GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

JUNE 2022

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.

In answers to the questions based on case study, the students may write any other alternative answer with valid reasoning.

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

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MODULE 3

PROFESSIONAL PROGRAMME EXAMINATION

JUNE 2022

CORPORATE FUNDING & LISTING IN STOCK EXCHANGES

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *Answer ALL Questions.*

PART A

Question 1

X Ltd. wants to issue 1000 shares through a book built offer within a Price Band of ₹130 to ₹150. Bids are received as follows :

	Bid Price	*No. of Shares*	*Total Demand*
1	₹150	200	200
2	₹140	300	500
3	₹138	500	1000
4	₹130	1000	2000

(a) What is the cut off price in this offer ? Can the company decide the cut off at a lower price at which the issue is subscribed ? Can the company allot the shares to the retail investors at a price that is at a discount to the cut off price ?

(b) What would be the allocation pattern, presuming the company fulfils the eligibility criteria regarding net tangible assets, average operating profit, net worth etc. ?

(c) What would be allocation pattern, if the company does not meet the criteria as mentioned above in question no. 1 (b) ?

(5 marks each)

Answer 1(a)

The offer is filled up at the cut-off price of ₹138. All investors who bid at ₹138 and higher are eligible for allotment in their respective categories.

The company may decide the cut-off price at a price lower than the price at which the issue is subscribed for the benefit of the investors.

Book built issue may also have a clause which allows allotment to retail investors at a price, which is at a discount to the cut off price, which cannot, however exceed 10% of the price at which shares are allotted to the other category of investors.

Answer 1(b)

Regulation 32(1) & 129 (1) of SEBI (ICDR) Regulations, 2018 provides that in a book built offer, where the issuer fulfils the eligibility criteria regarding net tangible assets, average operating profit, net worth etc., the allocation pattern in the net offer shall be as follows:

a) Not less than 35% to the retail individual investors.

b) Not less than 15% to non-institutional investors

c) Not more than 50% to the QIBs of which 5 per cent shall be reserved for mutual funds.

However, the unsubscribed portion in either of the categories specified in (a) & (b) may be allocated to applicants in any other category.

Further, in addition to 5% allocation available in terms of clause (c), mutual funds shall be eligible for allocation under the balance available for qualified institutional buyers.

Answer 1(c)

Regulation 32(2) & 129 (2) of SEBI (ICDR) Regulations, 2018 provides that in book-built offer, where a company does not meet the eligibility criteria regarding net tangible assets, average operating profit, net worth etc., the allocation pattern shall be as follows:

a) Not more than 10% to the retail individual investors

b) Not more than 15% to non-institutional investors

c) Not less than 75% to the QIBs of which 5% shall be reserved for mutual funds.

However, the unsubscribed portion in either of the categories specified in (a) & (b) may be allocated to applicants in the other category.

Further, in addition to 5% allocation available in terms of clause (c), mutual funds shall be eligible for allocation under the balance available for qualified institutional buyers.

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

Question 2

(a) "No person shall act as a Real Estate Investment Trust (REIT), unless it is registered with SEBI under the REIT Regulations". Structure a REIT with due consideration to Eligibility and basic conditions to be fulfilled under SEBI (REIT) Regulations, 2014.

(b) MSC Ltd would like to issue Commercial Paper (CP). Calculate the effective interest yield of the commercial paper (CP) from the following data :

Particulars	*Amount in ₹*
Face Value	*10,00,000*
Sale Price	*9,91,000*
Maturity Period	*120 days*
Brokerage and other charges	*2.50%*

Consider One Year = 360 days

(c) Neel Bio Tech Limited whose specified securities are traded on the "Innovators Growth Platform" (IGP) pursuant to an initial public offer (IPO) would like to exit from IGP. Explain in brief the conditions under which the company can exit from the "Innovators Growth Platform" as per SEBI (ICDR) (Second Amendment) Regulations 2021.

(5 marks each)

OR (Alternate question to Q. No. 2)

Question 2A

Distinguish between the following :

(i) Seed Funding and Start-up Financing

(ii) Red Clause Letter of Credit and Green Clause Letter of Credit

(iii) Financial Bank Guarantee and Performance Bank Guarantee.

(5 marks each)

Answer 2(a)

Eligibility : In a REIT structure, the following parties are involved:

i. REIT Applicant (viz. Trust which holds the underlying properties),

ii. Sponsor (like a promoter in case of a listed company),

iii. Trustee of the REIT; and

iv. Manager (viz. a company or an LLP which manages assets and investments of the REIT and undertakes operational activities of the REIT)

Conditions to be fulfilled under SEBI (REIT) Regulations, 2014

i. REIT Applicant

The applicant must be a sponsor on behalf of trust and Trust Deed shall be duly registered in India under the provisions of the Registration Act, 1908 containing its main objective as undertaking activity of REIT in accordance with the REIT Regulations and includes responsibilities of the Trustee in accordance with of the provisions of REIT Regulations. Persons have been designated as sponsor(s), manager and trustee and all such persons are separate entities.

ii. Sponsor

a) Each sponsor shall hold or propose to hold not less than 5% of the number of units of the REIT on post-initial offer basis.

b) For each sponsor group not less than one person shall be identified as a sponsor.

c) Out of the entities categorized as sponsor group, only the following entities may be considered:

- a person or entity who is directly or indirectly holding an interest or shareholding in any of the assets or SPVs or holdcos proposed to be transferred to the REIT.
- a person or entity who is directly or indirectly holding units of the REIT on post-issue basis.
- a person or entity whose experience is being utilized by the sponsor for meeting with the eligibility conditions required under REIT regulations.

d) Sponsor(s), on a collective basis, have a net worth of not less than ₹ 100 crores, with each Sponsor having net worth of at least ₹ 20 crores.

e) Sponsor or its associate(s) has not less than 5 years' experience in development of real estate or fund management in the real estate industry and where the sponsor is a developer, at least 2 projects of the sponsor have been completed.

iii. Trustee

It should be registered with SEBI under SEBI (Debenture Trustees) Regulations, 1993 and is not an associate of the sponsor(s) or manager. It has such wherewithal with respect to infrastructure, personnel, etc. to the satisfaction of the Board and in accordance with circulars or guidelines as may be specified by the SEBI.

iv. Manager

a) In case, Manager is a body corporate or a company, the net worth of the manager shall not be less than ₹10 crores or in case, the manager is a LLP, the value of net tangible assets shall not be less than ₹10 crores.

b) Manager or its associate has not less than 5 years' experience in fund management or advisory services or property management in the real estate industry or in development of real estate and have at least 2 key personnel who each have 5 years' experience in Real Estate Activities;

c) It has not less than half of its directors in the case of a company or of members of the governing Board in case of an LLP, as independent and not directors or members of the governing Board of another REIT.

d) The manager must have entered into an investment management agreement with the trustee which provides for the responsibilities of the manager in accordance with REIT Regulations.

Answer 2(b)

Calculation of effective interest yield of Commercial Paper (CP) of MSC Ltd.

Particulars	*Amount in ₹*
Face Value	10,00,000
Sale Price	9,91,000
Maturity Period	120 days
Brokerage and other Charges	2.50%
Brokerage Value (2.50% of ₹10,00,000)	25,000
Net Sale Price (₹9,91,000 - ₹25,000)	9,66,000

Yield = [(Face Value - Sale Price)/Sale Price] * (360/Maturity Period) * 100

= [(₹10,00,000 - ₹9,66,000) / ₹9,66,000)] *(360/120) *100

= 10.559%

Answer 2(c)

As per SEBI (Issue of Capital and Disclosure Requirements (Second Amendment) Regulations, 2021 -

— An issuer company whose specified securities are traded on the Innovators Growth Platform pursuant to an initial public offer may exit from the Innovators Growth Platform.

- if such an exit is approved by the Board of directors of the company in its meeting.
- if such an exit is approved by the shareholders of the company by a special resolution passed through postal ballot or e-voting, by majority of public shareholders after disclosure of all material facts in the explanatory statement sent to the shareholders in relation to such resolution.

However, the special resolution shall be acted upon only if the votes cast by the majority of public shareholders are in favour of such exit proposal.

— Delisting price is based on a floor price determined in terms of Regulation 8 SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, as may be applicable, and an additional delisting premium justified by the acquirer / promoter.

— The post-offer acquirer / promoter shareholding (along with the persons acting in concert with the acquirer / promoter), taken together with the shares tendered reaches 75% of the total issued shares of that class and at least 50% shares of the public shareholders as on date of the meeting referred are tendered and accepted; and Recognised stock exchange(s) where its shares are listed approves of such an exit.

— Exit shall be pursuant to the SEBI (Delisting of Equity Shares) Regulations.

Answer 2A(i)

Seed Funding

Seed funding, taken from the word "seed" is the capital needed to start / expand your business. It often comes from the company founders' personal assets, from friends and family or other investors. The amount of money is usually relatively small because the business is still in the idea or conceptual stage. This type of funding is often obtained in exchange for an equity stake in the enterprise, although with less formal contractual overhead than standard equity financing.

Lenders often view seed capital as a risky investment by the promoters of a new venture, which represents a meaningful and tangible commitment on their part to making the business a success.This would be a type of Venture Capital Funding and hence covered under the provisions of Angel Funding in the SEBI (Alternative Investment Fund) Regulations, 2012.

Start up Financing

The riskiest aspect of venture capital is the launch of a new business after the Research and Development activities are over. At this stage, the entrepreneur and his products or services are still not tried and rested in the market forces. The finance required usually falls short of his own resources. Start-ups may include new industries / businesses set up by the experienced persons in the area in which they have knowledge, specialization and proficiency. Others may result from the research bodies or large corporations, where a venture capitalist joins with an industry experienced or corporate partner.

Answer 2A(ii)

Red Clause Letter of Credit

Red clause letter of credit is an advance payment letter of credit. Under the red clause letter of credit, the issuing bank will make an advance payment to the exporter i.e. the seller before the seller ships the goods to the importer i.e. buyer. This is usually done to provide aid to the seller in the form of working capital to purchase raw material, processing and packaging of goods, etc. The advance payment will be done against documentary requirement under the red clause letter of credit. Generally, documents required are written undertaking and receipts.

Green Clause Letter of Credit

Green clause letter of credit is an extension of the red clause letter of credit, as it provides the advance of not only the purchase of raw materials, processing and packaging of goods, but it also takes into account pre-shipment warehousing at the port of origin and insurance expenses.

In usual cases, the advance under this letter of credit is granted only after the purchased goods are stored in bonded warehouses. This type of letter of credit is usually used in transactions related to commodity market such as wheat, rice, gold, etc.

Answer 2A(iii)

Financial Bank Guarantee

A financial guarantee assures repayment of money. The banker issues guarantee in favour of a government department against caution deposit or earnest money to be deposited by bank's client. At the request of his customer, in lieu of a caution deposit/ earnest money, the banker issues a guarantee in favour of the government department. This type of guarantee helps the bank's customer to bid for the contract without depositing actual money. In case, the contractor does not take up the awarded contract, then the government department would invoke the guarantee and claim the money from the bank.

Performance Bank Guarantee

A performance guarantee provides an assurance of compensation in the event of inadequate or delayed performance on a contract. Performance Guarantees are issued by banks on behalf of their clients. In performance guarantee, the bank issues on behalf of his client to assure the third party to complete some work on time or as per the terms of the contract between the parties. If the work is not completed as per the terms of the contract, then the third party can request the bank to invoke the bank guarantee and make payment for default.

Performance Bank Guarantees are issued guaranteeing due performance of contract or obligation of the borrower under the contract. In the event of non-performance of obligation in terms of the contract, the bank assumes monetary liability up to the amount specified in the Guarantee.

Question 3

(a) Explain the eligibility conditions for the Fast Track Follow-on Public Offer (FPO). *(5 marks)*

(b) Gulab Ltd is a newly incorporated company and it would like to purchase raw materials from domestic sources as well as from other countries under Letter of Credit (LC). On the basis of the following information, calculate the limit for Letter of Credit (LC) for the Financial Year 2021-22: *(5 marks)*

(i)	*Estimated Raw Material purchase for FY 2021-22*		*₹240 crore*
(ii)	*Estimated purchase under Letter of Credit (LC) for FY 2021-22 (90%)*		*₹216 crore*
(iii)	*Of which import of Raw Material under Letter of Credit (30%)*		*₹64.80 crore*
(iv)	*Lead Time*	*– Domestic*	*1 Month*
		– Import	*2 Months*
(v)	*Transit Time*	*– Domestic*	*1 Month*
		– Import	*2 Months*
(vi)	*Credit (Usance) Period available*	*– Domestic*	*1 Month*
		– Import	*4 Months*

(c) Speed Information Ltd. would like to issue US $ 750 million Global Depository Receipts (GDRs) for setting up cloud computing services. Managing Director of the company requests you as a Company Secretary to prepare a checklist for the issue of Depository Receipts. Prepare a checklist considering conditions to be fulfilled by a company as per the provisions of Companies (Issue of Global Depository Receipts) Rules, 2014. *(5 marks)*

Answer 3(a)

The eligibility conditions for the Fast Track Follow-on Public Offer (FPO) are as follows:

1) *Listing* : Equity shares of the issuer have been listed on any stock exchange for a period of at least three years immediately preceding the reference date;

2) *Demat Form* : Entire shareholding of the promoter group of the issuer is held in dematerialised form on the reference date;

3) *Market Capitalisaton* : Average market capitalisation of public shareholding of the issuer is at least one thousand crore rupees in case of public issue and two hundred and fifty crore rupees in case of rights issue;

4) *Trading Turnover* : Annualised trading turnover of the equity shares of the issuer during six calendar months immediately preceding the month of the reference date has been at least two per cent of the weighted average number of equity shares listed during such six month's period. However if the public shareholding is less than 15% of its issued equity capital, the annualised trading turnover of its equity shares has been at least 2% of the weighted average number of equity shares available as free float during such six months' period;

5) *Delivery based Trading* : Annualized delivery-based trading turnover of the equity shares during six calendar months immediately preceding the month of the reference date has been at least ten per cent of the annualised trading turnover of the equity shares during such six months period;

6) *Compliance with LODR* : Issuer has been in compliance with the equity listing agreement or the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, as applicable, for a period of at least three years immediately preceding the reference date;

7) *Investor Complaints* : Issuer has redressed at least ninety- five per cent of the complaints received from the investors till the end of the quarter immediately preceding the month of the reference date;

8) *No show cause Notices* : No show-cause notices have been issued or prosecution proceedings have been initiated by SEBI and pending against the issuer or its promoters or whole-time directors as on the reference date:

9) *No alleged Violations* : Issuer or promoter or promoter group or director of the issuer has not settled any alleged violation of securities laws through the consent or settlement mechanism with SEBI during three years immediately preceding the reference date;

10) *Disciplinary Measures* : Equity shares of the issuer have not been suspended from trading as a disciplinary measure during last three years immediately preceding the reference date:

11) *Conflict of Interest* : There shall be no conflict of interest between the lead manager(s) and the issuer or its group companies in accordance with the applicable regulations.

