Court by its judgement and award partly allowed the award. It was held that the services of the workman were legally terminated by the company. However it was held that the workman was entitled to get full back wages.

Aggrieved by the award and judgement, the workman filed writ petition in the High Court of Bombay against the same on the ground of the Labour Court validating the order of termination. The Company also filed a writ petition against the order awarding full back wages to the workman.

On consideration of the above facts, answer the following questions :

(a) (i) Whether the order passed by the Labour Court validating the termination from the work is legal or illegal ? Decide.

(i) Whether the contention of the company that no enquiry was required before issuing the order of termination of workman is justifiable one ?

(ii) Whether termination for habitual absence could be made without enquiry ?

(3+3+2=8 marks)

(b) (i) Whether striking off the name of workman from the muster roll amounted to retrenchment ?

(ii) Whether the order of the Labour Court could be modified to include reinstatement with back wages ?

(4+4=8 marks)

(c) (i) Whether the prosecution of the workman on a criminal case could be a justifiable ground for absenteeism ?

(ii) Whether termination amount to retrenchment ? Briefly explain.

(4+4=8 marks)

(d) (i) State whether the workman is entitled to claim gratuity.

(ii) Whether the contention of the company that the workman would not be entitled to the full back wages is correct ?

(4+4=8 marks)

(e) *(i)* State in brief the objectives of Standing Orders under the Industrial Employment (Standing Orders) Act, 1946.

(ii) State the issues raised by the workman and the company in their writ petitions before High Court of Bombay.

(iii) Re-instatement or compensation of lump sum amount, which one according to you is ideal to meet the ends of justice ?

(2+3+3=8 marks)

Answer 1(a)(i)

The order passed by the Labour Court validating the termination of the workman is illegal. It is merely stated in the termination order that since the workman had deserted his post, his services were terminated. In the present case, it is an admitted position that no inquiry was held by the management before issuing the order of termination of the workman. The order of termination also does not refer to previous absenteeism on the part of the petitioner workman. But the fact that he was absent from 2nd October 2018 to 13th October 2018 was entirely beyond his control as he was arrested in theft charges outside the factory premises and was in police custody until he was released on acquittal. When reported for work on 14th October 2018, he was not allowed. He was issued with a termination order without proper hearing and is in contraventions of Section 11A of the Industrial Disputes Act, 1947.The procedure under Section 10 of the Industrial Disputes Act, 1947 too to be complied with. Hence, the Labour Court erred in its order i.e., error of law apparent on the face of the record by holding the misconduct was established without enquiry. [*Shri Maruti Bhanudas Kamble vs M/S.Bajaj Auto Ltd on 25 June, 2009*]

Answer 1(a)(ii)

In the instant case to a large extent the contention of the company that no enquiry needed before issuing the order of termination is incorrect as per Section 11A of the Industrial Disputes Act, 1947 though the workman's work discipline of the past was very poor thus warranting termination. But the arrest and subsequent acquittal is a criminal case was entirely beyond the control of the workman. Hence, the workman could not report on 2nd October 2018. Hence, the contention of the company is not correct and is within the scope of jurisdiction of Labour Court as per Second Schedule of the Industrial Disputes Act, 1947 when referred to it for adjudication.

Answer 1(a)(iii)

Habitual absence is a misconduct within the meaning of Clause 24(f) of the Standing Orders, however, the said misconduct has to be established and in the present case, no opportunity was given to the workman either by issuing a show cause notice or by holding departmental enquiry. The Labour Court, therefore, clearly committed an error of law which is apparent on the face of record by holding that the misconduct under Clause 24(f) was established and was undisputed and therefore, there was no need to hold the departmental enquiry. [*Shri Maruti Bhanudas Kamble vs M/S.Bajaj Auto Ltd on 25 June, 2009*]

Answer 1(b)(i)

"Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include:

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health.

Thus, the definition contemplates following requirements for retrenchment:

(i) There should be termination of the service of the workman.

(ii) The termination should be by the employer.

(iii) The termination is not the result of punishment inflicted by way of disciplinary action.

(iv) The definition excludes termination of service on the specified grounds or instances mentioned in it.

[Section 2(oo) of the Industrial Disputes Act, 1947]

Section 25F of the Industrial Disputes Act, 1947 provides that no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

Perusal of the said Sections clearly reveals that striking off the name of the workman is not covered in any of the grounds mentioned in Section 2(oo) and therefore, it amounts to retrenchment under Section 25F of the Industrial Disputes Act, 1947.

In the present case, it is an admitted position that the company had not complied with the provisions of Section 25F before issuing order of termination. So far as the misconduct under Clause 24(f) of the Standing Orders is concerned, even before issuing an order of termination for habitual absence under Clause 24(f) of the Standing Orders, the company ought to have given the workman an opportunity of defending himself and for the purpose, the Show Cause Notice ought to have been issued to him and thereafter an inquiry was to be held to prove habitual absence. In the present case, the workman was arrested by the police and was in police custody from 2nd October, 2018 to 13th October, 2018 and as such, it was beyond his control to work during the said period. Immediately on his release, he had reported to work and had informed his superior officers about his detention. [*Shri Maruti Bhanudas Kamble vs M/S. Bajaj Auto Ltd on 25 June, 2009*]

The definition of retrenchment is very clear and it excludes termination on disciplinary grounds among others the words 'for any reason whatsoever' occurring in Section 2(oo) are very wide and almost admitting of no exception. The striking of the name of workman from the muster roll does amount to retrenchment in the instant case, as it was unclear, as to whether on disciplinary grounds or not. Hence, the striking of the name of the workman from the muster roll in this case amounts to illegal retrenchment as per provisions of Section 25F of the Industrial Disputes Act, 1947 which was not complied with by the company. (*SBI Vs Sundarmany (AIR 1976 SC 11)*

Answer 1(b) (ii)

The award (order) of the Labour Court could be modified if any fault or error with the routine and casual exercise of the Section 11A of the Industrial Disputes Act, 1947 inherent power is found. The termination order in violative of Section 11A and even Section 25F of the Industrial Disputes Act, 1947 and hence the order of the Labour Court is amenable for modification as per the law on judicial review.

Answer 1(c) (i)

When the workman was arrested for an offence under Section 380 of Indian Penal Code, 1860 necessarily the prosecution will take place and the workman will be produced before the competent court and proceedings to be held as per the Criminal Procedure Code. But since the court found the offence not established beyond doubt, it passed the order of acquittal. Since, the absenteeism of the workman from 2nd October, 2018 to 13th October, 2018 was not due to his fault and it was beyond his control to remain present during this period on account of his illegal detention by the police, [*Allahabad High Court in the case of Afsar Mian vs. Labour Court, Bareilly and others*], the period of arrest cannot be counted as absenteeism and hence not justifiable ground at all.

Answer 1(c) (ii)

Termination by the employer of the service of a workman for any reason whatsoever, other than termination as punishment by way of disciplinary action is retrenchment. Even following are not retrenchment as per provisions of Section 2 (oo) of the Industrial Disputes Act, 1947.

(i) Voluntary retirement of the workman;

(ii) Retirement on superannuation;

(iii) Termination on account of non-renewal of contract of employment;

(iv) Termination on grounds of continued ill health.

(v) Termination by the employer on account of real & bonafide closure of the establishment.

(*Duryodhana Naik vs. UOI – 1969 Lab IC 1282*)

Answer 1(d)(i)

Section 4 of the Payment of Gratuity Act,1972 prescribed that the gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years. The conditions like continuous service required as per Section 25B of the Industrial Disputes Act, 1947 should be complied with which *inter alia* states that a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman.

In the instant case, the workman was appointed in 2011 and working since then. Though 5 Years of continuity of service is an essential condition to claim gratuity, but in cases of wrongful termination this will not apply. Therefore, as per provisions of Section 4 and Section 10 of the Payment of Gratuity Act,1972, the workman is entitled to gratuity.