12) *Audit Qualification* : Impact of audit qualifications, if any and where quantifiable, on the audited accounts of the issuer in respect of those financial years for which such accounts are disclosed in the letter of Offer does not exceed five per cent of the net profit or loss after tax of the issuer for the respective years.

Point no. 8, 9 and 12 have been substituted by the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2022 w.e.f. 14.1.2022. Substituted points are as under:

8. no show-cause notices, excluding proceedings for imposition of penalty, have been issued by the Board and pending against the issuer or its promoters or whole time directors as on the reference date:

In cases where against the issuer or its promoters or whole time directors,

(i) show-cause notice(s) has been issued by the Board or the Adjudicating Officer, in a proceeding for imposition of penalty; or

(ii) prosecution proceedings have been initiated by the Board;

necessary disclosures in respect of such action(s) along with its potential adverse impact on the issuer shall be made in the offer document

9. if the issuer or the promoter or the promoter group or the director of the issuer has settled any alleged violations of securities laws through the settlement mechanism of the Board in the past three years immediately preceding the reference date, then the disclosure of such compliance of the settlement order, shall be made in the offer document.

12. for audit qualifications, if any, in respect of any of the financial years for which accounts are disclosed in the offer document, the issuer shall provide the restated financial statements adjusting for the impact of the audit qualifications. Further, for the qualifications wherein impact on the financials cannot be ascertained, the same shall be disclosed appropriately in the offer document.

Answer 3(b)

Calculation of Inland & Foreign Letter of Credit Limit of Gulab Ltd. for the Financial Year 2021-22

Annual Raw Material Consumption for FY 2021-22	A	₹240 crore	
Estimated purchase under Letter of Credit (LC) for FY 2021-22 (90 %)	B	₹216 crore	
		Calculation of ILC*	Calculation of FLC*
Annual Raw Material Procurement through ILC/FLC	C	₹151.20 crore	₹64.80 crore
Monthly Consumption	D	₹12.60 crore	₹5.40 crore
Lead Time (Time from order placement to shipment)	E	1 Month	2 Months
Transit Time	F	1 Month	2 Months
Credit (Usance) Period Available	G	1 Month	4 Months
Total Period	H=E+F+G	3 Months	8 Months
LC limit Required for FY 2021-22	I=D*H	₹37.8 crore	₹43.2 crore

* ILC = Inland Letter of Credit

* FLC = Foreign Letter of Credit

Answer 3(c)

Conditions to be fulfilled by a company for issue of depository receipts as per the provisions of Companies (Issue of Global Depository Receipts) Rules, 2014 are as under:

Rule - 3

- A company may issue depository receipts provided it is eligible to do so in terms of the Scheme and relevant provisions of the Foreign Exchange Management Rules and Regulations and amendment thereto.

Rule - 4

- The Board of Directors of the company intending to issue depository receipts shall pass a resolution authorising the company to do so.
- The company shall take prior approval of its shareholders by a special resolution to be passed at a general meeting.

However, a special resolution passed under section 62 of Companies Act 2013 for issue of shares underlying the depository receipts, shall be deemed to be a special resolution for the purpose of section 41 of the Companies Act 2013 as well.

- The depository receipts shall be issued by an overseas depository bank appointed by the company and the underlying shares shall be kept in the custody of a domestic custodian bank.
- The company shall ensure that all the applicable provisions of the Scheme and the rules or regulations or guidelines issued by the Reserve Bank of India are complied with before as well as after the issue of depository receipts.
- The company shall appoint a merchant banker or a practising chartered accountant or a practising cost accountant or a practising company secretary to oversee all the compliances relating to issue of depository receipts and the compliance report taken from any of the above persons so appointed shall be placed at the meeting of the Board of Directors of the company or of the committee of the Board of directors authorised by the Board in this regard to be held immediately after closure of all formalities of the issue of depository receipts.

However, the committee of the Board of Directors referred to above shall have at least one independent director in case the company is required to have independent directors.

Rule - 5

- The depository receipts can be issued by way of public offering or private placement or in any other manner prevalent abroad and may be listed or traded in an overseas listing or trading platform.
- The depository receipts may be issued against issue of new shares or may be sponsored against shares held by shareholders of the company in accordance with such conditions as the Central Government or Reserve Bank of India may prescribe or specify from time to time.

- The underlying shares shall be allotted in the name of the overseas depository bank and against such shares, the depository receipts shall be issued by the overseas depository bank abroad.

Rule - 6

- A holder of depository receipts may become a member of the company and shall be entitled to vote as such only on conversion of the depository receipts into underlying shares after following the procedure provided in the Scheme and the provisions of this Act.
- Until the conversion of depository receipts, the overseas depository shall be entitled to vote on behalf of the holders of depository receipts in accordance with the provisions of the agreement entered into between the depository, holders of depository receipts and the company in this regard.

Rule - 7

- The proceeds of issues of depository receipts shall either be remitted to a bank account in India or deposited in an Indian bank operating abroad or in any foreign bank (which is a Scheduled Bank under the Reserve Bank of India Act, 1934) having operations in India with an agreement that the foreign bank having operations in India shall take responsibility for furnishing all the information which may be required and in the event of a sponsored issue of Depository Receipts. In case of a sponsored issue of Depository Receipts, the proceeds of the sale shall be credited to the respective bank accounts of the shareholders.

Question 4

(a) Moon Ltd makes an application for Bank Guarantee Limit for the Financial Year 2021-22 with following data to PQR Bank Ltd :

(i) Outstanding Bank Guarantee as per the last Audited Balance Sheet : ₹95 lakhs

(ii) Bank Guarantee required for the Financial Year 2021-22 : ₹115 lakhs

(iii) Estimated maturity or Cancellation during the period : ₹65 lakhs

Compute the Bank Guarantee limit of Moon Ltd for the Financial Year 2021-22.

(b) Securitization is the transformation of financial assets into securities. Discuss in brief.

(c) Explain in brief manner of parking of ECB proceeds abroad & domestically.

(d) What are conditions for issuance and listing of Non-Equity Regulatory Capital Instruments by Banks ? Enumerate in brief.

(e) Discuss the obligations and duties of Electronic Book Provider in relation to issuance of debt securities. *(3 marks each)*

Answer 4(a)

Computation of Bank Guarantee limit of Moon Ltd for Financial Year 2021-22

		Amount in ₹
A	Outstanding Bank Guarantee as per Audited Balance Sheet	95 lakhs
B	*Add* : Bank Guarantee required during the period	115 lakhs
C	*Less* : Estimated maturity or Cancellation during the period	65 lakhs
D	Requirement of Bank Guarantee (A+B-C)	145 lakhs

Answer 4(b)

Securitization is the process of pooling and repackaging of homogenous illiquid financial assets into marketable securities that can be sold to investors. It is the transformation of financial assets into securities. The process leads to the creation of financial instruments that represent ownership interest in, or are secured by a segregated income producing asset or pool of assets. The pool of assets collateralizes securities. These assets are generally secured by personal or real property (e.g., automobiles, real estate, or equipment loans), but in some cases are unsecured (e.g., credit card debt, consumer loans).

There are four steps in the process of securitization:

(i) Special Purpose Distinct Entity (SPDE) is created to hold title to assets underlying securities;

(ii) the originator or holder of assets sells the assets (existing or future) to the SPDE:

(iii) the SPDE with the help of an investment banker, issues securities which are distributed to investors, and

(iv) the SPDE pays the originator for the assets with the proceeds from the sale of securities.

Securitization is used by financial entities to raise funding other than what is available via the traditional methods of on-balance -sheet funding.

Answer 4(c)

ECB proceeds are permitted to be parked abroad as well as domestically in the manner given below:

Parking of ECB proceeds abroad : ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilization. Till utilisation, these funds can be invested in the following liquid assets

(i) Deposits or Certificate of Deposit or other products offered by banks rated not less than AA (-) by Standard and Poor/ Fitch IBCA or Aa3 by Moody's;

(ii) Treasury bills and other monetary instruments of one-year maturity having minimum rating as indicated above; and

(iii) Deposits with foreign branches/ subsidiaries of Indian banks abroad.

Parking of ECB proceeds domestically : ECB proceeds meant for Rupee expenditure should be repatriated immediately for credit to their Rupee accounts with AD Category I banks in India. ECB borrowers are also allowed to park ECB proceeds in term deposits with AD Category I banks in India for a maximum period of 12 months cumulatively. These term deposits should be kept in unencumbered position.

Answer 4(d)

Issuance and listing of Non-Equity Regulatory Capital Instruments by Banks

The provisions of Chapter VI of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 shall apply to the issuance and listing of Perpetual Non-Cumulative Preference Shares and Innovative Perpetual Debt Instruments by banks. No issuer other than a bank shall issue such instruments subject to the prior approval and in compliance with the Guidelines issued by RBI.

(a) If a bank is incorporated as a company under Companies Act, 2013, it shall, in addition, comply with the provisions of Companies Act, 2013 and/or other applicable statues.

(b) The bank shall comply with the terms and conditions as may be specified by SEBI from time to time and shall make adequate disclosures in the offer document regarding the features of these instruments and relevant risk factors and if such instruments are listed, shall comply with the listing requirements.

Alternate Answer

Conditions for Issuance and listing of Perpetual Debt Instruments, Perpetual Non-cumulative Preference Shares and Similar Instruments

Issuers permitted by the RBI to issue perpetual debt instruments, perpetual non-cumulative preference shares and instruments of similar nature forming part of non-equity regulatory capital may list such instruments after complying with the conditions stipulated under chapter V of SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021.

An issuer may issue such instruments in compliance with the guidelines issued by the RBI and/or any other relevant applicable laws.

Issuers of these securities shall be required to make the disclosures as specified under Schedule II of SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 202; any disclosure as provided under the guidelines framed by the RBI or the Companies Act, 2013 (18 of 2013), as applicable; and any other disclosures as may be specified by the SEBI.

The issuer shall comply with the terms and conditions as may be specified by the SEBI from time to time and shall make adequate disclosures in the offer document regarding the features of these instruments and relevant risk factors and if such instruments are listed, shall comply with the listing regulations.

The SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 have come into force vide SEBI notification dated August 09, 2021 and SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013) stands repealed.

Answer 4(e)

The recognized stock exchange and depository are identified to act as an Electronic Book Provider (EBP). In order to streamline the procedures for issuance of debt securities on private placement basis and enhance transparency to discover prices, SEBI has laid down a framework for issuance of debt securities on private placement basis through an electronic book mechanism. The obligations and duties of the EBP:

- EBP shall ensure that all details regarding issuance is updated on the website of the EBP.
- EBPs shall together ensure that the operational procedure is standardized across all EBP platforms and the details of such operational procedure are disclosed on their website.
- Where an issuer has disclosed estimated cut-off yield/range to the EBP, the EBP shall ensure its electronic audit trail and secrecy.
- All EBPs shall ensure coordination amongst themselves and also with depositories so as to ensure that the cooling off period for issuers and debarment period for investors is adhered to
- EBP shall ensure that bidding is done.
- The EBP shall be responsible for accurate, timely and secured bidding process of the electronic bid by the bidders.
- The EBP shall be responsible for addressing investor grievances arising from bidding process.
- EBP shall ensure that the pay-in of funds towards allotment of securities, placed through EBP platform, are done through clearing corporation mechanism

PART B

Question 5

(a) *Sunlight Solar Ltd decides to issue six right shares for every eleven shares held. The right shares are priced at ₹561 each and the present cum-right price of the company's share traded in the NSE/BSE is ₹785. Average Floating Cost of each right share is ₹10. Calculate the fair value of the right.*

(b) *Briefly discuss Legal Compliance in relation to the Risk Management Committee as per SEBI (LODR) (Second Amendment) Regulations, 2021.*

(c) *SGX's Main Board listing requirements are benchmarked against international standards and are in line with best practices from developed jurisdictions. Discuss in brief.*

(d) *Smart Care Infra Ltd. has availed credit facilities from Banks, Financial institutions and issued bonds. One of the conditions of bond issued was to obtain credit rating from any two credit rating agencies. However, Smart Care Infra Ltd. refused to co-operate with credit rating agencies and does not provide information for rating the credit facilities. Explain the above situation with reference to SEBI guidelines on "Norms for rating agencies on non-cooperative firms".*

(5 marks each)

Answer 5(a)

Value of each share after rights issue = Total Holding value (including Right Shares) /Total Nunber of Holding (including Right Shares)

Value of Right = Market Value of Share – Value of share after rights issue

A	Market value of the 11 existing holdings @ ₹785/- per share)	₹8,635/-
B	Issue Price of 6 new holdings @ ₹561	₹3,366/-
	Total holding	17 shares
A+B	Value of holdings	₹12,001/-
	Value of each share (₹12,001/17 shares)	₹705.94/-
	Fair Value of the Right	₹(785-705.94) = ₹79.06

Value of Right : ₹79.06

Alternate Answer 5(a)

Value of Right = [Number of Rights Shares/ Total Shares (Old + New Holdings)] x [(Market Value – Right issue price)]

6/17 x (₹785 - ₹561)

6/17 x 224 = ₹79.06

Value of Right : ₹79.06

Answer 5(b)

Legal Compliance in relation to the Risk Management Committee (Regulation 21) as per SEBI (LODR) Second Amendment Regulations, 2021

- *Applicability* : Top 1000 listed entities determined on the basis of market capitalisation at the end of immediate previous financial year and a 'high value debt listed entity'.

- *Composition* : Minimum three members, majority of member of Committee shall consist of Members of the Board of directors, including at least one independent director.

  In case of a listed entity having outstanding SR equity shares, at least two thirds of the Risk Management Committee shall comprise independent directors.

- *Number of meetings* : At least twice in a year and not more than 180 days shall elapse between any two consecutive meetings.

- Quorum: Two members or one third of the members of the committee, whichever is higher, including at least one member of the Board of Directors in attendance.

- Roles and responsibilities of Risk Management Committee shall be defined by

Board of Directors and may delegate the monitoring and reviewing of the risk management plan to the Committee and such other functions as it may deem fit. The role and responsibilities of the Risk Management Committee shall mandatorily include the performance of functions specified in Part D of Schedule II of SEBI (LODR) Regulations, 2015.

- The Risk Management Committee shall have powers to seek information from any employee, obtain outside legal or other professional advice and secure attendance of outsiders with relevant expertise, if it considers necessary

Answer 5(c)

Singapore is one of the few Asian countries with an “AAA” rating. As a listing destination for global companies, SGX listing rules provide flexibility for companies with diverse backgrounds to source for public financing in Singapore. While SGX continues to attract more global companies, its listing standards and the quality of listed companies are never compromised.

Singapore operates a predominantly disclosure-based regime for capital markets. SGX's Listing Rules augment the disclosure-based regime with high baseline admission standards and continuing requirements for issuers. A cornerstone of the regime is to require listed issuers to make timely disclosure of all material information to the marketplace.

SGX's regulatory team reviews listing applications to ensure that issuers meet the minimum requirements prescribed. In reviewing listing applications, SGX's regulatory team relies on due diligence carried out by issue managers and their representations to determine the applicants suitability to list.