Answer 1(d)(ii)

The contention of the company is not correct. When the termination is not valid, then as per Section 11A of the Industrial Disputes Act, 1947, the workman is entitled to reinstatement and back wages. If retrenchment is illegal then again, he is entitled to get similar relief as per Section 25F of the Industrial Disputes Act, 1947.

Answer 1(e)(i)

The fundamental requirement in any establishment are the rules of discipline. The Standing Order represents the service rules, conditions of employment. A uniform code of discipline is sine qua non for quality industrial relations. The Industrial Employment (Standing Orders) Act,1946 was passed to enable the employer of the establishment to frame rules of discipline and conditions of employment and compliance to applicable procedure for its certification. The objects of the Industrial Employment (Standing Orders) Act, 1946 are:

(i) To define the rules of discipline.

(ii) To define the conditions of employment.

(ii) To overt disputes.

(iii) To ensure industrial peace and progress.

(iv) To enforce uniformity in the conditions of services under different employers in different industrial establishments.

Answer 1(e)(ii)

Issues raised by workman in his writ petition before High Court of Bombay:

(i) The order of the termination of workman by the company was upheld by the Labour Court is evidently perverse and illegal.

(ii) Non-application of mind by the Presiding Officer of the Labour Court into the facts and hence is erroneous interpretation.

(iii) The termination of workman by the company is illegal.

(iv) The termination amounted to retrenchment as per Section 2(oo) of the Industrial Disputes Act, 1947 and since there was non-compliance of Section 25F of the Industrial Disputes Act, 1947, is illegal retrenchment.

(v) When workman is not in any fault and the circumstances were beyond his control, it should not be treated as absenteeism.

The company, on the other hand, being aggrieved by the judgment and award passed by the Labour Court awarding full back wages to the workman filed Writ Petition. Issues raised by the company:

(i) The Labour Court's Award (Order) of giving full back wages to the workman is not proper.

(ii) The finding recorded by the Labour Court on payment of back wages was perverse and was liable for the set aside.

(iii) The workman's habitual absence does not warrant enquiry for termination.

Answer 1(e)(iii)

Since the termination is not as per the procedure of Section 11A of the Industrial Disputes Act, 1947 and since retrenchment if at all so then it is illegal retrenchment for not complying with provisions of Section 25F of the Industrial Disputes Act, 1947, the ideal relief is reinstatement with back wages.

In the matter of *Shri Maruti Bhanudas Kamble vs M/S.Bajaj Auto Ltd on 25 June, 2009,* it has come on record that the workman was having a badge and rick driving licence since 1976 and he used to drive rickshaw. Therefore, it cannot be said that the workman was not earning any money during this period. The reply given by him in the cross-examination does indicate that his children are studying in a good school which could not have been possible if the workman was not earning. It, of course, has to be noted that the workman has made specific averment that he was unemployed and reiterated his stand in his evidence. The burden, therefore, was on part of the company to establish that he was gainfully employed. Merely because he was plying an auto rickshaw, could not be that he was gainfully employed. The company has not brought on record any evidence to show that he was working elsewhere after his services were terminated. However, looking at the peculiar facts and circumstances of the case, in my view, ends of justice would be met if the employer is directed to pay lump sum amount to the workman towards full and final settlement of his claim and therefore, instead of directing reinstatement of the workman, the employer should pay a lump sum amount which is quantified at Rupees Eight lakhs.

Question 2

(*a*) The election of a Trade Union office bearers was held at the factory premises. Apart from the workers employed in the factory, 2 trade union members and a non-employee of the factory desired to become the office bearers. One of the conditions for the eligibility to contest for the office bearer is the contribution to general fund and political fund. The other members objected to an outsider becoming the office bearer. Is it proper for a non-worker to contest for the post of office bearer ? Explain.

(b) Bharath, the Managing Director of a company unilaterally announced the target in the Production Section that 9000 units of a particular type of Annunciator are to be manufactured in a month as against the normal production of 5000 units. The workers of the company resisted the move and collectively decided to go on strike instantly. The Managing Director threatened to terminate them from services.

Answer the following questions :

(i) What procedure the Managing Director should follow while setting the increased production targets ?

(ii) Whether the decision to go on instant strike is legal ? State the procedure.

(*6 marks each*)

Answer 2(a)

Office-bearer in the case of a trade union, includes any member of the executive thereof, but does not include an auditor. [Section 2 (b) of the Trade Unions Act, 1926]

Section 22(1) of the Trade Unions Act, 1926 provides that not less than one-half of the total number of the office-bearers of every registered Trade Union in an unorganised sector shall be persons actually engaged or employed in an industry with which the Trade Union is connected. Provided that the appropriate Government may, by special or general order, declare that the provisions of this section shall not apply to any Trade Union or class of Trade Unions specified in the order. Further, Section 22(2) provides that, save as otherwise provided in sub-section (1), all office-bearers of a registered Trade Union, except not more than one-third of the total number of the office-bearers or five, whichever is less, shall be persons actually engaged or employed in the establishment or industry with which the Trade Union is connected.

Therefore, a non-worker can contest for the post of office bearer of a Trade Union as per Section 22 (2) of the Trade Union Act, 1926.

Answer 2(b)(i)

Bharath, the Managing Director of the company cannot unilaterally fix the target. It is not correct. He should hold a joint session with the workers and then convince them. It can be resolved by paying for overtime hours within the limits but still not a possibility, then only option to increase the workforce to meet the target. Otherwise with the existing workforce, if it is not possible, they cannot be subjected to pressure as it impairs industrial relations.

Answer 2(b)(ii)

Section 22 of the Industrial Disputes Act,1947 provides that no person employed in a public utility service shall go on strike in breach of contract –

(a) without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking; or

(b) within fourteen days of giving such notice; or

(c) before the expiry of the date of strike specified in any such notice as aforesaid; or

(d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

Further, Section 24 of the Industrial Disputes Act,1947 states that a strike shall be illegal if it is commenced or declared in contravention of the above-mentioned Section 22 of the Industrial Disputes Act,1947. Therefore, the workers deciding to go on strike instantly without observing the procedure as prescribed under Section 22 of the Industrial Disputes Act,1947 will render the strike illegal.

Question 3

(a) Surya Electrial Industries had its own Standing Orders duly approved by the Certifying Authority. After 5 years of its application, the Surya Electrical Industry was acquired by Shashi Electrical Industries. After the acquisition, Shashi Industries desires to enforce its own Standing Orders to the employees of the newly acquired Surya Electrical Industries.

(i) Is there any time limit for the applicability of Standing Orders ? State the procedure for its validity.

(ii) Whether the Standing Orders of the Surya Electrical Industries are applicable to its employees even after the change of ownership ?

(6 marks)

(*b*) Mukund Industries, manufacturing auto parts was formed in the year 2021. Its workforce strength stood at 324. It had provided fencing at all places where machines were installed for safety reasons. It so happened that one of the employees, in the absence of the supervisor, and that too without the knowledge of the sueprvisor, had removed the fencing. As a consequence, it resulted in an accident, causing injury to a worker. State with relevant legal provisions as to the liability of compensation. Are Mukund Industries liable for the violation of safety rules ?

(6 marks)

Answer 3(a)(i)

Section 3(1) of the Industrial Employment (Standing Orders) Act, 1946 provides that within six months from the date on which this Act becomes applicable to an industrial establishment, the employer shall submit to the Certifying Officer five copies of the draft standing orders proposed by him for adoption in his industrial establishment. Provision shall be made in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment, and where model standing orders have been prescribed, shall be, so far as is practicable, in conformity with such model.