Answer 5(d)

As per directive of SEBI credit rating agencies (CRAs) are required to downgrade an instrument to 'non-investment grade with issuer not cooperating (INC) status, if all outstanding ratings of the issuer remain non-cooperative for more than six months.

If non-cooperation by the issuer continues for a further six months from the date of downgrade to non-investment grade, no CRA should assign any new ratings to such issuer, until the company resumes cooperation or the rating is withdrawn.

CRAs to withdraw from an issue, which has multiple ratings. The rating agency is allowed to withdraw, if it has rated an instrument for three years continuously or for 50 per cent of the tenure of the instrument, whichever is longer.

Additionally, the CRA must have received a no-objection certificate from 75 per cent of the bondholders of the outstanding debt for withdrawal of rating. The CRA must also have received an undertaking from the issuer that another rating is available on that instrument.

Further, at the time of withdrawal, the CRA should assign a rating to such instrument and issue a press release in the prescribed format mentioning the reason for withdrawal of rating.

If the company stops cooperating with the CRA and does not provide information, the

CRA must continue to publish a rating accompanied with the statement, 'issuer did not cooperate, based on best available information.

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

Question 6

(a) Ajanta Car Care Ltd. successfully completed its initial public offer (IPO). List out the documents to be submitted on T+2 days for listing of IPO.

(b) The Luxembourg Stock Exchange is well known for its independent and international listing expertise. Discuss in brief.

(c) A listed company can apply to stock exchange for re-classification of the Promoter's holdings as public shareholders under SEBI regulations. Whether the following promoters can apply for re-classification, with reference to SEBI Regulations, 2015 ?

(i) Promoter is declared as fugitive economic offender.

(ii) Promoter is holding 18% of total voting rights in the listed entity.

(iii) Promoter is acting as Chief Financial Officer of the listed entity.

(iv) The promoter company has outstanding listing fees only for one year.

(v) Trading of its shares suspended by the stock exchanges.

(d) Briefly describe the provisions of Meetings of shareholders and voting under Regulation 44 as per SEBI (LODR) Regulations 2015.

(5 marks each)

OR (Alternate question to Q. No. 6)

Question 6A

(i) "Great responsibility has been given to the Company Secretary holding the position of Compliance officer in a listed entity". Explain the obligations of the Company Secretary in brief in light of SEBI Regulations, 2015. *(5 marks)*

(ii) The listed entity shall frame Policy for determination of materiality and Criteria for determination of materiality of events/information. Enumerate in brief with reference to SEBI Regulations, 2015. *(5 marks)*

(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. Discuss in brief. *(5 marks)*

(iv) Briefly describe the provisions with respect to the following as per SEBI (LODR) (Second Amendment) Regulations, 2021 :

(a) Secretarial Audit and Secretarial Compliance Report

(b) Compliance Certificate under Regulation 7(3).

(5 marks)

Answer 6(a)

List of documents to be submitted on (T+2 days) for listing of IPO are as under:

- All due diligence certificates filed with SEBI by Merchant banker(s).
- Observation Letter issued by SEBI pursuant to filing of draft offer document.
- List of authorized signatories along with their specimen signatures.
- Confirmation from Lead Managers that devolvement notices have been sent to underwriters (applicable if the issue has devolved).
- Certificate from the BRLM(s) that the issue has received minimum subscription as specified under Regulation 45 (1) of SEBI (ICDR) Regulations, 2018.
- Confirmation from the company regarding the email ID for Investor Grievances as per Regulation 46 of SEBI (LODR), Regulations, 2015.
- Copies of all advertisements published in connection with the issue up to T+1 stage.
- Confirmation from the company stating that they have obtained authentication for SCORES from SEBI as per Regulation 13 of SEBI (LODR) Regulations, 2015.

Answer 6(b)

The Luxembourg Stock Exchange is well known for its independent and international listing expertise.

Listing in Luxembourg is both relatively straightforward and flexible. There are three main phases in the process:

— The pre-application and file submission phase.

— The application phase.

— The approval phase

Listing with the Luxembourg Stock Exchange is a simple 5-step process, from selecting a market to listing of a security:

Step 1: Choose a market

Step 2: Prepare a prospectus

Step 3: Submit the prospectus

Step 4: Listing and admission to trading

Step 5: Post-listing reporting

Issuers on the BdL and Euro MTF (Multilateral Trading Facility) can take advantage of LuxSE'S FIRST, an integrated tool that enables issuers to publish and disseminate information. By being outside the scope of EU regulations, issuers on the Euro MTF market benefit from less stringent requirements for financial reporting.

However, only issuers that list on the BdL market have access to EU passporting, meaning that the same prospectus approval can be used to list on other EU exchanges.

Answer 6(c)

(i) The promoter(s) seeking re-classification and persons related to the promoter(s) seeking re- classification shall not be a fugitive economic offender.

(ii) The promoter(s) seeking re-classification and persons related to the promoter(s) seeking re-classification shall not together, hold more than 10% of the total voting rights in the listed entity.

(iii) The promoter(s) seeking re-classification and persons related to the promoter(s) seeking re-classification shall not act as a key managerial person in the listed entity.

(iv) The listed entity shall not have any outstanding dues to the stock exchanges.

(v) The listed entity shall not have trading in its shares suspended by the stock exchange.

The Promoters cannot apply for re-classification as none of the above conditions are satisfied as per SEBI (LODR) Regulations, 2015.

Answer 6(d)

The provisions of Meetings of shareholders and voting as per Regulation 44 of SEBI (LODR) Regulations, 2015 are as under:

- The listed entity shall provide the facility of remote e-voting facility to shareholders in respect of all shareholder's resolutions.
- The e-voting facility to be provided to shall be provided in compliance with the conditions specified under the Companies (Management and Administration) Rule 2014.
- The listed entity shall submit to the stock exchange details regarding the voting results in the format specified by the SEBI, within two working days of conclusion of its General Meeting.
- The listed entity shall send proxy forms to holders of securities in all cases mentioning that a holder may vote either for or against each resolution.
- The top 100 listed entities by market capitalization, determined as on March 31st of every financial year shall hold their annual general meetings within a period of five months from the date of closing of the financial year.
- The top 100 listed entities shall provide one-way live webcast of the proceedings of the annual general meetings.

Answer 6A(i)

Every listed company shall appoint a qualified Company Secretary as the Compliance Officer. The Company Secretary is responsible under Regulation 6 (Listing Obligations and Disclosure Requirements) Regulations, 2015 for:

- ensuring conformity with the regulatory provisions in letter and spirit.

- co-ordination with and reporting to SEBI recognized stock exchange(s) and depositories with respect to compliance with rules, regulations and other directives of these authorities in manner as specified from time to time.
- ensuring that the correct procedures have been followed that would result in the correctness, authenticity and comprehensiveness of the information, statements and reports filed by listed entities.
- monitoring email address of grievance redressal division as designated by the listed entity for the purpose of registering complaint by investors.

This regulation is not applicable to listing of units of mutual funds.

Answer 6A(ii)

The listed entity shall frame policy for determination of materiality and criteria for determination of materiality of events/ information.

Policy for determination of materiality

- is based on criteria specified under Regulation (4) (i) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015
- is duly approved by its Board of Directors;
- shall be disclosed on its website.

Criteria for determination of materiality of events/ information

- the omission of an event or information, which is likely to result in discontinuity or alteration of event or information already available publicly; or
- the omission of an event or information is likely to result in significant market reaction if the said omission came to light at a later date;
- an event/information may be treated as being material if in the opinion of the Board of Directors of listed entity, the event / information is considered material.

Answer 6A(iii)

The Securities and Exchange Commission (SEC) strives to promote a market environment that is worthy of the public's trust. The laws and rules that govern the securities industry in the United States derive from a simple and straightforward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it. To achieve this, the SEC requires public companies to disclose meaningful financial and other information to the public.

The SEC oversees the key participants in the securities world, including securities exchanges, securities brokers. 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).

Answer 6A(iv)

Secretarial Audit and Secretarial Compliance Report (Regulation 24A)

Every listed entity and its material unlisted subsidiaries incorporated in India shall undertake secretarial audit and shall annex a secretarial audit report given by a Company Secretary in practice, in such form as specified, with the annual report of the listed entity.

Every listed entity shall submit a secretarial compliance report in such form as specified, to stock exchanges, within 60 days from end of each financial year.

Compliance Certificate [Regulation 7(3)]

The listed entity shall submit a compliance certificate to the exchange duly signed by both the compliance officer of the listed entity and the authorised representative of the share transfer agent, within 30 days from the end of the financial year certifying compliance with the requirements of Regulation 7(2) of SEBI (LODR) Regulations which states that the listed entity shall ensure that all activities in relation to share transfer facility are maintained either in house or by Registrar to an issue and share transfer agent registered with the SEBI.

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MULTIDISCIPLINARY CASE STUDIES

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 :

Happy Living Bank, a smaller national bank based in State of Bihar, opened its first out-state branch in Jharkhand in 2009. The branch was opened for a variety of reasons. This would be a significant step toward Happy Living's goal of becoming a national bank.

Having a presence in India would enable the bank to better support its Biharian stakeholders while also generating additional revenue from mostly India-based Biharian-owned, but also linked, businesses. Although the majority of Happy Living's customers were small and mediumsized businesses, many of them had national operations. Furthermore, having certain personnel based in other states would allow the bank to keep up with Indian banking trends better.

Managers at Happy Living were well aware that the competition for Biharian clients in India was fierce. Many Bihari banks have well-established operations in India, some of them substantially larger than Happy Living. Nonetheless, they believed it was the appropriate time to launch all India based offices because many tiny businesses were having trouble acquiring finance as a result of the financial crisis.

Jharkhand was chosen as the location for the branch because it was India's developing industrial and money centre-based state, and because the Jharkhand-Patna area had a significant concentration of Biharian-owned and operated enterprises.

The Jharkhand branch of Happy Living was a wholesale operation. The main purpose was to lend Indian Rupees to Biharian or Indian-based businesses. To reduce the risk of other state deposit withdrawals, the branch had to raise all of its funds from the all-India money markets, with the exception of a tiny capital contribution from Happy Living Bank. For the convenience of Happy Living's other states clients, only a few retail accounts were kept.

To help establish the retail part of the firm, no special services were supplied. Cheque clearance was outsourced to a large Indian bank situated in Jharkhand. The bank's management – Hitesh Shukla, a former account manager for Happy Living, Madhupuri – has been promoted as senior manager of the Jharkhand branch. Shukla swiftly engaged five experienced account managers who had previously worked for other Indian banks and had a track record of success. Clients in need of loans were identified by the account managers.

The majority of the time, the account managers were given specific geographical regions to grow. Two were on the East Side, two on the West Side, and one in the Central Business District. Two of the account managers, on the other hand, had extensive past industry experience and were tasked with generating possibilities *with a few carefully selected prospective clients in those industries who were located beyond their assigned territory.*

Shukla was well aware that the account managers he selected had a variety of business backgrounds and operational methods, but he was unconcerned. He only imposed a few restrictions on their operations. He assured the account managers that he didn"t mind how they found and nurtured their clients as long as they "booked good deals" ultimately.

Shukla set up each account manager as a "mini profit centre" for monitoring and incentive purposes. The interest generated on the loans initiated was credited to their profit centres, and they were charged for the expenses involved, including the cost of funding the loans. Although this was not the technique employed by Happy Living Bank, Shukla believed that such a system was necessary to foster account managers' entrepreneurialism, which would be required to swiftly expand the branch.

The account managers were paid a bonus of 10% of the aggregate profits created in their small profit centres each year, in addition to their base salary, which were significantly below comparable bank averages, according to branch studies. They were not penalised for annual losses, but it was recognised that losses would not be permitted over long periods of time. Shortly after the fiscal year ended, the bonuses were paid out in full in cash. Shukla believed that after the account managers had expanded their loan portfolios to their desired levels, their overall compensation would be competitive with established banks.

Shukla had hoped that when the branch grew, he would be able to set targets for each account manager and reward them for meeting them, but he didn't have enough understanding of the market potentials or the account managers' capabilities to do so during the start-up phase.

He was concerned that in the wholesale banking market, short-term profits were merely an imperfect measure of performance. For one thing, the loans were normally given for 5 to 10 years, and no loan was ever given with a 100% possibility of default. However, he believed that the primitive infrastructure in place would suffice throughout the branch's first stages. Over time, a more complicated reward system would most likely arise.

Account managers needed to be able to effectively manage their time. The quantity of potential clients was enormous across all geographical boundaries. However, the competition was fierce. Many Biharian banks had already established themselves in India, and other Biharian-oriented firms had also raised funds from non-Biharian banks. The account managers at Happy Living have to discover and solicit business from their top prospects.

Businesses who desired larger loans with higher margins and, more significantly, the ability to repay the loans were the ideal clients. The account managers had to factor in both the costs of locating prospects, researching their conditions, and drafting loan applications, as well as the likelihood of the loans being accepted.

The account managers created a credit application package, after identifying loan prospects. A description of the client and its business, the anticipated use of the loan funds, the proposed loan terms (e.g., size, payments, fees, security, covenants), *and an appraisal of the loan's risk were all required in the loan application package. Risk was dealt with in a variety of ways.*

Shukla may approve applications for loans of less than rupees ten lakh. If the proposed loan amount was greater than rupees ten lakh, the application had to be authorised by the branch's Credit Committee, which included Shukla, the branch's CFO/treasurer, and two of the branch's most experienced account managers. If the loan amount is greater than ₹ 5 lakh, the Happy Living Bank Corporate Credit Committee in Madhupuri must additionally approve the loan before it can be made. Management, national bank examiners, and external auditors assessed loans on a regular basis after they were made. Clients were also watched on a regular basis by management for symptoms of potential difficulties, which might be suggested by Management, national bank examiners, and external auditors assessed loans on a regular basis after they were made. Management also kept a close eye on clients for signals of potential issues, such as declining business conditions, covenant violations, and late payments.

A loan application that was turned down in early 2020, Jimit Patel, an account manager assigned to the southern India area, presented a credit application for Far East Trading Corporation (FETC), a corporation with major business interests in Bihar, for a ₹ 11 lakh, seven-year term loan. A 1% closing charge and a variable rate of 5% above prime lending rate were included in the pricing of loan. Inventory was used to fully secure the loan. Because of the size of the loan, Jimit took great care in evaluating and assessing the application.

He liked it : "I thought this was a wonderful offer for Happy Living," he said. We were going to make good money during the life of the loan because I priced it with a relatively wide spread. FETC is a reputable organisation that has been around for a long time and has a knowledgeable management team. Despite the current economic downturn, they have discovered good commercial prospects. As a result, I came to the conclusion that the loan was quite low risk.

The loan was immediately accepted by the Branch's Credit Committee, which Jimit was not a member of Committee members remarked at the time that Jimit's application was wellprepared, and that they trusted Jimit's judgements on the deal's merits. Jimit was one of the more experienced account managers on the team. Before joining Happy Living's Jharkhand branch, he worked for two big Indian banks for long years.