Further, Section 5 of the Industrial Employment (Standing Orders) Act, 1946 lays down the procedure to be followed by Certifying Officer. On receipt of the draft Standing Order from the employer, the Certifying Officer shall forward a copy thereof to the trade union of the workmen or where there is no trade union, then to the workmen in such manner as may be prescribed, together with a notice requiring objections, if any, which the workmen may desire to make in the draft Standing Orders. These objections are required to be submitted to him within 15 days from the receipt of the notice. On receipt of such objections, he shall provide an opportunity of being heard to the workmen or the employer and will make amendments, if any, required to be made therein and this will render the draft Standing Orders certifiable under the Act and he will certify the same. A copy of the certified Standing Orders will be sent by him to both the employer and the employees association within seven days of the certification.

Section 7 of the Industrial Employment (Standing Orders) Act, 1946 stipulates that Standing Orders shall come into operation on the expiry of 30 days from the date on which the authenticated copies are sent to employer and workers representatives or where an appeal has been preferred, they will become effective on the expiry of 7 days from the date on which copies of the order of the appellate authority are sent to employer and workers representatives.

Answer 3(a)(ii)

The Standing Orders of the Surya Electrical Industries are applicable to its employees even after change of ownership and would not automatically cease to exist. Shashi Electrical Industries need to follow the procedure for its standing orders application to the newly acquired Surya Electrical Industries workers as per Section 4 (Conditions for certification of standing orders), Section 5 (Certification of standing orders) and Section 10 (Duration and modification of standing orders) of the Industrial Employment (Standing Orders) Act, 1946.

The Provisions as to the duration and modification of Standing Orders are provided in Section 10 of the Industrial Employment (Standing Orders) Act, 1946. Section 10 prohibits an employer to modify the Standing Orders once they are certified under this Act except on agreement between the

employer and the workmen or a trade union or other representative body of the workmen. Such modification will not be affected until the expiry of 6 months from the date on which the Standing Orders were last modified or certified as the case may be. The modified Standing Order requires certification process for its authentication.

Answer 3(b)

Section 21(1)(iv)(c) of the Factories Act, 1948, provides that every dangerous part of any other machinery, shall be securely fenced by safeguards of substantial construction which shall be constantly maintained and kept in position while the parts of machinery they are fencing are in motion or in use.

In the case of *State of Gujarat vs Jethela Chelabhai Patel 1964-LU-389* the Supreme Court held that:

(i) The mere fact that someone else had removed the safeguard without the knowledge, consent or connivance of the occupier or manager does not provide a defence to him. When the statute says that it will be his duty to keep a guard in position while the machine is working and when it appears that he has not done so, it will be for him to establish that notwithstanding this he was not liable.

(ii) Even where the occupier or manager could establish that somebody else had removed the fence, he has further to prove that he exercised due diligence to see that the fence, which under the Act was his duty to see was kept in position all along, had not been removed.

Employer will not be liable if he fulfils both conditions as stated above.

Section 3 of the Employee's Compensation Act, 1923 prescribes that if personal injury is caused to an employee by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation.

In the given situation, Mukund Industries have to pay compensation to the worker since accident occurred during the course of employment and arising out of employment causing the personal injury as per Section 3 of the Employee's Compensation Act, 1923.

Question 4

(a) Sapta Swara, a Music Band gives musical orchestra and concerts on occasions like marriage, college functions, receptions and other social functions which helped the music band to claim fixed sum from the organisers. The musicians and other artists were paid fixed wages for their performances. The Music Band seeks exemption from Employees' State Insurance Act, 1948. Decide as to the applicability of the Act and whether they are entitled to exemption ?

(b) Varun, an employee in a factory employing more than 60 workers was about to complete 5 years of continuous service for becoming entitled to gratuity. But he joined with the other workers in strike, which resulted in break in service, i.e. 18 days short of continuous period of 5 years. The factory management decided to treat it as illegal strike and terminated Varun among others from the service after complying with the procedure.

(i) Whether payment of Gratuity Act is applicable to the factory ?

(ii) State whether Varun is entitled to get Graduity ?

(6 marks each)

Answer 4(a)

In terms of Sections 1(4) of the Employees' State Insurance Act, 1948, it shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories.

Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.

Section 1(5) of the Employees' State Insurance Act, 1948 empowers the appropriate Government to extend any of the provisions of the Act to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise after giving one month's notice in the Official Gazettee. However, this can be done by the appropriate Government, only in consultation with the Employees' State Insurance Corporation set up under the Act and, where the appropriate Government is a State Government, it can extend the provisions of the Act with the approval of the Central Government. Under these enacting provisions, the Act has been extended by many State Governments to shops, hotels, restaurants, cinemas, including preview theatres, newspaper establishments, road transport undertakings, etc., employing 20 or more persons. It is not sufficient that 20 persons are employed in the shop. They should be employee as per Section 2(9) of the Act, getting the wages prescribed therein (*ESIC v. M.M. Suri & Associates Pvt. Ltd., 1999 LAB IC SC 956*).

The activities of Sapta Swara, a music band are covered by Employees' State Insurance Act, 1948. According to Section 1 of the Act, even entertaining people during occasions like marriage, functions etc. in return for stipulated payments by way of remuneration to all was considered as activities of employment attracting the Provisions of Employees' State Insurance Act, 1948. (*Hindu Jae Band Jaipur vs Regional Director, ESI, Jaipur 1987, SC 1166*).

Section 87 and Section 88 of the Employees' State Insurance Act, 1948 states that the appropriate Government may exempt any factory/establishment from the purview of this Act, as well as any person or class of persons employed in any factory/establishment, provided the employees employed therein are in receipt of benefits superior to the benefits under the Act. Such exemption is initially given for one year and may be extended from time to time. The applicant has to submit application justifying exemption with full details and satisfy the concerned Government.

Further, according to Section 89 of the Employees' State Insurance Act, 1948, no exemption shall be granted or renewed under section 87 or section 88, unless a reasonable opportunity has been given to the Corporation to make any representation it may wish to make in regard to the proposal and such representation has been considered by the appropriate Government.

Thus, as per the provisions of above-mentioned Sections of the Employees' State Insurance Act, 1948, unless exception is guaranteed by the appropriate Government on application, they cannot deem it like exempted merely on the ground of intermittent nature.

Answer 4(b)(i)

As per Section 1(3) of the Payment of Gratuity Act, 1972, this Act shall apply to—

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

Therefore, the Act is applicable to the factory.

Answer 4(b)(ii)

As per Section 2A of the Payment of Gratuity Act, 1972, for the purposes of this Act, an

employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

In the given case, the factory management decided to treat the strike as an illegal strike and terminated Varun from the service. As to the entitlement to gratuity as per Section 4 of the Payment of Gratuity Act, 1972, Varun the employee can appeal to the appropriate authority to treat his participation in strike as absence from duty and not as break in service. If Government passes such an order, then it cannot be treated as break in service though he may lose his pay during the period of strike, then only Varun is eligible to gratuity. (*Lalappa Vs Laxmi Vishnu Textile Mills — 1981 Sec 238 (S .2A of the Act, 1972*)

Question 5

(a) A company is carrying on its work in 3 industrial units and all the 3 industrial units are located in the same place of the establishment. The first unit manufactures Metal Sheets, the second one Milling Paddy and the third one is a Saw Mill. Out of these only the first unit was an industry covered under the schedule of the Provident Fund Act of 1952. The PF Authorities however issued direction to the company to apply the Provident Fund scheme to the other two units as well.

(i) Decide on the applicability of the Provident Fund & Miscellaneuous Provisions Act, 1952.

(ii) Whether the Provident Fund authorities are correct in issuing directions for its application to the company ? Refer to legal provisions.

(b) Sriram Industires is carrying on its operations by employing employees which included even child workers. Refer to the working hours and penalty provisions relating to employment of child workers under the Child and Adolescent Labour (Prohibition and Regulation) Act 1986 ?

(*6 marks each*)

Answer 5(a)(i)

As per Section 1(3) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the Act applies--

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf.

Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification.

Further, as per Section 2(g) of the Employees' Provident Funds and Miscellaneous Provisions

Act, 1952, "factory" means any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power.

According to Section 1(3)(a) of the Employees' Provident Funds and Miscellaneous Provisions Act,1952, the Act is applicable to composite Industries or Factory. (*RPF commissioner, Bombay Vs Sri Krishna Metal Co.) (1962, SC 1536*)

Answer 5(a)(ii)

The Provident Fund Authorities are correct in issuing directions to the company for the application of the Provisions of the Act to all the units of the company as per Section 1(3)(a). The test for determining whether or not the Act is applicable to such type of composite factories is to examine what kind of activities are involved as primary and dominant and what kind of activities are feeder and incidental. If it is primary and dominant one, then all units come under the purview of the Act. Workers working in each of the units shall be 20 each as well. (*RPF commissioner, Bombay Vs Sri Krishna Metal Co.) (1962, SC 1536*)

Answer 5(b)

The statutory provisions which shall be compiled with by Sriram Industries employing child workers are contained in the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986.

According to Section 2(ii), the "child" means a person who has not completed his fourteenth year of age or such age as may be specified in the Right of Children to Free and Compulsory Education Act, 2009, whichever is more. Further, Section 2(i) defines the term adolescent which means a person who has completed his fourteenth year of age but has not completed his eighteenth year.

Section 3 of the Child and Adolescent Labour (Prohibition and Regulation) Act 1986, provides that no child under the age of 14 shall be employed. However, working hour provisions for adolescents are contained in Section 7 which states that no adolescent shall be required or permitted to work in any establishment in excess of such number of hours as may be prescribed for such establishment or class of establishments.

- The period of work on each day shall be so fixed that no period shall exceed three hours and that no adolescent shall work for more than three hours before he has had an interval for rest for at least one hour.
- The period of work of an adolescent shall be so arranged that inclusive of his interval for rest, it shall not be spread over more than six hours, including the time spent in waiting for work on any day.
- No adolescent shall be permitted or required to work between 7 p.m. and 8 a.m.
- No adolescent shall be required or permitted to work overtime.
- No adolescent shall be required or permitted to work in any establishment on any day on which he has already been working in another establishment.

Section 14 of the Child and Adolescent Labour (Prohibition and Regulation) Act 1986 lays down the penalties for contravention of the Act. It is provided that whoever employs any child or permits any child to work in contravention of the provisions of section 3 shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years, or with fine which shall not be less than twenty thousand rupees but which may extend to fifty thousand rupees, or with both. Provided that the parents or guardians of such children shall not be punished unless they permit such child for commercial purposes in contravention of the provisions of section 3.

Whoever employs any adolescent or permits any adolescent to work in contravention of the provisions of section 3A shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years or with fine which shall not be less than twenty thousand rupees but which may extend to fifty thousand rupees, or with both. Provided that the parents or guardians of such adolescent shall not be punished unless they permit such adolescent to work in contravention of the provisions of section 3A. The parents or guardians of any child or adolescent referred to in section 3 or section 3A, shall not be liable for punishment, in case of the first offence.

Whoever, having been convicted of an offence under section 3 or section 3A commits a like offence afterwards, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years. The parents or guardian having been convicted of an offence under section 3 or section 3A, commits a like offence afterwards, he shall be punishable with a fine which may extend to ten thousand rupees.

Whoever fails to comply with or contravenes any other provisions of this Act or the rules made thereunder, shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to ten thousand rupees or with both.

Question 6

(a) Explain the purpose of enacting the code on wages. Based on Gender whether the employer can have different policies for recruitment and remuneration.

(b) Explain the pre-requisites for claiming social security and welfare schemes under the Unorganised Workers Social Security Act, 2008.

(6 *marks each*)

Answer 6(a)

The Code on Wages, 2019 amalgamate, simplify and rationalise the relevant provisions of the following four central labour enactments relating to wages, namely: –

(a) The Payment of Wages Act, 1936;

(b) The Minimum Wages Act, 1948;

(c) The Payment of Bonus Act, 1965; and

(d) The Equal Remuneration Act, 1976.

The amalgamation of the said laws will facilitate the implementation and also remove the multiplicity of definitions and authorities without compromising on the basic concepts of welfare and benefits to workers. The Code on Wages, 2019 would bring the use of technology in its enforcement. All these measures would bring transparency and accountability which would lead to more effective enforcement. Widening the scope of minimum wages to all workers would be a big step for equity. The facilitation for ease of compliance of labour laws will promote in setting up of more enterprises thus catalyzing the creation of employment opportunities.

The employer cannot have different policies. As per Code on Wages, 2019, the employer cannot make any discrimination on the ground of sex while recruiting any employee for the same work or work of similar nature and in the conditions of employment, except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force.

The Code prohibits the employer from causing any gender discrimination in matters relating to the wages for the same work or work of similar nature done by any employee. The code has done

away with the male, female and neutralized it by the expression gender to recognize and consider transgender and their rights as well as per Section 3(1) of Code on Wages 2019.

Answer 6(b)

Section 2(l) of the Unorganized Workers' Social Security Act, 2008 defines the term unorganized sector which means an enterprise owned by individuals or self-employed workers and engaged in the production and sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers where the number of such workers is less than ten.

Further, Section 2(m) defines unorganized worker which means a home-based workman, self-employed worker or a wage worker in the unorganized sector and includes a worker in the organised sector who is not covered by any of the Acts mentioned in Schedule II to this Act.

As per the Unorganized Workers' Social Security Act, 2008, the Central Government is bound to provide social security to workers of unorganized sector on matters relating to life and disability cover, health and maternity benefits, old age protection and any other benefit as may be determined by the Central Government. The schemes included in the Schedule 1 to this Act as mentioned below shall be deemed to be the welfare schemes.

In accordance with Section 10 of the Unorganized Workers' Social Security Act, 2008, every unorganised worker shall be eligible for registration subject to the fulfilment of the following conditions, namely: –

(a) he or she shall have completed fourteen years of age; and

(b) a self-declaration by him or her confirming that he or she is an unorganised worker.

Every eligible unorganised worker shall make an application in the prescribed form to the District Administration for registration and he shall be registered and issued an identity card by the District Administration which shall be a smart card carrying a unique identification number and shall be portable.

If a scheme requires a registered unorganised worker to make a contribution, he or she shall be eligible for social security benefits under the scheme only upon payment of such contribution. Where a scheme requires the Central or State Government to make a contribution, the Central or State Government, as the case may be, shall make the contribution regularly in terms of the scheme.

INSOLVENCY – LAW & PRACTICE

MODULE 3 ELECTIVE PAPER 9.5

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

PART- I

Question 1

(A) Mr. K Sridhar and Mr. K. Murali are the Directors of M/s S & M Engineering Enterprises Limited (SMEEL). Unfortunately, being the victims of COVID 2019 pandemic, by both the brothers and their respective families, they could not concentrate on the day-to-day affairs of the business and in the short run, the top line and the bottom line of the business went southwards and ultimately, they had to face the brunt of huge debts.

An application for initiation of Corporate Insolvency Resolution Process (CIRP) against M/s SMEEL under the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) was moved by an 'Assignee' of an Operational Creditor for Non-payment of dues. The Adjudicating Authority admitted the application because there was no intimation of any dispute within the 10 days.

After following all the compliances prescribed under the IBC, 2016, the Adjudicating Authority passed an order to Liquidate the Corporate Debtor, on an intimation from the Resolution Professional to do so, as decided by the Committee of Creditors (CoC) by requisite voting, before the approval of the resolution plan.