The application had to be authorised by the Corporate Credit Committee in Madhupuri because the loan's proposed value exceeded ₹5 lakh. Jimit participated in part of the corporate committee meeting by telephone. Jimit was questioned by the committee members, who sought answers as well as more information. Jimit believed he had successfully answered all of the inquiries.

However, Jimit and Shukla were informed a few days later that corporate had opted against making the loan. The issue, according to the committee spokesman, was not with Jimit's analysis or the loan terms.

Certain members of the Credit Committee were concerned because they had learned that FETC was involved in some transfer pricing conflicts with the tax authorities. These disagreements could result in lengthy legal fees, possibly substantial fines, *or a costly settlement. When it came time to vote on this application, a majority of the committee members decided to err on the side of caution because they couldn't confirm the claims and didn't know if the legal settlements, if any, would affect FETC's ability to meet its cash flow requirements.*

Evaluate Happy Living Bank's system and justify your comments:

(a) What makes a good account manager ?

(b) Did Jimit Patel do a good job and what would your observation of Jimit ?

(c) Is the bank's control system effective ?

(d) What will the control system look like in 10 years, say, assuming the branch is significantly larger ? (10 marks each)

Answer 1(a)

A good account manager is knowledgeable and understands the goals and priorities of the company. They embrace and display its core values. Also, the account manager knows the industry and the company's product or service. In addition, this person understands the competition, as well as their strengths, weakness, and vulnerabilities.

A good account manager is also customer relations-oriented. Clients have to trust their account manager to have their best interests at heart. This is done by nurturing the relationships and going the extra mile to foster an environment that values clients.

A good account manager clearly articulates the company's products or services and explains the advantages to clients in a way that is persuasive without being pushy.

Although a good account manager shouldn't be pushy, it's important to not lose sight of the company's goals and their role in generating results. By understanding client needs, building trust, and establishing a rapport, the account manager secures and maintains profitable accounts.

A good account manager also has business insight. In the competitive marketplace, this individual is sensitive to industry shifts and business trends. They actively identify new areas of growth and pursue those opportunities.

Account managers must find their best prospective - clients, solicit their business, structure the deals (term, pricing, covenants), prepare the loan applications, and convince the various parties in Happy Living (e.g., credit committee) of the worth of those applications because they had to approve the funding of the loans. Since the branch was new and there were so many potential clients, time management was key. The account managers had to consider both the benefits (loan size, term, lending spread) and the costs (find, analyse, prepare application, risk of non-funding) of all their client search activities.

Answer 1(b)

In defence of Jimit, he found a client that appears to fit the branch's mission. He apparently worked effectively with the client and got the application submitted. All indications are that the application was well prepared. Maybe the corporate Credit Committee was wrong and Jimit was right.

On the other hand, the final outcome was negative for the bank. Jimit caused the bank to incur significant expenses for no benefit. Should he be faulted for the negative outcome?

Perhaps he should have known about the client's potential tax risks and considered whether he wanted to have the bank do business with a client engaged in such activities. Perhaps he should have lobbied more effectively with the Committee that the client was worthy of the loan even in the face of the allegations. Maybe he should have gone to Madhupuri to plead the case in person, rather than just participating in a conference call. In the end, the Credit Committee decided that FETC was not worthy of a loan, so the outcome was poor.

Answer 1(c)

On the positive side:

- It appears to protect the bank from making bad loans because there are multiple levels of reviews. The controls are tighter with larger loan applications.
- It allows the account managers to use their own personal operating styles that, presumably, play into their individual strengths. They can be as creative as they wish.
- It should foster a sense of teamwork. The account managers should be willing to help each other, assuming they have different strengths (and they do).
- It is relatively inexpensive. The experienced account managers do not need a lot of training. There is not a lot of control infrastructure, except the application procedures and committee meetings.

On the negative side:

- It is pretty loose.
  - o There is not much direction given to the account managers. They are told to "book good deals," but apparently what makes a good deal good is not well communicated.
  - o There is not much assurance that the account managers are working effectively. Shukla cannot supervise them closely because they are physically located across the region.
  - o The reviews cause delays in the funding of the loans.
  - o The need for reviews might cause account managers to create small loan applications.

Answer 1(d)

When the branch becomes larger, it will be more difficult for Shukla, or the branch manager at that time, to know all that is going on in the branch and, hence, to provide direct supervision. Formal procedures or reports of actions taken will probably have to become more important. The major caution must be to avoid implementing procedures that are so rigid that they make it impossible for the account managers to exercise their individualism and creativity.

The following additional points may be considered regarding control system:

- Placing certain qualification restrictions and employing only certified, qualified financial managers and staff working with the formulation and implementation of financial management policies
- Establishing an efficient, direct chain of communication among the accounting staff, financial managers, and senior-level managers, including the CFO (Chief Financial Officer)
- Periodic training sessions and information sessions among accounting staff, etc. to ensure being updated with the changing laws and evolving business environment concerning business finance
- Periodic, thorough financial analysis and evaluation of financial ratios and statements wherever fluctuations are significant
- Delegation of financial duties in a segregated and hierarchical fashion in order to establish a chain of operation and efficiency via specialization

Question 2

(a) M/s. Alpha LLP with M/s. Beta Pvt. Ltd., and their respective partners, shareholders, and creditors proposed to be amalgamating Alpha (Transferor) with Beta (Transferee). The petition for joint company; under section 230 to 232 of the Companies Act, 2013, and Companies (Compromises, Arrangements, and Amalgamation) Rules, 2016 and National Company Law Tribunal Rules, 216; before National Company Law Tribunal (NCLT), Delhi. Alpha is incorporated on 4th February, 2016 under the provisions of Limited Liability Partnership (LLP), Act, 2008 and its registered office in Delhi. Beta is a private limited company incorporated on 12th February, 2017 under the Companies Act, 2013 and having its registered office in Delhi. Alpha and Beta are engaged in the establishing and/or acquiring Health care related products.

NCLT found that all statutory requirements have been fulfilled as per Companies Act, 2013. NCLT also discovered that LLPs can be incorporated into a company under Section 394(4)(b) of the Companies Act, 1956, but that no such provision exists in the Companies Act, 2013. Because section 234(2) of the Companies Act, 2013 allows a foreign LLP to combine with an Indian business, it would be incorrect to assume that section 234(2) of the Companies Act, 2013 forbids an Indian LLP from merging with an Indian company.

By the assailed order, the NCLT applied the Casus Omissus principle and authorised the merger of Alpha and Beta. (6 marks)

(b) Ajay Oza was a director in several companies and was barred from being appointed or reappointed as a director for a term of five years under Section 164(2)(a) due to a failure by one of the firms to file annual returns and financial statements for the financial year 2015-17. In 2018, the list of directors that were disqualified was made public. Before the Gujarat High Court, Ajay challenged the list of disqualified directors for defaults in the financial years 2013-15 and 2014-17.

Was there a requirement to provide prior notice and an opportunity to be heard before publishing the list of disqualified directors ? (6 marks)

Answer 2(a)

In the case of Regional Director, Southern Region and Ors. vs. Real Image LLP and Ors, Company Appeal (AT) No. 352 of 2018, Judgement dated 04.12.2019, NCLAT observed that it is undisputed that transferor LLP is incorporated on 04.01.2016 under the provisions of LLP Act, 2008 and the transferee company is incorporated on 12.01.2017 under the Companies Act, 2013. Thus, these corporate bodies were governed by the respective Acts and not by earlier Act, 1956. Hence, it is apparent that as per Section 232 of the Companies Act, 2013, a company or companies can be merged or amalgamated into another company or companies. The Companies Act, 2013 has taken care of merger of LLP into company. In this regard Section 366 of the Companies Act, 2013 provides that for the purpose of Part I of Chapter XXI the word company includes any partnership firm, limited liability partnership, cooperative society, society or any other business entity which can apply for registration under this part. It means that under this part LLP will be treated as company and it can apply for registration and once the LLP is registered as company then the company can be merged in another company as per Section 232 of the Companies Act, 2013.

NCLAT further observed that the provisions of the Companies Act, 2013 as a whole in reference of conversion of Indian LLP into Indian company there is no ambiguity or absurdity or anomalous results which could not have been intended by the legislature. The principal of casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. There is no such occasion to apply the principal of casus omissus. *Cassus Ommisus* is a situation omitted from or not provided for by statute or regulation and therefore governed by the common law.

The legislature has enacted provision in the Companies Act, 2013 for conversion of Indian LLP into Indian Company and vice versa in the Limited Liability Partnership Act, 2008. Thus there is no question infringement of any constitutional right of the Respondent.

The NCLAT held that the impugned order passed by NCLT, Chennai Bench is not sustainable in law and thus, set aside, which is allowing the merger of an Indian LLP with an Indian company without such registration.

Answer 2(b)

The present case is similar to the case of the case of *Mukut Pathak & Ors.* vs. *Union of India & Anr. W.P. (C) 9088/2018 & CM Appln. No.35006/2018*, judgement dated 04.11.2019. In this case Delhi High Court observed that principles of natural justice are only meant to supplement the law and are a kind of code of fair administrative procedure in the decision making process. However, in the present case, the administrative authorities are not required to take any qualitative decision, in as to when a director would be disqualified. Section 164(2) merely sets out the conditions, which if not complied with, would disqualify a person from being reappointed or appointed as a director. Thus, it was unable to accept that exclusion of the "audi alteram partem" rule resulted in any procedural unfairness.

Question 3

(a) M/s. Suraksha Ltd. is aggrieved by the impugned order of the National Company Law Tribunal (NCLT) Mumbai Branch, pursuant to which Zamaria Bank's

application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) was admitted, a moratorium was imposed, and an Interim Resolution Professional was appointed with specific instructions. The Zamaria Bank claimed that the Suraksha had defaulted to the tune of ₹ 28.15 crore before the NCLT. Suraksha was granted facilities consisting of cash credit, term loan, and bank guarantee totaling 14.69 lakh by Zamaria Bank on the basis of a 'sanction letter' dated December 26, 2015, in terms of which Suraksha was granted facilities consisting of cash credit, term loan, and bank guarantee totaling 14.69 lakh, repayment of which was secured by various assets.

Zamaria Bank also relied on the 'statement of accounts' to back up its claim for the sum in question. Because the petition was accepted by the NCLT, the aggrieved party filed an appeal with the National Company Law Appellant Tribunal (NCLAT). You must decide whether or not the appeal can be accepted in favour of the aggrieved party. (6 marks)

(b) The Competition Commission of India (CCI) has launched a probe into the alleged arbitrary procurement of Romania brands by Parikh Agricultural Produce Marketing Board (PAPMB) and Mojhi Agricultural Produce Marketing Board (MAPMB), in violation of the Act's Section 4 requirements. The Director General (DG) stated that PAPMB, as the sole procurer of A+ category wheat in Madhya Pradesh, with a 100 percent market share and indisputable supremacy, had purposefully neglected the importance of diverse wheat brands.

The DG found PAPMB in violation of Section 4(2)(c) of the legislation, as well as Section 4(2)(b)(i) of the act. MAPMB, on the other hand, was not found to be in violation. After a thorough deliberation, the CCI issued a show cause notice to PAPMB and MAPMB on August 30, 2018, asking them to explain why their actions should not be regarded to be in violation of section 4 of the act. An appeal was filed with the National Company Law Appellant Tribunal by a party who felt aggrieved by the same (NCLAT).

You must demonstrate whether or not the appeal before the NCLAT is maintainable under Sections 53A and 53B. (6 marks)

Answer 3(a)

The present case is similar to the case of *Shalini Publicity Creative Pvt. Ltd. (Appellant)* vs. *Dena Bank (Respondent) Company Appeal (AT) (Insolvency) No. 153 of 2019 judgement dated 18/02/2019*. In this case NCLAT observed that:

The Adjudicating Authority taking note of the fact that the One Time Settlement (OTS) proposal made by the Corporate Debtor had been rejected by the Financial Creditor and that the 'debt' and 'default' was established, proceeded to admit the application thereby initiating Corporate Insolvency Resolution Process against the Corporate Debtor. Learned counsel for the Appellant tried to make a vain attempt to assail the impugned order raising the issue of limitation. In the first place be it seen that no such plea was raised before the Adjudicating Authority. That apart, under Article 137 of the Limitation Act, the right to sue accrues when a default occurs. The period of three years, as envisaged under aforesaid Article, would therefore have to be reckoned from the date of default unless there is a continuing cause of action. It emanates from record that the

Financial Creditor relied upon various security documents connected with the sanction of loan facilities. In addition thereto reliance was also placed on notice issued under Section 13(2) of SARFAESI Act, 2002 demanding a sum of Rs.16, 31, 06,448/- as on 17th February, 2016.

Once the debt was acknowledged on 26th February, 2015 and the suit for recovery was filed before the Debts Recovery Tribunal-3, Mumbai on 19th October, 2016, the claim cannot be held to be barred by limitation. Even otherwise, the objection in regard to the claim being barred by limitation has to be determined during the Corporate Insolvency Resolution Process only. Triggering of Corporate Insolvency Resolution Process on grounds of default of a debt that's payable in law or in fact is different from admission or rejection of a claim of a creditor during such process.

Section 7 of I&B Code providing for initiation of Corporate Insolvency Resolution Process by Financial Creditor came into force on 1st December, 2016. Remedy by way of triggering of insolvency resolution process on the ground of default committed qua the financial debt was admittedly not available to a Financial Creditor prior to such date. It is not disputed by learned counsel for the Appellant that the application under Section 7 of I&B Code came to be filed by the Financial Creditor on 12th October, 2018. The triggering of Corporate Insolvency Resolution Process, therefore,` cannot be said to be beyond limitation, more so as there has been acknowledgement of debt on 26th February, 2015 and remedy for initiation of Corporate Insolvency Resolution Process in terms of Section 7 of I&B Code was not available prior to 1st December, 2016. That apart, there has been continuing cause of action as OA 1194 of 2016 filed by the Financial Creditor against the Corporate Debtor before the Debts Recovery Tribunal, Mumbai on 19th October, 2016 is still pending adjudication.

Learned counsel for the Appellant made feeble attempt to contend that the debt acknowledgement letter dated 26th February, 2015 was manipulated and fictitious and same could not be made a basis for either reckoning the period of limitation or for entertaining claim. In absence of such plea having been raised before the Adjudicating Authority besides no complaint alleging forgery, fabrication/ fudging of record being lodged, this argument must be rejected with the contempt that it deserves. On one hand the Appellant was seeking restructuring of loan in terms of RBI Guidelines seeking more time for One Time Settlement (OTS) but on the other hand alleges fabrication and manipulation. What prompted the Corporate Debtor to seek restructuring of loan through One Time Settlement is explainable on no hypothesis other than the one that the Corporate Debtor had committed default qua the outstanding amount which was payable.

For the foregoing reasons, NCLAT of the considered opinion that the appeal is devoid of any merit. The appeal is accordingly dismissed.