The relevant information related to M/s SMEEL for the purpose of liquidation is produced as follows :

Liabilities	**₹ in Lakhs**	**Assets**	**₹ in Lakhs**
Capital :		**Fixed Assets :**	
Equity	300	Land and Buildings	350
Preference	200	Plant and Machinery	150
Financial Creditors :		**Current Assets :**	
Secured	250	Inventories	100
Unsecured	150	Trade Receivables	300
Operational Creditors :		Other Current Assets	50
Secured	60	Cash and Cash Equivalents	100
Unsecured	70	Fictitious Assets	190

Government Dues	50		
Workmen's Dues	80		
Employees Dues	80		
Total	1,240	Total	1,240

Other Information :

1. Workmen's dues represent the amounts payable for the period of 30 months preceding the liquidation commencement date.
2. Employee's liability includes ₹ 72 Lakhs outstanding to employees for a period of 12 months, preceding the liquidation commencement date.
3. Land and Buildings would realize 110% of its book value, Plant and Machinery would realize 60% of its book value, net of any realization cost. Inventories and Trade Receivables would realize 72% of its book value.
4. The secured financial creditors worth ₹ 45 Lakhs decided to enforce their security interest in the other current assets and they could realize 80% of its value.
5. There has been a pending court case against the Company for use of child labour which could result in a penalty of approximately ₹ 30 lakhs. This has been reflected as a contingent liability only. It has been finally decided to pay ₹ 25 lakhs and settle the case.
6. Based on the amount realized and distributed, the cost of liquidation and insolvency period cost is computed to be ₹ 20 lakhs and ₹ 12 lakhs respectively.

In the light of the above inputs and with reference to the relevant provisions of the IBC, 2016, answer the following questions :

(i) Whether the decision made by the Adjudicating Authority of admitting the application filed by the 'Assignee' of an Operational Creditor is valid in law ?

(6 Marks)

(ii) Explain distribution of proceeds from the sale of the liquidation assets as per the IBC, 2016.

(5 Marks)

(iii) State the order of priority with notes indicating the relevant Section of the Code in which the liquidator shall distribute the proceeds under the IBC, 2016. Briefly show the workings.

(10 Marks)

(iv) What are the circumstances, other than the situation mentioned in the case study, that may also have led the Adjudicating Authority to pass an order of Liquidation?

(4 Marks)

(B) Mr. Krish, an operational creditor, filed an application with the Adjudicating Authority (NCLT, Delhi) to initiate the Corporate Insolvency Resolution Process (CIRP) against M/s Master Mind Limited, and the application was accepted. On 10th July 2023, NCLT Delhi appointed Mr. Aditya to act as an Interim Resolution Professional of M Limited. After the appointment, Mr.

Aditya issued the public announcement on 12th July 2023, of the initiation of CIRP process and called for the submission of claims. On 20th July 2023, the Committee of Creditors was constituted by Mr. Aditya.

Thereafter, Mr. Krish wants to withdraw his application under Section 12A of the Insolvency and Bankruptcy Code, 2016. However, Mr. Aditya denied filing a withdrawal application stating that the Committee of Creditors has already been constituted.

Referring to the provisions of the Insolvency and Bankruptcy Code, 2016, answer the following with reference to the above facts :

(i) Is Mr. Aditya right to deny Mr. Krish to file a withdrawal application with NCLT, Delhi ? Explain in detail.

(ii) Would your answer differ in case the Committee of Creditors is not constituted ?

(iii) Who is the authority to pass the final order of withdrawal application ?

(6+6+3 Marks = 15 Marks)

Answer 1(A)(i)

As per the provisions of the Insolvency and Bankruptcy Code, 2016 the procedure followed in the decision-making process by the Adjudicating Authority admitting the application filed by the assignee of an Operational Creditor is explained in detail below:

'Default' means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be [Section 3(12)].

'Operational Creditor' means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred; [Section 5(20)].

An Operational Creditor who has assigned or legally transferred any operational debt to a Financial Creditor, the assignee or transferee shall be considered as an Operational Creditor to the extent of such assignment or legal transfer. *(Cooperative Rabobank U.A. Singapore Branch Vs. Shailendra Ajmera [CA (AT) (Ins.) No. 261 of 2018] NCLAT judgement dated 29.04.2019)*

Therefore, assignee also falls in the definition of Operational Creditor.

Serving a Demand Notice: On occurrence of default, an operational creditor shall first send a demand notice and a copy of the invoice to the Corporate Debtor.

On receipt of demand notice by the Corporate Debtor:

The Corporate Debtor shall, within a period of 10 days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor about:

a) existence of a dispute about the debt, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.

b) the payment of an unpaid operational debt: it is possible that the corporate debtor might have already paid the unpaid operational debt. In such a situation, corporate debtor will inform within 10 days:

(i) by sending an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or

(ii) by sending an attested copy of a record that the operational creditor has en-cashed a cheque issued by the corporate debtor [Section 8(2)(b)(ii)].

If no reply is received or payment or notice of the dispute under Section 8(2) from the corporate debtor within 10 days from the date of delivery of the notice or invoice demanding payment, the operational creditor can file the application before the Adjudicating Authority (NCLT) for initiating a CIRP as per Section 9 of the Code. Section 21(5) provides that where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

Thus, based on the afore-mentioned provisions, the decision made by the Adjudicating Authority of admitting the application filed by the 'Assignee' of an operational creditor is Valid as an operational creditor also includes a person to whom such debt has been assigned.

Answer 1(A)(ii)

Section 53 of the Insolvency and Bankruptcy Code, 2016 states the provisions relating to the distribution of assets from the sale of the liquidation assets.

Distribution of Proceeds from the sale of the Liquidation Assets:

Notwithstanding anything to the contrary in any law enacted by the Parliament or State Legislation for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period as may be specified, namely:

a) the Insolvency Resolution process costs and the liquidation costs paid in full;

b) the following debts which shall rank equally between and among the following:

(i) Workmen's dues for the period of 24 months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52;

c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

d) financial debts owed to unsecured creditors;

e) the following dues shall rank equally between and among the following:

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

f) any remaining debts and dues;

g) preference shareholders, if any; and

Disregard the order of priority:

Any contractual arrangements between recipients with equal ranking, if disrupting the order of priority shall be disregarded by the liquidator.

Fees to Liquidator: The fees payable to the liquidator shall be deducted proportionately from the

proceeds payable to each class of recipients and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation: It is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full or will be paid in equal proportion within the same class of recipients if the proceeds are insufficient to meet the debts in full; and

The term' workmen's dues shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013.

Answer 1(A)(iii)

(in Lakhs)

Particulars	₹	₹
Value Realized by the Liquidator: 350 L x 110%+ 150 L x 60% + 100 L x 72%+ 300 L x 72%		763
Add: Cash		100
Total Amount of Funds Available		863
Less: Section 53(1)(a) Insolvency Resolution process costs and the Liquidation Costs		
(i). Cost of Liquidation	20	
(ii). Insolvency Professional related costs	12	
Balance Available	32	831
Less: Section 53(1)(b)		
(i). Workmen's dues for the period of 24 months preceding the liquidation commencement date (80 lakhs X 24/30)	64	
Debts Owed to Secured Creditors		
(a). Secured Financial Creditors (250 L-45 L)	205	
(b). Secured Operational Creditors	60	
Balance Available	**329**	502
Less: Section 53(1)(c)		
Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date	72	
Balance Available	**72**	430

Less: Section 53(1)(d).		
Financial Debts owed to Unsecured Creditors	150	
Balance Available	**150**	280
Less: Section 53(1)(e) – Debts to rank equally		
Amount due to the Central Government and the State Government	**50**	
Penalty for the use of Child Labour – Court Case.	25	
Amount remaining unpaid to secured financial creditors who enforced their security interest [50 lakhs X 80% 40 Lakhs, unpaid amount=45 Lakhs (-) 40 lakhs = 25 Lakhs	5	
Balance Available	**80**	200
Less: Section 53(1)(f).		
(i)Workmen's dues pending beyond 24 months of Liquidation commencement date	16	
(ii)Employees' liability pending beyond 12 months of liquidation commencement date	8	
(iii)Unsecured Operational Creditors	70	
Balance Available	**94**	106
Less: Section 53(1)(g).		
Amount to be given to Preference Shareholders	106	
Balance Available	**106**	NIL
Less: Section 53(1)(g).		
Amount to be given to Equity Shareholders	NIL	
Balance Available		NIL

Answer 1(A)(iv)

Pursuant to the provisions of Section 33 of IBC, 2016, an order for liquidation can be passed by the Adjudicating Authority in the following circumstances:

a. Before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the CIRP under Section 12 of the IBC, 2016, or the fast track CIRP under Section 56 of the Code, as the case may be, the Adjudicating Authority does not receive a resolution plan under Section 30(6) of the Code;

b. The Adjudicating Authority rejects the resolution plan under Section 31 of the Code for non-compliance of the requirements specified therein;

c. Where the resolution plan approved by the Adjudicating Authority under section 31 is

contravened by the concerned corporate debtor, and any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order.

Answer 1(B)(i)

Section 12A of the Insolvency and Bankruptcy Code provides that the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.

Before admission of the application, however, the Adjudicating Authority may permit withdrawal of the application on the request of the applicant under rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Form FA given under Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is required to be filed for withdrawal of the CIRP.

Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that an application for withdrawal under section 12A may be made to the Adjudicating Authority –

(a) before the constitution of the committee, by the applicant through the interim resolution professional or

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be.

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

Hence, Mr. Aditya cannot deny Mr. Krish for filing of withdrawal application only on the basis that committee of creditors has been constituted.

Answer 1(B)(ii)

Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that application for withdrawal of to the Adjudicating Authority before constitution of CoC shall be made through the interim resolution professional. The interim resolution professional shall submit such withdrawal application to the Adjudicating Authority on behalf of the applicant, within three days of receipt of request.

Further, the final approval of such withdrawal shall be by way of an order passed by the Adjudicating Authority.

Thus, if Committee of Creditors is not constituted Mr. Krish shall apply to the Adjudicating Authority (NCLT. Delhi) through the Interim Resolution Professional, for withdrawal.

Hence, the answer will not differ and Mr. Aditya cannot deny Mr. Krish to file a withdrawal application with NCLT, Delhi.

Answer 1(B)(iii)

The final approval of withdrawal of CIRP Application under section 12A of the Insolvency and Bankruptcy Code, 2016 read with regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is approved by way of an order passed by the Adjudicating Authority and in the present case, by NCLT, Delhi.

Question 2

Write short notes on the following :

(a) Jurisdiction of Civil Court under Insolvency Cases.

(b) Will SARFAESI Act, 2002 prevail over Insolvency and Bankruptcy Code ? Explain with Decided Cases.

(*6 Marks each*)

Answer 2(a)

Section 63 of the Insolvency and Bankruptcy Code, 2016excludes the jurisdiction of the Civil Courts. It provides that no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal (NCLT) or the National Company Law Appellate Tribunal (NCLAT) has jurisdiction under this Code.

Section 180 of the Insolvency and Bankruptcy Code, 2016 provides that Civil Court not to have jurisdiction i.e.

(1) No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal has jurisdiction under this Code.

(2) No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal by or under this Code.

Section 231 of the Insolvency and Bankruptcy Code, 2016 provides bar of jurisdiction stating that no civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority or the Board is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority or the Board under this Code.

In most jurisdictions, Civil Courts typically do not have jurisdiction over Insolvency Cases. Insolvency Cases, which involve matters such as Bankruptcy and Liquidation, are generally handled by specialized Insolvency or Bankruptcy Courts, or by relevant administrative bodies specifically established to deal with such matters.

The rationale behind having specialized courts or administrative bodies for insolvency cases is to ensure that these cases are handled efficiently and in accordance with the Specific Laws and procedures governing insolvency proceedings. These specialized courts or bodies often have judges or officials with expertise in Insolvency Law and Procedures, which can help ensure that decisions are made effectively and fairly.

However, there may be instances where civil courts have some involvement in insolvency cases, such as when disputes arise that are related to the insolvency proceedings but fall within the jurisdiction of the civil court. For Example, Civil Courts may have jurisdiction over contractual disputes between parties involved in an insolvency case or disputes over property rights that are affected by the insolvency proceedings.

Overall, while Civil Courts may have some limited involvement in insolvency cases, the primary jurisdiction typically lies with specialized insolvency courts or administrative bodies.

Answer 2(b)

Insolvency and Bankruptcy Code, 2016 will prevail over SARFAESI Act, 2002.

Both of the Insolvency and Bankruptcy Code, 2016 and SARFAESI Act, 2002 serve different purposes and operate independently. However, there can be situations where conflicts arise between the two laws, especially when it comes to the rights and remedies available to creditors.

In general, if there is a conflict between the provisions of the SARFAESI Act and the IBC, the provisions of the IBC shall prevail in light of the provisions of section 238 of IBC, 2016 which provides as follows:

"The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

It is to be noted that a similar non-obstante clause is present in Section 35 of SARFAESI Act, 2002 as well however, given that IBC is a later and more comprehensive legislation that deals specifically with insolvency and bankruptcy matters, including the resolution of default situations, it will prevail in case of any conflict in the provisions of both the Laws.

In the case of *Canara Bank V/s Shri Chandramoulishvar Spg. Mills (P) Ltd*., the NCLAT while referring to Supreme Court's verdict in *Innovative case* has ruled that when two proceedings are initiated, one under the Insolvency and Bankruptcy Code, 2016 (the Code) and the other under the SARFAESI Act, 2002, then the proceeding under the Code shall prevail.

The appeal in the case was preferred by the Financial Creditor i.e., Canara Bank against the NCLT's (National Company Law Tribunal) Order, whereby the application preferred by Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 (application for initiation of corporate insolvency resolution process by operational creditor) against the Corporate Debtor i.e., *M/s Sri Chandra Moulishvar Spinning Mills Private Limited* was admitted by the Tribunal. The Appellant's main grievance in the case was that he had already initiated proceedings under the SARFAESI Act, 2002 for recovery against the Corporate Debtor.

The NCLAT in view of the issue involved in the case, made reference to Supreme Court's verdict in the case of *Innoventive Industries Ltd. V/s ICICI Bank*, whereby the Apex Court was of the view that if the application under Section 9 is complete and there is no 'existence of dispute' and there is a 'debt' and 'default' then the Adjudicating Authority is bound to admit the application. Thus, NCLAT upheld NCLT's decision and also noted that such action cannot continue as the Code will prevail over SERFASESI Act, 2002.

Question 3

(*a*) Are Winding-up and Dissolution Synonymous ? Explain the difference between a Company Winding-up as per IBC, 2016 and Companies Act, 2013.

(*6 Marks*)

(*b*) "The intent of fresh start process is to provide debtors with comparatively small debts, a chance to discharge off their debts and restart afresh without any liability. The fresh start process is an alternative to the insolvency and bankruptcy processes. To prevent and curb the abuse of this debtor centric process, the Code has aligned certain restrictions on the applicability and validity of fresh start process."

To support the eligibility of fresh start the applicant has to give affirmation, explain the contents of the affirmation.

(*6 marks*)

Answer 3(a)

The terms "Winding up" and "Dissolution" are sometimes erroneously used to mean the same

thing. But, the legal implications of these two terms are quite different and there are fundamental differences between them as regards the legal procedure involved.

The entire procedure for bringing about a lawful end to the life of a company is divided into two stages i.e., 'winding up' and 'dissolution'. Winding up is the first stage in the process whereby assets are realized, liabilities are paid off and the surplus, if any, distributed among its members. Dissolution is the final stage whereby the existence of the company is withdrawn by the law. Dissolution brings about an end to the legal entity of the company.