Answer 3(b)

Hon'ble NCLAT vide judgment dated 12.03.2020 in *Uttarakhand Agricultural Produce Marketing Board* vs. *CCI & Ors*. held that it is clear from the impugned order that Competition Commission of India (CCI) issued show cause notice to GMVNL & KMVNL to show cause as to why their conduct should not be held to be in contravention of the provisions of Section 4(2) (b) and 4(2)(c) read with Section 4(1) of the Competition Act. The Informant alleged that the opposite parties including appellant herein had abused their dominant position in contravention of the provisions of Section 4 of the Act and further alleged that the opposite parties including the appellant herein took advantage of their monopoly and abused their dominance. No specific finding had been given by the CCI against UAPMB.

Section 53A of the Competition Act relate to establishment of Appellate Tribunal which can hear and dispose off the appeal against order passed under sub-section (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act.

Section 53B of the Act allows an enterprise aggrieved by any direction, decision or order referred to in clause (a) of Section 53A to prefer an appeal to the Appellate Tribunal.

Further, the NCLAT observed that it was also clarified by the CCI in its order that nothing stated therein shall tantamount to a final expression of opinion on the merits of the case and the final view would be taken after considering the replies and arguments of the parties and the material on record. In view of the aforesaid fact, it was held by NCLAT that the impugned order did not amount to passing of an order under Section 27 of the Act and thereby the appeal under Section 53B read with Section 53A was not maintainable.

Question 4

(a) *A wary purchaser of a secured asset is caught in the litigious cross fire between the borrowers and the banker. Spent his money, burnt his fingers (as he claims), and now wants to salvage the situation. The purchaser wants to withdraw from the sale and get his money back. But he faces uncertainty. After suffering an adverse order before the DRT, the Bank has filed an appeal before the DRAT, Chennai. And its disposal assumes importance for the purchaser to press his claim for refund. He wants the Appellate Tribunal to dispose of the appeal early. Now the question is, can this Court, in Kerala, assume supervisory jurisdiction over the Appellate Tribunal in Chennai, Tamil Nadu ?*

A question of territorial jurisdiction must be resolved. *(6 marks)*

(b) *Rajula Ltd. and Drink Ltd. have reached an agreement for the building of a soft drink bottling factory. Drink Ltd. was supposed to supply the concentrates for making soft drinks. According to the deal between Rajula Ltd. and Drink Ltd., the soft drink would be sold in seven districts across Gujarat.*

The Drink Ltd. cancelled Rajula Ltd.'s agreement. Commercial manufacturing at the plant ended in 2010, and Rajula Ltd. filed a lawsuit. After subtracting ₹18.10 lakh payable by the Rajula Ltd. to the Drink Ltd. as consultant expenses, the learned Single Judge ruled the Suit, awarding damages for loss of projected earnings and plant installation costs. Drink Ltd. was ordered to pay Rajula Ltd. an amount of ₹8.48 crore plus 10% interest from the date of the suit until payment. The Division Branch reversed the decree and dismissed the case on appeal. As a result, an appeal to the Supreme Court has been filed.

You are required to comment whether the Rajula Ltd., is entitled for damages for loss of anticipated profit ? *(6 marks)*

Answer 4(a)

The situation given in the question is similar to the case of *Thomas Chacko (Appellant)* vs. *The Chief Manager, Bank of India & Ors (Respondent)*.

Decision : Petition allowed.

Reason:

Plainly read, Article 227 of the Constitution of India confers on every High Court superintendence over all courts and tribunals throughout the "territories" over which the High Court exercises its jurisdiction. Then, should we reckon "territories" in the literal, geographical sense or in the figurative, legal sense as fiction.

In *Ambica Industries* v. *Commissioner of Central Exercise (2007) 6 SCC 769*, the appellant carried on business at Lucknow. A dispute involving the appellant, however, arose before the CESTAT, New Delhi. The Tribunal exercises its jurisdiction over the cases from the State of Uttar Pradesh, National Capital Territory of Delhi, and the State of Maharashtra. Against the Tribunal's order, the appellant filed an appeal under Section 35G of the Central Excise Act before the Delhi High Court. A Division Bench held that it had no territorial jurisdiction; it dismissed the appeal. So the matter reached the Supreme Court.

In the above factual backdrop, Ambica Industries has held that as for Article 227 of the Constitution of India, as also Clause (2) of Article 226, the High Court exercises its discretionary jurisdiction over the orders passed by the Subordinate Courts within its territorial jurisdiction. And even if any part of the cause of action has arisen within its territory that will suffice. But this principle cannot be applied, holds Ambica Industries, when the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State. Then, "the High Court situated in the State where the first court is located" should be the proper forum.

Without much ado, I may hold that Ambica Industries's assertion clinches the issue: when the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State, then the High Court in the State where the first court is located should be the proper forum. Indeed, here the first or the primary forum is the DRT, Ernakulum. So this Court can eminently exercise its supervisory jurisdiction over the DRAT, Chennai. Here, the petitioner wants a direction to the Appellate Tribunal to dispose of the appeal early.

That said, this Court cannot be oblivious to the docket pressure the Appellate Tribunal faces. Nor can it set impracticable deadlines, for adjudication is not akin to answering a multiple-choice question paper. It is much more. A back-breaking, brain-racking exercise.

So I queried with the learned Central Government Counsel about the Appellate Tribunal's convenience and the feasibility of an early disposal. He has, presumably on instructions, submitted that the Appellate Tribunal will dispose of the AIR (SR) No.460 of 2017 in three months' time.

Under these circumstances, I hold that the DRAT, Chennai, will dispose of the AIR (SR) No.460 of 2017 expeditiously in three months

Answer 4(b)

The facts given in the question are similar to the case *Kanchan Udyog Ltd. (Appellant)* vs. *United Spirits Ltd. (Respondent), SC dated 19.06.2017* wherein the bottler's agreement was terminated by the respondent. Commercial production at the plant ceased and the suit was instituted by the appellant in 1990. The learned Single Judge decreed the Suit, awarding damages towards loss of anticipated profits, and towards costs for installation of the plant. But the Division Bench in appeal reversed the decree, and dismissed the Suit. Hence the appeal was made to the Supreme Court.

Appeal was dismissed by the Supreme Court for the following reasons:

Despite of huge expenditure on advertisement by respondent, the appellant incurred very less expenditure. The fact that it was unable to pay for the concentrates seeking deferred payment, acknowledgement on 09.05.1988 that it would continue to suffer loss for the next six years upto 1992-93 seeking long term credit for five years for supply of concentrates and its acknowledgement in letter dated 27.04.1987 that due to "many factors already discussed with you we have not been able to run the factory and the sales of our product have not picked up in the market", and not to press for payment of consultancy fees, failure to deploy adequate manpower as per its own projections demonstrates the poor financial condition of the appellant as the prime reason for its inability to run the plant and earn profits.

In the facts of the present case, it cannot be held that the breach by the respondent was the cause, much less the dominant cause for loss of anticipated profits by the appellant.

The appellate court with reference to evidence has adequately discussed that the appellant failed to take steps to mitigate it losses under the Explanation to Section 73 of the Act. We find no reason to come to any different conclusion from the materials on record. If concentrates were available from M/s. VEC, the appellant had to offer an explanation why it stopped lifting the same after having done so for nearly a year, and could have continued with the business otherwise and earned profits. It could also have taken steps to sell the unit after its closure in May, 1989 rather than to do so belatedly in 1996. No reasonable steps had been displayed as taken by the appellant for utilisation of its bottling plant by negotiations with others in the business. Nothing had been demonstrated of the injury that would have been caused to it thereby.

That leaves the question with regard to reliance loss and the expectation loss. Whether the two could be maintainable simultaneously or were mutually exclusive? In Pullock & Mulla, 14th Edition, Volume II, page 1174, the primary object for protection of expectation interest, has been described as to put the innocent party in the position which he would have occupied had the contract been performed. The general aim of the law being to protect the innocent party's defeated financial expectation and compensate him for his loss of bargain, subject to the rules of causation and remoteness. The purpose of protection of reliance interest is to put the plaintiff in the position in which he would have been if the contract had never been made. The loss may include expenses incurred in preparation by the innocent party's own performance, expenses incurred after the breach or even pre-contract expenditure but subject to remoteness.

In view of the conclusion, that the appellant was not entitled to any expectation loss towards anticipated profits, for reasons discussed, any grant of reliance loss would tantamount to giving a benefit to it for what was essentially its own lapses. There are no allegations of any deficiency in the plant.

The aforesaid discussion leads to the inevitable conclusion that the appellant had failed to establish its claim that the breach by the respondent was the cause for loss of anticipated profits, that the profitability projection in its loan application was a reasonable basis for award of damages towards loss of anticipated profits. The appellant had failed to abide by its own obligations under Exhibit 'C' and lacked adequate infrastructure, finances and manpower to run its business. It also failed to take reasonable steps to mitigate its losses. The appeal lacks merit and is dismissed

For the above stated reasons, the appeal by Rajula Ltd. would be dismissed by the Supreme Court and he won't be entitled for damages for loss of anticipated profit.

Question 5

(a) *'Dakshinarayan' was a Surat restaurant with rented premises. It was well-known, with award-winning chefs and attractively decorated premises. Executive lunches and dinners accounted for a large portion of the company's revenue. Dakshinarayan suffered economic losses after the opening of 'Trusty,' another outstanding restaurant in the area, and the business eventually went bankrupt.*

Attempts to decrease the rent or sell the firm were both fruitless. Suppliers of food, beverages and utilities were owed ₹ 67,50,000 in outstanding supplies from the previous 45-60 days. There were 50,000 in rental arrears owed to landlord Rajashekar for one month. Rajashekar was given three months' advance rent, with one month's rent as security and one month's rent as advance.

'Saran Bank' was another secured creditor for Dakshinarayan. Because the accounts were kept up to date, the bank indicated that it did not want to appoint a receiver or file for insolvency. Kakubhai ran Dakshinarayan as a private proprietorship. He had a ten-person team, which included a chef, an assistant chef, six waiters, and two housekeepers. These employees' incomes have been cut in half for the past three months.

In this circumstance, who has the authority to start the insolvency process ? Justify your actions. *(6 marks)*

(b) *Since the last ten years, Satya Ltd. has been misreporting its financial accounting accounts, which have been duly audited by the Practicing Chartered Accountants (PCA) Partnership business. Satya had no choice but to declare the firm bankrupt when the company's financial situation deteriorated to the point that it was unable to pay any current liabilities as well. During the discussion and under pressure from stakeholders, Satya Ltd. published a press release claiming that there is a discrepancy between actual and reported earnings over the last decade due to accounting irregularities.*

During the course of the forensic audit, it was discovered that the auditing firm's independence had been compromised by a huge audit fee and hefty consultant income. Because Satya was such a significant client for PCA, it had intentionally signed off on incorrect statements to protect the company's management. The examination also discovered a number of serious internal control flaws, including *a lack of effective management oversight of the external reporting process and a disregard for applicable accounting standards.*

Can the provision of auditor rotation be used to circumvent such situations ? Examine the situation critically. *(6 marks)*

Answer 5(a)

Part III of the Insolvency and Bankruptcy Code, 2016 deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms whereby section 78 of the IBC stipulates Application of the Part as follows. –

This Part shall apply to matters relating to fresh start, insolvency and bankruptcy of individuals and partnership firms where the amount of the default is not less than one thousand rupees: Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one lakh rupees.

Dakshinarayan is run by Kakubhai as properitorship. So, this Part applies to him.

Therefore, for applicability of this part, default of prescribed limit by the debtor is necessary.

Default is defined in PART I of the Code which applies to whole of the Code. As defined in section 3(12) of the Code, "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;

Now, if go by facts of the case to check whether there has been made any default by the proprietor:

1. Suppliers of food, beverage and utilities were owed INR 67,50,000 in outstanding supplies from the previous 45-60 days but it is not stated that the same has become due and payable and is defaulted by Kakubhai, running Dakshinarayan as proprietorship.
2. No default has been made w.r.t. rent as landlord has three month's rent in advance and only one month rent is due.
3. No default has been made w.r.t. Saran Bank, secured creditor.
4. Ten person's team (employees') incomes have been cut but not defaulted.

Going by the above facts, no insolvency resolution process can be initiated against Kakubhai, running Dakshinarayan as proprietorship as no default has been made yet.

It may be noted that section 6 of the Insolvency and Bankruptcy Code, 2016 provides that where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner provided under Chapter II of Part II of the Code.

Answer 5(b)

An important issue highlighted by the case is rotation of auditors. 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 more than 10 yrs. 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.

Section 139(2) read with Rule 5 of the Companies (Audit and Auditors) Rules, 2014 provides that no listed company or a company belonging to the following classes of companies excluding one person companies and small companies:-

I. all unlisted public companies having paid up share capital of rupees 10 crore or more;

II. all private limited companies having paid up share capital of rupees 20 crore or more;

III. all companies having paid up share capital of below threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of rupees 50 crore or more shall appoint or re-appoint –

- an individual as auditor for more than one term of five consecutive years; and
- an audit firm as auditor for more than two terms of five consecutive years.

Also, an individual auditor who has completed his term of five consecutive years shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term. An audit firm which has completed two terms of five consecutive years shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term.

Provided further that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

Therefore, the provision of auditor rotation as stated above can be used to circumvent situations given in the question.

Question 6

Babul Sharma, a partner of the Partnership firm, M/s. Jivatma Corporation, had been agreed upon and submitted his immovable property title deed, i.e., his house, to the Manjushri Banker, to support the firm to availl the loans from the Manjushri

Banker. The said mortgage deed happened in 23rd April, 2017. Later on, as on 12th December, 2019; he retired from the firm, on account of his ill health. As on 22nd December, 2020; Jivatma Corporation seeks mandamnus to Manjushri Banker to release the mortgage title deeds of the property of the Babul Sharma, and to discharge the Babul from the guarantee furnished by the Babul, for repayment of the dues of the M/s. Jivatma Corporation to the Manjushri.

In this regard, it's worth noting that, prior to filing the current petition, the Babul had filed a suit against the other Jivatma partners, claiming specific performance of the agreement contained in the deed of reconstitution of partnership to have the Babul's security furnished, in which the Manjushri Bank is also a party.

You are required to make a decision based on legal considerations as to whether the guarantee should be released by Manjushri Bank or not ? (12 marks)

Answer 6

The facts of the case given in question are similar to the case of *Sandeep Gupta* vs. *Punjab National Bank & Ors, Delhi High Court, Judgement dated 20.01.2016*. Petition was dismissed in the above case citing the following reasons:

The said suit was admittedly instituted prior to the institution of this petition. The petition is not maintainable on this ground alone. The petitioner cannot maintain a petition under Article 226 of the Constitution of India for the relief for which the petitioner, prior to instituting the writ petition, has already availed of the relief under the civil law.

Supreme Court in *Jai Singh* vs. *Union of India (1977)1 SCC* 1 held that the appellant therein having filed a suit in which the same question as the subject matter in the writ petition was agitated could not be permitted to pursue two parallel remedies in respect of the same matter at the same time.

Similarly in *Bombay Metropolitan Region Development Authority, Bombay* vs. *Gokak Patel Volkart Ltd. (1995) 1 SCC 642* finding that the writ petitioner had availed of the alternative statutory remedy it was held that the writ petition should not have been entertained. Yet again in *S.J.S Business Enterprises (P) Ltd* vs. *State of Bihar (2004) 7 SCC 166* it was held that if a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the court to entertain the writ petition. This rule was held to be based on public policy. Reference in this regard can also be made to *K.S. Rashid and Son* vs. *Income Tax Investigation Commission AIR 1954 SC 207*, *Madura Coats Limited* vs. *Union of India (UOI) 112 (2004) DLT622*.

Even otherwise, the respondent no.1 Bank which is the trustee of public monies cannot be left high and dry by granting the relief of releasing the security of the outgoing partners without the continuing / new partners substituting the said security. The petitioner prior to signing the deed of reconstitution of firm ought to have ensured that the security furnished by him is released, if that was the agreement with the respondents No.3 & 4.

Therefore in the given question too, guarantee by Babul Sharma should not be released by Manjushri Bank for the reasons cited above.

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BANKING – LAW & PRACTICE

(Elective Paper 9.1)

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *Answer ALL Questions.*

Question 1

Read the following case study and answer the questions that follow :

Non-Banking Financial Companies (NBFCs)

The Non-Banking Finance Companies (NBFCs) ecosystem in our country is a place of immense diversity and complexity as well. There are more than 9,000 NBFCs across different categories focussed on a diverse set of products, customer segments, and geographies. As of March 31, 2021, the NBFC sector (including HFCs) has assets worth more than ₹54 lakh crore, equivalent to about 25% of the asset size of the banking sector. Therefore, there can be no doubt regarding its significance and role within the financial system in meeting the credit needs of a large segment of society. Over the last five years the assets of the NBFC sector have grown at a cumulative average growth rate of 17.91 percent. Demandside pull or supply-side push which is contributing to the growth of the NBFC sector. This distinction becomes important as it has significant implications for the efficiency of the sector. Conventional wisdom tells that growth consequential to demand-side pull factors translates into increased efficiency and better services to the customers. Supply-driven growth could, on the other hand, arise out of entry by entrepreneurs who would like to enter financial services industries but are unable to meet the scale and stringent norms meant for banks.

The preamble to the Reserve Bank of India Act, 1934, enjoins on the Bank, to operate the currency and the credit system of the country to its advantage. Thus, the promotion of an efficient financial intermediation system, which facilitates adequate credit flow to every segment of the society, more so to the financially disadvantaged population is an embedded goal for the Reserve Bank.

The non-banking financial sector assumes an important role in the process as it is a valuable source of financing for many firms, micro, and small units as well as individuals and small business, facilitating competition and diversity among credit providers. Further, niche NFBCs fulfill the unmet and exclusive credit needs of various segments such as infrastructure, factoring, leasing, etc. NBFC-MFIs reach out to the underprivileged sections of society. Along with banking, which is the primary channel of financial intermediation, NBFCs have been increasingly playing a significant complementary role in financial intermediation and provision of last-mile delivery of financial services.

Non-banking financial entities, by their regulatory design, enjoy the freedom to undertake a wider spectrum of activities as compared to banks for which the permissible activities are enshrined in the statute itself. This freedom, coupled with *a light touch regulatory prescription, gives them a greater risk-taking capacity to engage in financial intermediation in the segments which are often underserved by other players. Hence, even with large universal banking's reach across the country, the NBFC sector can create a space for itself with customized services with a local feel.*

Apart from furthering the financial inclusion agenda, the added advantage of a well-functioning NBFC sector is that it can promote resilience in the financial system by being innovative and agile in offering tailored financial products and solutions as a supplemental source of credit alongside banks. It has to be noted that many recent financial sector credit delivery innovations, for example, micro-credit, were popularised by non-banking financial entities. This capability and freedom to innovate spurs a competitive advantage in the financial services sector with the ultimate beneficiary in the process being the customer.

However, the reputation of the non-banking financial sector has been dented in recent times by the failure of certain entities due to idiosyncratic factors. The challenge, therefore, is to restore trust in the sector by ensuring that few entities or activities do not generate vulnerabilities that go undetected and create shocks and give rise to systemic risk through their interlinkages with the financial system. Forestalling and where necessary, decisively resolving such episodes becomes a key focus of our regulatory and supervisory efforts.

The Global monitoring report on Non-banking Financial Institution (NBFI) by Financial Stability Board (FSB) classifies non-banking financial activities into five economic functions. (i) collective investment vehicles, (ii) loan companies which depend on short-term funding, (iii) market intermediaries, (iv) entities which engage in the facilitation of credit creation (such as credit insurance companies, financial guarantors) and (v) entities undertaking securitization-based credit intermediation. Globally, the collective investment vehicles are the most dominant category of non-banking financial activity and account for 73 percent of the global NBFI sector. In the global context, the second function of NBFIs i.e., loan companies depending on short-term funding is a small segment constituting just around 7 percent of the total NBFI sector, but in India, the non-banking sector is largely into direct credit intermediation.

The regulatory challenge in India is thus different with the focus on designing prudential regulations specifically meant for lending activities of NBFCs without compromising on their operational flexibility.

Over the years, the NBFC sector has evolved in terms of its size, operations, technological sophistication with entry into newer areas of financial services and products. To keep pace with the same, regulations have also evolved to address various accompanying risks and concerns. Reserve Bank had introduced an element of the differential regulation way back in 2006 when the regulatory framework for systematically important NBFCs was strengthened. Further in 2014, a revised regulatory framework was announced and many of the regulatory parameters with regard to net owned fund, prudential requirements, and corporate governance standards were strengthened.

The regulatory framework for NBFCs has remained a work in progress and it continues to be so. The fundamental premise has, however, been to allow operational flexibility to NBFCs and help them grow and develop expertise.

Based on the above information, answer the following questions :

(a) What is a Non-Banking Financial Company (NBFC) ? (4 marks)

(b) How does NBFCs differ from Banks ? (4 marks)

(c) Is it necessary that every NBFC should be registered with RBI ? (4 marks)

(d) Why are certain NBFCs classified as systemically important NBFCs ? (4 marks)

(e) Give an example of Harmonisation of different categories of NBFCs (4 marks)

(f) How are Core Investment Companies (CICs) different from other NBFCs in terms of regulations ? (4 marks)

(g) What action can be taken against persons/financial companies making a false claim of being regulated by the Reserve Bank ? (4 marks)

(h) Explain the terms 'owned fund' and 'net owned fund' about NBFCs. (4 marks)

(i) NBFCs are charging high-interest rates from their borrowers. Is there any ceiling on the interest rate charged by the NBFCs to their borrowers ? (4 marks)

(j) Whether NBFCs can accept deposits from NRIs ? (4 marks)

Answer 1(a)

A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act, 1956/2013 engaged in the business of loans and advances, acquisition of shares / stocks / bonds / debentures / securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or providing any services and sale / purchase / construction of the immovable property. A non-banking institution which is a company and has the principal business of receiving deposits under any scheme or arrangement in one lump sum or installments by way of contributions or in any other manner is also a Non-Banking Financial Company (Residuary Non-Banking Company).

Alternative Answer 1(a)

Section 45 I(f) of Reserve Bank of India (Amendment) Act, 1997 defines a Non-Banking Financial Company as:

(i) A financial institution which is a company;

(ii) A non-banking institution which is a company with principal business of receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;

(iii) Such other non-banking institution or class of such institutions, as the Reserve Bank with the previous approval of the Central Government may specifies by notification in the Official Gazette.

Answer 1(b)

Non-Banking Financial Company (NBFC) differ from Banks on following grounds:

i. NBFC cannot accept demand deposits (cannot open current or savings account but with specific authorization by RBI can accept term deposits for minimum period of 12 months and maximum period of 60 months); whereas banks can accept the same.

ii. NBFCs do not form part of the payment and settlement system and cannot issue cheques drawn on itself, whereas banks can do so;

iii. Deposit insurance facility of Deposit Insurance and Credit Guarantee Corporation is not available to depositors of NBFCs, unlike in case of banks.

iv. An NBFC is not required to maintain Reserve Ratios (CRR, SLR etc.). However minimum level of liquid assets to be maintained is 15% of public deposits.

v. An NBFC cannot indulge Primarily in Agricultural, Industrial Activity, Sale-Purchase and Construction of Immovable Property.

Answer 1(c)

In terms of Section 45-IA of the Reserve Bank of India Act, 1934, no Non-Banking Financial Company can commence or carry on the business of a non-banking financial institution without obtaining a certificate of registration from the Bank and without having a specified Net Owned Funds.

However, in terms of the powers given to the Bank, to obviate dual regulation, certain categories of NBFCs that are regulated by other regulators are exempted from the requirement of registration with RBI viz. Venture Capital Fund / Merchant Banking companies / Stockbroking companies registered with SEBI, Insurance Company holding a valid Certificate of Registration issued by IRDAI, etc.

Answer 1(d)

Non-Banking Financial Company (NBFC) whose asset size is Rs. 500 crore or more as per the last Audited Balance Sheet is considered systemically important NBFCs. As the activities taken by systemically important NBFCs are important for financial stability of the overall economy.

NBFCs are classified as systematically important due to:

- Larger public interest are involved
- Financial system to the advantage of the country
- Protection of the interest of investors and depositors

Answer 1(e)

With effect from February 22, 2019, the RBI has decided to harmonise three different categories of NBFCs into one, based on the principle of regulation by activity rather than regulation by entity.

Accordingly, three categories of Non-Banking Financial Companies (NBFCs), that is, Asset Finance Companies (AFCs), Loan Companies (LCs) and Investment Companies (ICs) are to be combined into a single category NBFC Investment and Credit Company (NBFC-ICC).

Answer 1(f)

The Reserve Bank of India (RBI) on August 13, 2020 announced stricter guidelines for Core Investment Companies (CICs), mandating more disclosures, better risk management and a simpler group structure.

While computing Adjusted Net Worth (ANW), the amount representing any direct or indirect capital contribution made by one CIC in another CIC, to the extent such amount exceeds 10% of Owned Funds of the investing CIC, shall be deducted.

Answer 1(g)

It is illegal for any financial entity or unincorporated body to make a false claim of being regulated by the Reserve Bank of India to mislead the public to collect deposits and is liable for penal action under the Indian Penal Code. Information in this regard may be forwarded to the nearest office of the Reserve Bank of India and the Police.

Answer 1(h)

"Owned Fund' means the aggregate of the paid-up equity capital, preference shares which are compulsorily convertible into equity, free reserves, balance in share premium account and capital reserves representing surplus arising out of sale proceeds of asset, excluding reserves created by revaluation of an asset, after deducting therefrom accumulated balance of loss, deferred revenue expenditure, and other intangible assets.

'Net Owned Fund' is the amount as arrived at above, minus the amount of investments of such company in shares of its subsidiaries, companies in the same group and all other NBFCs, and the book value of debentures, bonds, outstanding loans, and advances including hire purchase and lease finance made to and deposits with subsidiaries and companies in the same group, to the extent it exceeds 10% of the owned fund.

Answer 1(i)

Reserve Bank of India has deregulated interest rates to be charged to borrowers by financial institutions (other than NBFC - Micro Finance Institution). The rate of interest to be charged by the company is governed by the terms and conditions of the loan agreement entered into between the borrower and the NBFCs. However, the NBFCs have to be transparent and the rate of interest and manner of arriving at the rate of interest to different categories of borrowers should be disclosed to the borrower or customer in the application form and communicated explicitly in the sanction letter, etc.

Answer 1(j)

Non-Banking Financial Companies (NBFCs) cannot accept deposits from NRIs except deposits by debit to Non- Resident Ordinary (NRO) account of Non-Resident Indian

(NRI) provided such amount does not represent inward remittance or transfer from Non-Residential External (NRE)/FCNR (B) account. Existing NRI deposits can be renewed.

Question 2

Answer briefly the following questions :

(a) What is non-fund based financing of banks ?

(b) Why are the Nostro accounts maintained by banks ?

(c) Which Committees of the Bank Boards are constituted with focus on strengthening governance standards in banks ?

(d) Which three schemes are integrated into Reserve Bank Integrated Ombudsman Scheme, 2021 ?

(e) A voucher is essentially the backup document/proof for a transaction. How is it important for banking transactions ?

(f) What is the concept of 'Legal Entity Identifier' for Large Value Transactions in Centralised Payment Systems ? *(2 marks each)*

Answer 2(a)

Non-Fund Based Credit Facilities : Non-fund Based facilities are those, which do not involve outflow of bank's funds at the time of sanction. Non-fund-based limits may turn into fund-based facility on due date /occurrence of the specified event like devolvement of bills under LC, invocation of Bank Guarantee, etc. The types of Non-fund based credit facilities are given below:

(i) Bank Guarantees

(ii) Letter of Credit (LC)

(iii) Factoring

(iv) Commercial Papers (CP)

(v) Bills Purchase and Discount

Answer 2(b)

Nostro Accounts : Nostro Account is maintained by Indian banks in foreign countries in the currency of that country where they have operations for facilitating the easy clearing of their transactions. These accounts are maintained with their correspondent banks overseas who in turn act as their clearing bank in the foreign country where the Indian bank has its base.

Answer 2(c)

Committees of the Bank Boards constituted with focus on strengthening Governance standards in banks:

- Audit Committee of the Board (ACB).
- Risk Management Committee of the Board (RMCB).
- Nomination and Remuneration Committee (NRC).

Answer 2(d)

Three Ombudsman schemes integrated under Reserve Bank Integrated Ombudsman Scheme, 2021 are as follows:

(i) The Banking Ombudsman Scheme, 2006;

(ii) The Ombudsman Scheme for Non-Banking Financial Companies, 2018; and

(iii) The Ombudsman Scheme for Digital Transactions, 2019.

Answer 2(e)

A voucher is essentially the backup document/proof for a transaction. The banks when debit or credit the customer's or other accounts, the customers or their details of the transaction is noted on a piece of paper (approved format by the bank) which is called as voucher. Examples – paying-in-slip, cheques, office debit and credit vouchers used for their internal transactions (these do not have counterfoils). They serve as documentary evidence for a transaction. Office debit/credit vouchers are to be authenticated by sanctioning authority before the transaction is entered the system.

Answer 2(f)

Legal Entity Identifier (LEI) : The Legal Entity Identifier (LEI) is a 20-digit number used to uniquely identify parties to financial transactions worldwide. It was conceived as a key measure to improve the quality and accuracy of financial data systems for better risk management post the Global Financial Crisis. It has now been decided to introduce the LEI system for all payment transactions of value 50 crore and above undertaken by entities (non-individuals) using Reserve Bank-run Centralised Payment Systems viz. Real Time Gross Settlement (RTGS) and National Electronic Funds Transfer (NEFT).

Question 3

(a) While discounting "Trade Bills" by the Banks, the Quality of such bills is to be checked. Explain the various factors to determine the Quality of Trade Bills. *(3 marks)*

(b) How the 'acknowledgement of debt by borrower' helps banks in enforcing money suits while the document is Time-barred ? *(3 marks)*

(c) Read the following statements carefully. State whether True/False with reasons:

(i) Business Correspondent (BCs) model is useful for financial inclusion.