Winding up is governed under the Companies Act,2013 on six grounds out of which ground of inability to pay debt [stated below under(a)} has been transferred to the Insolvency and Bankruptcy Code,2016. Therefore, remaining grounds on which winding up can be initiated under the Companies Act, 2013 by the Tribunal are:

(a) if the company is unable to pay its debts ***(now dealt under Insolvency and Bankruptcy Code, 2016).***

(b) if the company has, by special resolution, resolved that the company be wound up by the tribunal;

(c) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality:

(d) if on an application made by the registrar or any other person authorized by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(e) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or

(f) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

Petition under the Companies Act,2013 for winding up can be made by the company, contributory/ies, Registrar of Companies (ROC), Central Government or State Government or any one authorised by Central Government or State Government while application for initiating insolvency can be made by a creditor or the company under the Code.

The petition is for winding up of the company under the Companies Act,2013, while the first step in IBC is to resolve the insolvency of the company which if fails result in liquidation and dissolution of the company.

Winding up is conducted by Official Liquidator appointed by the Tribunal under the Companies Act while Liquidation under the Code is conducted by the insolvency professional acting as Liquidator.

Answer 3(b)

The contents of the affirmation as per Section 81(4) of the Insolvency and Bankruptcy Code, 2016 provides that an application filed for fresh start process shall be in such form and manner and accompanied by such fee as may be prescribed by the Regulations after their enforcement and shall contain the following information supported by an affidavit namely:

(a) list of all debts owed by the debtor as on the date of the said application along with detail relating to the amount of each debt, interest payable thereon and the names of the creditors to whom each debt is owed;

(b) the interest payable on the debts and the rate thereof stipulated in the contract;

(c) list of security held in respect of any of the debts;

(d) the financial information of the debtor and his immediate family for up to two years prior to the date of the application;

(e) the particulars of the debtor's personal details, as may be prescribed;

(f) the reasons for making the application;

(g) the particulars of any legal proceedings which, to the debtor's knowledge has been commenced against him; and

(h) The confirmation that no previous fresh start order under the provisions of the Code has been made in respect of the qualifying debts of the debtor in the preceding twelve months of the date of the application.

Question 4

(A) Answer the questions given at the end of the following three scenarios :

(a) ABC Limited (Corporate Debtor) filed an application for initiating 'Pre-Packaged Insolvency Resolution Process" (PPIRP) on 1st March, 2024. While the application is pending, the Financial Creditor of the same Corporate Debtor has also filed an application for initiating Corporate Insolvency Resolution Process (CIRP).

(b) An Operational Creditor of ABC Limited (Corporate Debtor) has filed an application on 1st March, 2024 for initiating CIRP against the Corporate Debtor and while the application is pending, the same Corporate Debtor has also filed an application for initiating PPIRP on 10th March, 2024.

(c) A Financial Creditor of ABC Limited (Corporate Debtor) has filed an application on 1st March, 2024 for initiating CIRP against the Corporate Debtor and while this application is pending, the same Corporate Debtor has also filed an application for initiating PPIRP on 20th March, 2024.

Critically examine under IBC, 2016 as to whose application shall be disposed-off first by the Adjudicating Authority under the different scenarios as per the inputs given in para (a), (b) and (c) above.

(6 marks)

(B) "The Insolvency and Bankruptcy Board of India (IBBI) and Insolvency Professional Agencies have come across; some mistakes being committed by some of the Insolvency Professionals (IPs) in conduct of Corporate Insolvency Resolution Process (CIRP). The mistakes costs to the Corporate Debtor (CD) and to the economy, and often amounts to contravention of provisions of the law. Insolvency Professional must refrain from accepting too many assignments." Explain the Code of Conduct of Insolvency Professional in this regard by quoting with relevant cases.

(6 marks)

Answer 4(A)

Section 11A of the Insolvency and Bankruptcy Code, 2016 provides for disposal of applications under section 54C and under section 7 or section 9 or section 10 of the Code.

Adjudicating Authority shall dispose of the respective application under the different scenarios in the following manner:

(a) Where an application filed under Section 54C (to initiate PPIRP) is pending, the Adjudicating Authority shall pass an order to admit or reject such application, before considering an application filed under Section 7 or Section 9 or Section 10 during the pendency of such application under Section 54 C, in respect of the same Corporate Debtor. Accordingly, the Adjudicating Authority shall dispose of the application of the corporate debtor made on 1st March, 2024 for initiating PPIRP.

(b) Where an application under Section 54 C is filed within 14 days of filing of any application under Section 7 or Section 9 or Section 10, which is pending, in respect of the same corporate debtor, then, notwithstanding anything contained in Section 7, 9 and 10, the Adjudicating Authority shall first dispose-off the application under Section 54 C.

Hence, under this scenario, an application made by the Corporate Debtor on 10th March, 2024 for initiating PPIRP shall first be disposed-off by the Adjudicating Authority, albeit the Operational Creditor has filed his application prior to that application which is pending but period of 14 days has not expired.

(c) Where an application under Section 54C is filed after 14 days of filing of any application under Section 7 or Section 9 or Section 10, which is pending, in respect of the same corporate debtor, the Adjudicating Authority shall first dispose-off the application under Section 7, 9 or 10. As the application for initiating PPIRP under Section 54 C has been made on 20th March, 2024 i.e., after 14 days of the application filed by the Financial Creditor, the Adjudicating Authority shall first dispose-off the application of Financial Creditor for initiating CIRP.

Answer 4(B)

As per the provisions of regulation 7(2)(h) of the IBBI (Insolvency Professionals) Regulation, 2016 read with the First Schedule of the said Regulations, the Code of Conduct of Insolvency Professionals in conduct of Corporate Insolvency Resolution process (CIRP) are given below:

- An insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments.

A clarification has been inserted (w.e.f. 21.07.2021) provides that an insolvency professional may, at any point of time, not have more than ten assignments as resolution professional in corporate insolvency resolution process, of which not more than three shall have admitted claims exceeding one thousand crore rupees each.

- An insolvency professional must not engage in any employment when he holds a valid authorization for assignment or when he is undertaking an assignment.
- Where an insolvency professional has conducted a corporate insolvency resolution process, he and his relatives shall not accept any employment, other than an employment secured through open competitive recruitment, with, or render professional services, other than services under the Code, to a creditor having more than ten percent voting power, the successful resolution applicant, the corporate debtor or any of their related parties, until a period of one year has elapsed from the date of his cessation from such process.
- An insolvency professional shall not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment.
- An insolvency professional shall not provide any service for or in connection with the assignment which is being undertaken by any of his relatives or related parties
- Explanation: For the purpose of clauses 23A to 23C, "related party" shall have the same

meaning as assigned to it in clause (24a) of section 5, but does not include an insolvency professional entity of which the insolvency professional is a partner or director.

- An insolvency professional must not conduct business which in the opinion of the Board is inconsistent with the reputation of the profession

Further, in the matter of *'IDBI Bank Ltd. v. Lanco Infratech Ltd'*, the NCLT Hyderabad Bench also held that an insolvency Professional must refrain from accepting too many assignments, if he is unable to devote adequate time to each of his assignments as per Clause 22, Schedule I of the Code of Conduct for Insolvency Professionals.

Question 5

(*a*) Mr. V. Ramaswamy is former Director of Corporate Debtor namely M/s Narmada Project Limited an application field with Resolution Professional (RP) to provide 'Resolution Plan'. But RP denied to provide 'Resolution Plan' to Erstwhile Director of Mr. V. Ramaswamy and RP has contended that only the Members of CoC who is having Voting Rights are entitled to have Resolution Plans, as per CIRP Regulations. Whether the Resolution Professional Contention is Correct ? Explain with decided case in this regard.