(ii) In case the banker refuses payment wrongfully, then he is liable only to the drawer of the cheque and not to any endorsee or holder.

(iii) Cyber Crime includes all unauthorized access of information and breaks of security like privacy, password, etc., with the use of the internet.

(iv) Securities and Exchange Board of India has created a Central Repository of Information on Large Credits.

(v) A bank cannot grant any loans and advances on the security of its own shares.

(vi) SMA stands for 'Standard Mention Account'. *(1 mark each)*

Answer 3(a)

Discounting of Trade bills or Credit Facility against accounts receivables or Debtor Financing is a source of short-term funding, where the borrower can use their accounts receivables as collateral to raise funds from a bank. The bank would typically lend a fraction e.g., 80% or 90% of the face value of the receivables. The fraction varies depending on the quality of receivables the better the quality, the higher the fraction. The borrower still owns the receivables and is responsible for collecting from their debtors. A business should only use - Account Receivable Loans' if it keeps a good relationship with its debtors and is sure of the payments. Otherwise, there is a chance that a business might get squeezed between the Bank and the Debtor.

Quality of Receivables : Quality of receivables is key in making financing decisions by Banks. Below are a few key factors that decide the quality of a basket of accounts receivables:

1. *Credit worthiness of the Debtor* : The credit quality of the debtor is essential, as it is ultimately the debtor who makes the payment. So, a debtor with a poor credit rating reduces the quality of the basket and increases the cost of borrowing in terms of interest or reduction of the amount being lent.

2. *Duration of Receivables* : The duration, or age, of receivables, is the number of days they are outstanding. Long-duration receivables are considered to be of lower quality because the probability of the receivables being paid goes down. Generally, if a receivable is outstanding for more than 90 days, it is treated as a default. Hence, the shorter the duration of the basket, the lower the cost of financing.

3. *Industry of the Original Account* : The industry to which the original debtor belongs is important, as the macro trends within that industry affect the ability of the debtor to make good on their obligations. It is also important because financial institutions may want to restrict their exposure to certain industries.

4. *Quality of Documentation* : The quality of documentation that is associated with the account is also very important, as better documentation quality provides clarity of contracts. It also provides the basis for legal recourse in case of a default. Thus, good and clear documentation improves the quality of the receivable basket.

Answer 3(b)

The documents taken by banks for a credit facility, do not have perpetual life. The Limitation Act, 1963 prescribes limitation for different types of documents. Limitation period is the time limit within which the parties to a legal agreement, can take action in a court of law to enforce their legal rights. The life of a loan documents like Demand Promissory Note (DPN) is three years (from the date on it). Once the document is time-barred then the bank will not be able to enforce money suit to recover its due through the Court of Law (known as the statute of limitations). However, we need not assume that the borrower doesn't still owe it to the creditor because the loan document (DPN) is time-barred. Banks have many other ways to find out whether they can still enforce the recovery suits against the defaulter.

The acknowledgement of liabilities obtained from the borrower before the expiry of the limitation period grants a fresh period of limitation to the loan documents under Section 18 of the Limitation Act, 1963. Section 25(3) comes to the rescue of time-barred loan documents, where the period of limitation has already been expired. The acknowledgement of debt that was made within the period of limitation shall be treated as a promise to pay and the same can be invoked by the application of Section 25 (3) of the Contract Act, 1872. A fresh period of limitation starts from the date of acknowledgement of debt.

It is pertinent to mention that piece of evidence such as letters / e-mails (where liability is admitted), liability mentioned in the balance sheet, part payment of a loan made by cheque/ cash amount to an acknowledgement of debt. Acknowledgement of debt by the party during the limitation period of loan documents would automatically extend the validity period of the loan document for a further period of 3 years from the date of such acknowledgement provided that the same is directly or indirectly relates to the debt. A balance sheet signed by the authorized person. A balance confirmation letter also serves as acknowledgement of debt.

Answer 3(c)

i. *True* : Business Correspondents is appointed by the banks as agents for providing banking services, it helps in facilitating financial inclusion in the country.

ii. *True* : A bank is liable for dishonour of the cheque, to the drawer (his customer) only and not to the payee or the holder of the cheque as there is no privity of contract between the bank and the payee or the holder.

iii. *True* : Cybercrime refers to any illegal activity carried out using computers or the internet.

iv. *False* : This is created by Reserve Bank of India not by Securities and Exchange Board of India.

v. *True* : In terms of Section 20(1) of the Banking Regulation Act, 1949, a bank cannot grant any loans and advances on the security of its own shares.

vi. *False* : It is Special Mention Account

Question 4

(a) *An Exporter in India wishes to Discount Trade Bill of SGD of 10,000.*

***Interbank transaction**, India spot rate : USD 1 $ = 74.10/20 Rupees and Forward rate at the time of contract.*

1 Month	*0.15/0.10*
2 Months	*0.25/0.20*
3 Months	*0.45/0.30*

***Buy transaction** : Forward rates USD VS INR. Interbank rate, consider margin, In India, we buy dollars and send rupees (Buying rate).*

***Singapore spot rate** : USD 1 $ = 1.35/36 SGD and Forward rate at the time of contract.*

1 Month	*0.03/04*
2 Months	*0.04/05*
3 Months	*0.05/06*

***Sell Transaction** : Forward rates USD VS SGD, in Singapore we sell the dollar and take SGD (Selling Rate).*

The Exchange Margin is 0.15%.

The interest rate is 5%.

The transit period is 25 days.

The rate of interest is 8%.

What is the amount credited in Indian rupees to the exporters' current account ? (6 marks)

(b) *Consider a ₹1,000 par value bond, whose current market price is ₹850/-. The bond carries a coupon rate of 8 percent and has a maturity period of nine years. What would be the rate of return that an investor earns if he purchases the bond and holds it until maturity ? (6 marks)*

Answer 4(a)

Step 1 : Calculation of USD to Rupees interbank = Spot Rate- Swap points- Margin

= 74.20 - 0.10 - 0.15%

= 74.14 - 0.10 - 0.11 = 73.99

Step 2 : Calculation of USD to SGD = Spot Rate + Swap points

= 1.36 + 0.04 = 1.40

Step 3 : Calculation of Cross Rate = INR/USD = INR/SGD*USD/SGD

73.99 = INR/SGD*USD/SGD

73.99 = INR/USD*1.40

INR/SGD = 73.99/1.40

= 52.85

Step 4 : Calculation of amount to be credited to Exporter's Current Account (Before Interest)

= 10,000*52.80 = Rs.5,28,000

Step 5 : Calculation of Interest at the rate of 8% for 25 days = 5,28,000*0.08*25/365= 2,893

The amount to be Credited (after interest) in Indian rupees to the Exporter's Current Account : Rs. 5,28,000 - 2,893 = Rs. 5,25,107.

Working note:

Note 1: The transit period of 25 Days is considered as 1 Month for Buy and Sell transaction.

Answer 4(b)

If Cost of Debt (kd) is the yield to maturity then,

850 = 80 (PVIFA kd per cent, 9 Years) + 1,000 (PVIF kd, 9 Years)

= 80 (PVIFA 12 per cent, 9) + 1,000 (PVIF 12 per cent, 9)

= 80 x 5.328+ 1,000 x (0.361)

= 426.24 + 361 = Rs. 787.24

Since the above value is less than Rs. 850, a lesser rate of cost of debt (kd) may be considered i.e., 10%.

= 80 (PVIFA 10 per cent, 9) + 1,000 (PVIF 10 per cent, 9) = 80 x 5.759 + 1.000 * 0.424 = 884.72

From the above, it is clear that kd lies between 10% and 12%.

Now use linear interpolation in the range of 10% and 12%. Using it, find that kd is equal to the following:

(884.72-850)/(884.72-787.24)

34.72 / 97.48 = 10% +0.71=10.71%

Therefore, the yield to maturity is 10.71%

Question 5

(a) In what forms the credit risk arises for banks ?

(b) Why is there increasing importance of credit risk modelling ?

(c) In the measurement of Credit Risk, models may be classified into three different dimensions. What are such dimensions ? *(4 marks each)*

Answer 5(a)

Credit risk may take the following forms:

i. *In the case of Direct Lending* : Non-payment of principal / and or interest amount.

ii. *In the case of Guarantees or Letters of Credit* : Not meeting financial commitments by constituents on crystallization of these contingent liabilities.

iii. *In the case of Treasury Operations* : Default or cessation in payment or series of payments that have fallen due from the counter parties under respective contracts.

iv. *In the case of Securities Trading Businesses* : Non settlement of funds/ securities.

v. *In the case of Cross-Border Exposure* : Embargo or restrictions of free transfer of foreign currency funds imposed by foreign governments (Sovereigns).

Answer 5(b)

The increasing importance of credit risk modelling can be attributed to the following three factors:

1. Banks became more concerned for treatment of credit risk.
2. New markets are emerging in credit derivatives and the marketability of existing loans is increasing through securitisation / loan sales market.
3. Regulators are concerned to improve the current system of bank capital requirements especially as it is related to credit risk.

Credit Risk Models have assumed importance due to the fact that they provide the decision maker with insight or knowledge that would not otherwise be readily available or that could be obtained at a high cost. In a marketplace where margins are fast disappearing and the pressure to lower pricing is unrelenting, models give their users a competitive edge.

Credit risk models are intended to assist banks in quantifying, aggregating and managing risk across geographical and product lines. The outputs of these models also play significant roles in banks' risk management and performance measurement processes, customer profitability analysis, risk based pricing, active portfolio management and capital structure decisions. Credit risk modelling may lead to better internal risk management and may have the potential to be used in the supervisory oversight of banking organisations.

Answer 5(c)

In the measurement of credit risk, models may be classified along three different dimensions. They are the techniques employed, the domain of applications in the credit process and the products to which they are applied.

Techniques Employed

The following are the more commonly used techniques:

- Econometric Techniques
- Neural networks
- Optimisation
- Rule-based or expert systems
- Hybrid Systems

Domain of Application

These models are used in a variety of domains:

- Credit approval
- Credit rating determination
- Risk premia

- Early warning
- Common credit language
- Collection strategies

Credit Risk Models: Approaches

The literature on quantitative risk modelling has two different approaches to credit risk measurement. The first approach is the development of statistical models through analysis of historical data. This approach was frequently used in the last two decades. The second type of modelling approach tries to capture distribution of the firm's asset-value over a period of time.

Question 6

(a) CTS brings elegance to the entire activity of cheque processing and clearing. How ?

(b) What is the Positive Pay System for large value cheques ? State briefly the procedure for its functioning.

(c) Non-Performing Assets (NPAs) have made the banks financially ill. Comment.

(4 marks each)

Answer 6(a)

Under grid-based Cheque Truncation System (CTS) clearing, all cheques drawn on bank branches falling within the grid jurisdiction are treated and cleared as local cheques. CTS also benefits issuers of cheques. The Corporates if needed can be provided with images of cheques by their bankers for internal requirements if any.

The benefits from CTS are as follows:

- Shorter clearing cycle.
- Superior verification and reconciliation process.
- No geographical restrictions as to jurisdiction.
- Operational efficiency for banks and customers alike.
- Reduction in operational risk and risks associated with paper clearing.
- No collection charges for the collection of cheques drawn on a bank located within the grid.
- Enhancing customer service.
- Reducing reconciliation problems.
- Eliminating logistic issues.

Answer 6(b)

The concept of Positive Pay involves a process of reconfirming key details of large value cheques. Under this process, the issuer of the cheque (drawer) submits electronically, through channels like SMS, mobile application, internet banking, ATM, etc. with certain minimum details of that cheque (like date, name of the beneficiary / payee, amount, etc.) to the drawee bank, details of which are cross checked with the presented cheque by Cheque Truncation System (CTS). Any discrepancy is flagged by CTS to the drawee bank and presenting bank, who would take redressal measures.

National Payments Corporation of India (NPCI) developed the facility of Positive Pay in CTS and made available to participant banks. Banks enabled it for all account holders issuing cheques for amounts of Rs.50,000 and above. The availment of this facility is at the discretion of the account holder, banks may consider making it mandatory in case of cheques for amounts of Rs.5,00,000 and above.

Banks are advised to create adequate awareness among their customers on features of Positive Pay System through SMS alerts, display in branches, ATMs as well as through their web-site and internet banking.

Answer 6(c)

Non - Performing Assets (NPAs) of the banking system in India has assumed lot of importance in view of its effect on the Banking system of India. The legacy of huge NPAs have severely impacted the financial health of banks. Their income from lending activities have eroded and it has made dent to their profitability (non-accounting of interest and making of provisions / increase in administrative expenses of – monitoring, recovery and legal). Banks have no funds to add to their capital and their Net Interest Margin is too thin to survive.

However, in line with the international practices and as per the recommendations made by the Committee on the Financial System (Narasimham Committee) the RBI has introduced, in a phased manner, prudential norms for income recognition, asset classification and provisioning for the advances portfolio of the banks so as to move towards greater consistency and transparency in the published accounts. Prudential norms have been strengthened from time to time.

With the introduction of Insolvency and Bankruptcy Code, 2016 and restructuring exercises, banks have increased their emphasis on reduction of NPAs.

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INSURANCE – LAW & PRACTICE

(Elective Paper 9.2)

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *1. Answer **ALL** Questions.*

2. Suitable assumptions, if considered necessary, may be made while answering a question. However, such assumptions must be stated clearly.

3. Working notes should form part of the answer.

Question 1

Dalbir Singh aged 40 took a policy on 5th August, 2014 for a sum insured of ₹10 lakh from a private Indian Insurer on the basis of the solicitation made by an agent of the insurer. The agent had indicated to Dalbir Singh that in the event of death, twice the amount of the sum insured will be paid under the policy by the insurer on the payment of a small additional premium at the inception of the policy. Dalbir signed the proposal form on the strength of the advice of the insurance agent who guided the proposer in answering the questions in the proposal form and getting it completed.

One of the specific questions in the proposal form was on the subject of recent health condition of the proposer, viz, "whether the proposer had within six months of the date of the proposal had any disease or disorder of the respiratory system like asthma, tuberculosis, fever etc. To this question the proposer had indicated "No" as the answer. The proposal was put through the normal process in the insurer's office and after a medical examination of the proposal and on the payment of the first annual premium and the additional payment of the sum assured, the policy was issued. Dalbir Singh nominated his wife Smt Pushpa to secure the benefits under the policy.

On 28th December, 2014 the insurer received an intimation from the beneficiary through the insurance agent that Dalbir Singh had died on 20th December, 2014-apparently by natural causes. A medical report from a doctor was filed along with the claim. The beneficiary asked for the double payment under the conditions of the policy.

Since the claim by death arose within six months of the inception of the policy the insurer was surprised by the shortness of the time lapse between the dates of issue of the policy and the death claim. It instituted an investigation into the claim.