(*6 marks*)

(*b*) M/s ABC Assets Reconstruction Company incorporated in January, 2024 and Net Worth is ₹ 1,00,00,000/- and applied for Registration with Reserve Bank of India as an NBFC (Asset Reconstruction Company). During the Pendency of Registration Application, he wants to commence the Business of Securitization or Asset Reconstruction. Is it possible ? Under what grounds the Reserve Bank of India can reject the Application of M/s ABC Assets Reconstruction Company ?

(*6 marks*)

Answer 5(a)

In the matter of *Vijay Kumar Jain v. Standard Chartered Bank and others*, an appeal was filed with Supreme Court against orders rejecting the prayer of an erstwhile director for getting copy of the resolution plans from the RP. Both the NCLT and NCLAT ruled that appellant had no right to receive the resolution plans.

The Resolution Professioal(RP) has contended that only the members of CoC are entitled to have resolution plans, as per Section 30(3) IBC read with Regulation 39(2) CIRP Regulations. Relying on the Notes on Clauses to Section 24 of the Code, they argued that the members of suspended Board of directors are permitted to participate in CoC meetings only for the purpose of giving information regarding the financial status of the debtor.

The Supreme Court expressly rejected the argument based on Notes on Clauses to Section 24 of the Code and noted that every participant is entitled to a notice of every meeting of the committee of creditors. Such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters to be discussed and the issues to be voted upon at the meeting vide regulation 21(3)(iii). Court said the expression "documents" is a wide expression which would certainly include resolution plans.

The judgment also clarified that the RP can take an undertaking from the erstwhile director to maintain confidentiality of the information. Therefore, in view of this judgement of Supreme Court, it can be concluded that the contention of the RP with respect to sharing of the resolution plan only with the members of CoC having voting rights is incorrect.

Answer 5(b)

Section 3 of SARFAESI Act provides that no Assets Reconstruction Company shall commence or carry of the business of securitization or asset reconstruction without:

(a) Obtaining a Certificate of Registration; and

(b) Having Net Owned Fund of not less than two crore rupees or such other higher amount as the Reserve Bank may, by notification, specify:

Provided that the Reserve Bank of India (RBI) may, by notification, specify different amounts of owned fund for different class or classes of asset reconstruction of companies which is ₹100 crore.

So, in the given case being proposed ARC net worth is 21,00,00,000/- is less than Required Net worth of 100, 00,00,000/- and also not under any specific category or exemption provided is not eligible for Registration as ARC under SARFAESI Act.

Further without granting a Valid Registration certificate from RBI as an Asset Reconstruction Company is not entitled to commence or carry the Business.

Ground of Rejection of application of Asset Reconstruction Company:

The Reserve Bank may, for the purpose of considering the application for registration of an Asset Reconstruction Company to commence or carry on the business of Securitization or Asset Reconstruction, as the case may be, require to be satisfied, by an inspection of records or books of such asset reconstruction company, or otherwise, that the following conditions are fulfilled, namely: -

- that the Asset Reconstruction Company has not incurred losses in any of the three preceding financial years;
- that such Asset Reconstruction Company has made adequate arrangements for realization of the financial assets acquired for the purpose of securitization or asset reconstruction and shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified buyers or other persons:
- that the directors of Asset Reconstruction Company have adequate professional experience in matters related to finance, securitization and reconstruction.
- that any of its directors has not been convicted of any offence involving moral turpitude;
- that a sponsor of an Asset Reconstruction Company is a fit and proper person in accordance with the criteria as may be specified in the guidelines issued by the Reserve Bank for such persons;
- that Asset Reconstruction Company has complied with or is in a position to comply with prudential norms specified by the Reserve Bank.
- That Asset Reconstruction Company has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose.

RBI can reject the application of M/s. ABC for registration as an ARC if any of the above grounds is not satisfied.

Question 6

(a) "Companies through their Multi-layered Structures, move Cash and other Assets to other Jurisdictions, which creates hurdle in Regulating". In this connection, explain the Model Law Conflicts, Interpretation, definition on "Foreign Proceeding" and its types.

(6 marks)

(*b*) What challenges you foresee in implementation of the provisions of the Insolvency and Bankruptcy Code relating to Insolvency Resolution and Bankruptcy of Individual and Partnership Firms ?

(6 marks)

Answer 6(a)

The movement of cash and other assets by companies through multiple layered structures to different jurisdictions often creates regulatory hurdles. This complex web of corporate and financial arrangements can pose significant challenges for regulators and lawmakers, especially when dealing with insolvency and restructuring across borders. The explanation of model law conflicts, interpretation, and the definition and types of foreign proceedings in this context are as follows:

Model Law Conflicts:

Principle of supremacy of international obligations (Article 3) provides that to the extent the Model Law conflicts with an obligation of the state enacting the Model law arising out of any treaty or other form of agreement to which it is a party with one or more other states, the requirements of the treaty or agreement prevail.

Interpretation of Model Law:

In the interpretation of Model law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. [Article 8]

Meaning of "Foreign Proceeding":

"Foreign Proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

Types of "Foreign Proceedings":

Foreign proceedings can be classified in the following main types:

(a) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the center of its main interests;

(b) "Foreign non-main proceeding" means foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this Article;

To fall within the scope of the Model law, a foreign insolvency proceeding needs to possess certain attributes. These include the basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. Within those parameters, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding up or reorganization. It also includes those proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g., suspension of payments, "debtor in possession"). An inclusive approach is also used as regards the possible types of debtors covered by the Model law.

Answer 6(b)

Implementing provisions of the Insolvency and Bankruptcy Code (IBC) relating to insolvency

resolution and bankruptcy of individual and partnership firms can pose several challenges. Here are some of the key challenges:

1. Lack of infrastructure and expertise: The infrastructure required to handle insolvency and bankruptcy proceedings for individuals and partnership firms may not be as developed compared to that for corporate entities. Additionally, there may be a shortage of professionals with the necessary expertise in handling such cases.
2. Complexity of individual and partnership structures: Unlike corporate entities, individuals and partnership firms often have complex ownership structures, personal assets, and liabilities. This complexity can make it challenging to assess the financial situation accurately and devise suitable resolution plans.
3. Sensitivity and stigma: Personal bankruptcy carries significant social and emotional implications. Individuals and partners may be reluctant to admit insolvency due to fear of stigma or damage to their reputation. Overcoming this stigma and encouraging individuals to come forward and seek resolution can be a challenge.
4. Variability in assets and liabilities: Individual and partnership assets and liabilities can vary widely, making it difficult to standardize insolvency procedures. Each case may require a unique approach tailored to the specific circumstances, which can increase the complexity and time required for resolution.
5. Legal complexities: Dealing with personal insolvency involves navigating various legal frameworks, including personal property laws, family law considerations, and taxation issues. Harmonizing these legal aspects with insolvency proceedings under the IBC can be challenging and may require amendments or clarifications to existing laws.
6. Financial distress of small businesses: Partnership firms, often comprising small businesses, may lack the resources to withstand financial distress. Implementing effective resolution mechanisms for such entities requires addressing the unique challenges faced by small businesses, including access to credit, market volatility, and regulatory compliance burdens.
7. Awareness and education: Many individuals and partnership firms may not be aware of their rights and obligations under the IBC or may lack understanding of the insolvency resolution process. Promoting awareness and providing education about insolvency laws and procedures is essential for ensuring effective implementation.
8. Judicial capacity and backlog: Courts play a crucial role in the insolvency resolution process by adjudicating disputes and approving resolution plans. However, existing judicial capacity constraints and backlog of cases in Indian courts may hinder timely resolution of insolvency cases for individuals and partnership firms.

Addressing these challenges requires a concerted effort from policymakers, regulators, legal professionals, and other stakeholders to streamline processes, enhance infrastructure, and promote awareness about insolvency laws and procedures for individuals and partnership firms.