The investigator went through the proposal form etc. and made enquiries in the neighbourhood where Dalbir had lived. He found out that hardly a fortnight before the proposal, Dalbir had been hospitalised for about a week in the end of July, 2014. He then proceeded to check with the hospital where Dalbir had received the treatment and found that around 20th July, 2014 Dalbir had vomited blood and had suffered from a stomach ailment probably caused by an infected liver. Dalbir had stayed in the hospital for a week and had been discharged on 31st Ju1y, 2014.

On the strength of the investigation report the insurance company repudiated the claim for non-disclosure of material facts and purposely giving a wrong and misleading information in the proposal form viz that he had not suffered from any disease during the period of six months prior to issue of the policy.

The beneficiary appealed to the Dispute Resolution Board of the insurance company but was not successful. She then proceeded against the insurer in the District Consumer's Forum which decided in her favour considering the fact that Dalbir had suffered from a minor stomach upset and the answer contained in the proposal form was not incorrect. The insurer then took up the matter to the State's Consumers' Council which confirmed the view of the District Forum. On this, the insurance company filed an appeal in the Supreme Court of India contending that there was a material non-disclosure of the facts and the proposal form did not indicate the real state of health of the proposer. There was breach of contract terms and the insurer wanted the Supreme Court to set aside the decision of the Council.

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

(a) The insurer contended before the Supreme Court that "there was breach of terms of contract". Indicate what the insurance company meant by this statement? (10 marks)

(b) In an insurance contract what does constitute a material fact ? What are the provisions of the law that enable an insurance company to avoid payment under a policy ? Is there any time limit for the operation of any such provision ? Discuss. (15 marks)

(c) In the given case the Proposal form was signed by the proposer under the guidance and help from the insurance company's own agent. Can this be questioned by the insurance Company ? What are the agent's liabilities to an insured in such a case ? (10 marks)

(d) Are the consumer forums the proper agencies where an insured or beneficiary can agitate issues like this ? Briefly discuss the dispute settlement procedure outlined by IRDAI and regulations in this regard. (5 marks)

Answer 1(a)

Insurance is a contract, represented by a policy, in which an individual or entity receives financial protection or reimbursement against losses from an insurance company. An insurance policy is a document or a contract that evidences an agreement between the proposer (insured) and the insurance company and is as much as contract under the Contract Act as any financial or commercial contract. It has all the details of the conditions or circumstances under which either the insured individual or policy nominee receives insurance benefits from the insurer. In the case of life policy, the proposer specifically declares certain answers to the questions raised by insurer on the quality of life, health etc. that would enable the insurer to price the product properly.

Insurance policy is a document evidencing the transfer of risk from one to another and therefore is subject to the scrutiny of the acceptor term and conditions as prescribed. Though in a community of risks covered, they are generally prescribed and applied across the board. Hence the insurance company expects each of the answer given to the issues raised in the proposal form as an admission of fact or a statement of fact supported by proof and evidence. Any incorrect statement or misleading entry in the proposal form will therefore be contended by the insurer as a false statement or an attempt to mislead the insurer to accept the proposal and grant an insurance cover.

Statement in the proposal form can be direct or derived, can be answer to question posed or offer of facts that a proposer makes to enable him / her to fetch an insurance cover.

In the present case, the proposer, Mr. Dalbir Singh had answered on direct question in the proposal from that required a candid statement on the state of health of the proposer. Not only this, the question was specific and wanted a detailed answer from the proposer whether he had, in the immediate past had any health problem relating to the heart, liver, lungs etc. To this question, Mr. Dalbir Singh has given a negative reply meaning thereby that he did not have any problems on health ground. This statement was accepted by the insurer and on the basis of that a life policy for a cover of Rs. 10 lakh was issued. Thereafter, within six month of the commencement of the policy, Mr. Dalbir dies leading to a claim on the policy.

On an investigation, it was found that hardly a fortnight before the proposal, Mr. Dalbir singh had been hospitalized with a problem for a week or so. On 20th July 2014 Mr. Dalbir had vomited blood and suffered from severe stomach ailment probably caused by an infected liver. He stayed in hospital for a week and got discharged on 31st July, 2014 which was not disclosed at the time of issue of the policy. Insurer considers this as a material fact and a disclosure of this might have resulted in the risk cover being rejected and a claim cannot be passed due to Breach of contract. This is the basis of contention of the insurer before the Supreme Court. Another important ground for an insurance contract is that it is governed by the principle of Utmost good faith which mandates the proposer and the insurer to be truthful, and disclose all facts fully, positively and correctly. Therefore, in this contract, there is breach of the principle of utmost good faith and hence thereby there is breach of terms of contract, as the non-disclosure of hospitalization is indeed a vital fact to the insurer.

Answer 1(b)

In insurance, material facts are used to determine the amount of coverage and the cost of the premium that will be charged. The information is used to determine the level of risk or class of insurance that the insurance company may be willing to offer. The statement of material facts is a document in which the moving party sets out each material fact that it contends is not in genuine dispute. The rules regarding the statement of material facts vary widely among district courts.

A material fact is one that will critically affect the decision of the acceptor to a contract, whether to agree or not to agree, being a party to the contract. Proposer is the offeror and insurance company is the acceptor and for the existence of a valid contract, there must be consensus as-idem i.e. meeting of two minds or complete understanding and consensus between the parties as to the subject matter of the contract. A breach of the condition may lead to the parties cancelling the contract. In some cases, contract will become illegal or void ab initio. A material fact is one which will critically affect or influence the decision making of the parties and affect the very structure of the obligation flowing under an agreement. Fraud or misstatement of facts with a view to inducing the other party to conclude an agreement, a fact or statement that could materially affect the decision maker as to accepting the contract or not, is an issue that is critically questioning the very roots or the basis of an agreement, are material facts in the eye of law. A breach of this fundamental philosophy can break the contract and make the party responsible for that misstatement etc. to penalties in addition to the cancellation of the agreement / contract. These cannot be an application of this principle to situation where the party or its agent knew about the impugned facts or a mere mistake unknowingly made or done without wilful motives or a mere slip cannot be considered as material facts wrongly portrayed. In these cases, the contract will enforce but there can be monetary penalties for a non-willful breach. This is the argument that the insurer had placed before the Supreme Court for having rejected the claim.

The source of the power of the insurer to adopt this stand is found in section 45 of the Insurance Act which gives scope and cover for an insured to question the validity of life insurance policies and consequently to avoid any liability under the policy. This power can be used within two years of the commencement of the policy where the question of genuineness of the claim, the non-acceptability of the liability under the policy due to prevalence of fraud, non-statement of material facts etc. can be looked into. Non-disclosure of material facts is a clear ground for breach of contract. Fraudulent representation of a material fact entitles the insurer to avoid the policy and moreover, when the non-disclosure is intentional, like in the present case, where the hospitalization facts were deliberately not revealed in the proposal form. Thus, the wilful intention makes the contract enforceable, and the insurer has the right to repudiate the claim on the basis of non-disclosure of material facts. As per the provisions of the law, there is a time limit of two years from the date of issue of the policy for the insurer to contest in cases like these. Thereafter, the insurer cannot cancel or contest on the ground of mis-statements in the policy application. An incontestability clause is a provision in a life or disability insurance policy that prevents the insurance company from cancelling the policy based on misstatements in the policy application after the insurance has been in effect for a certain period of time, usually two years, as per the Insurance Act, 1938, but then recently revised to three years as per the Insurance Amendment Act, 2015. In this case, however, the said time period of two years has not lapsed. Therefore, the insurer can repudiate the claim on breach of contract, and breach of utmost good faith and mis-statement in the policy application, as it is not time barred allegation.

In the present case, death of the insured having taken place within six month of the commencement of the policy triggered an investigation by the insurer leading to the presence of a wrong statement of material facts. The time limit set by section 45 can be looked as some sort of safety value for the policy holders since, if the time of 3 years, as per the recent amendment in the year 2015, had been lapsed, the insurer cannot question the wise of the policy except in very limited cases of downright fraud.

Answer 1(c)

The question of material facts not being disclosed to an insurer is the basic test to be passed by an insurer under section 45 of the Insurance Act. This feature may be present in cases of direct selling of policies through intermediaries that act under various schemes of the insurer without examining the issues. But in the case of an agent, the situation is totally different. An insurance agent is an employee or the agent of the insurer and his conducts binds the insurer. This can be gathered from the regulation made by IRDAI.

If the agent had been posted with the information of Mr. Daibir's illness just before making the proposal to the insurer and his having been admitted into the hospital, then a reasonable defence can be put up by the insured or the beneficiary under the policy that there was no fraud or mis-statement of material fact in the proposal leading to the cancellation of the policy under section 45 of the Insurance Act and non-payment of claim.

Oftentimes, in many cases of less educated person, policies taken in the rural areas. The insurance agents themselves fill in the columns after a discussion with the proposer and clear certain admissions or statements of the proposal or the entries in the proposal form as non-material. The lure of the business and the achievement of targets leads to a mis-selling of the policies. In these circumstances, it will be difficult for an insurer to ask for application of section 45 of the Insurance Act. The difficulty in this area could well be cured by an insurer by proper training to its agents especially in cases of large policies.

The answer to the question posed is that the applicability of section 45 cannot be made as far as the agent's liability to the proposer or the insured, there can be none. Agents need to be trained and qualified in this area.

The agent cannot be held as personally liable to pay the insured, the sum assured when the insurer refuses the claim. If the cooperation of the agent in answering the question in the proposal form is accepted, then the proposer or the insured will not suffer.

In this cases, it is for the insurer to pull up its agent and train properly its agency force.

Answer 1(d)

Ombudsman, Consumer Grievances settlement agencies etc. are the forums where a dis-satisfied insurance customer can take his case for redressal. They are effective and are mostly located in the local centres easily approachable by the insured's. The cost of litigating before the forums is very less unlike before a court and it so happens that these forums act very quickly.

The dispute settlement procedure under the regulation is very elaborate and has been prescribed to provide consumers quick and early relief. To maintain these, there are internal dispute resolution committees of the insurers, the Ombudsman, the consumer forum and finally the court. The insurance Ombudsman scheme regulated by IRDAI does not deal with commercial policies and confines itself to retail customer having a claim of Rs. 20 Lakhs or less. The insured alone can reach the ombudsman whose decision in a case is binding on the insurance company. In cases where the insured does not accept the decision, his chances are not blocked for relief since he can approach in other forums and courts. Anyway, the agencies available to a customer are quick acting and have rendered very useful service. The Integrated Grievance Management System (IGMS) platform is a very integrated system wherein the progress and status of the complaint or grievance can be tracked by the insured.

Further, the Grievance Redressal Cell in the Consumer Affairs Department of the Insurance Regulatory and Development Authority of India looks into complaints/grievances from policyholders. This Cell takes up the grievances with the respective insurers for redressal. Policyholders who have complaints against insurers are required to first approach the Complaints/Grievance Redressal Cell of the insurer concerned. They will mail to the Grievance Redressal Officers of the insurers. If they do not receive a response from the insurer within a reasonable period of time or are dissatisfied with the response of the company, they may approach the Grievance Redressal Cell in the Consumer Affairs Department of the IRDAI.

Only complaints from the insured or the claimants shall be entertained. The Cell shall not entertain complaints written on behalf of policyholders by advocates or agents or by any third parties. Complainants are requested to submit complete details of the complaint as required in the complaint registration form put on the IRDAI website – policyholder.gov.in. Without the required information called for in the Complaint Registration Form, IRDAI will not be in a position to register the complaint.

Registration of Complaints with the IRDAI by Policyholders:

1. Can make use of the Integrated Grievance Management System(IGMS) - IRDAI Portal at *https://igms.irda.gov.in* for registering the complaints themselves and to monitor the status of the complaints.

2. Can send the complaint through Email to **complaints@irdai.gov.in**.

3. Can call Toll Free No. 155255 or 1800 4254 732.

4. Apart from the above options, if it is felt necessary by the complainant to send the communication in physical form, the same may be sent to IRDAI addressed to:

   General Manager
   Insurance Regulatory and Development Authority of India (IRDAI)
   Consumer Affairs Department – Grievance Redressal Cell
   Sy.No.115/1, Financial District, Nanakramguda
   Gachibowli, Hyderabad – 500 032.

Question 2

The business of insurance was opened up in India in 2000 for participation of new companies with the establishment of the new regulator IRDAI.

Has this development in your assessment resulted in the growth of business and development of good market practices and the creation of customer care ?

Explain the issue in an analytical manner. *(12 marks)*

Answer 2

In past years, India had insurance companies doing life and non-life business exclusively in the private sector. Due to complaints that emanated on the non-performance of these companies, misfeasance, fraud and mismanagement, the life insurance companies were nationalised and a single corporation called LIC came into being in 1956. The non-life companies were nationalised in 1971 by formation of a holding company called GIC and four companies carrying on general business.

The assessment of the performance of the nationalised insurance companies was made by a committee headed by Shri R. N. Malhtora which recommended the broad based of the insurance business and throwing open of the sector for private participation. The suggestion to appoint an independent regulator for the sector was also made.

The IRDAI was set up in 2000 and the process of admission of new companies in a continuous process started from then. We now have companies carrying an insurance business in India - both in the public and private sectors. Broad basing of the industry was done broadly with a view to analyse the capital Market to find resources for investment in long term projects and also to develop amongst the public an awareness to adopt risk protection and risk management practices.

India was and still continues to be a market where the penetration of insurance consciousness is at a very low level. Though we have improved in this area from a mere 1% to a somewhat good looking 3% or a little more. This progress is still very low compared to developed counties where percentages are often found in the range of 7% to 11%. Hence concerted efforts are necessary to spread the knowledge of insurance in the country. There must be a systematic approach to the market / people to enlighten it on the different aspects on an insurance cover i.e. risk allocation, capital development, replacement of capital at vulnerable times, Investment build-up, progress of the industry to provide it with replacement capital and above all to a sustained industrial and economic development.

Till the industry was exclusively in the hands of the public sector, very little development was attempted in this area. Companies was owned and regulated by the government with the result that these worked only to do the minimum business to keep them going. Lacked initiatives in the development of the new product and markets. Only living for today with no forecast for tomorrow. Skill development in the areas was totally lacking and products available in the market were general. Each of the four companies doing general insurance business in the country was offering same product - the only difference to the customer being the quickness of the settlement of a claim or the others.

The element of competition amongst them, an element that will successfully result in growth of new product and practice was significantly lacking. Growth of the insurance business in India is built on the following factor:

1. Choice- for the customers chooses from a basket.
2. Competition- not an administered rate or tariff but the pricing of a product on scientific lines.
3. Customer Service- not only to generate a market demand but also educate the market on the availability and reach of the products, settlement of claims etc.
4. Coverage – extension of the concept of insurance to new areas - not stick to traditional lines an offer.
5. Publicity and development – the growth of the market, including the market penetration factor, education of the public to the necessity of insurance covers, risks management process etc.
6. Development of Capital Resources – to participate in the market development etc.

Having recognised the need to develop and grow the insurance business to new and newer heights, the market performance, even after the admission of new player, there are at least 100 companies under different risk underwriting business, the actual performance is significantly lacking.

Though we have representative of the various developed countries participating in the growth of the new insurance, by becoming co-investor in new companies, the growth of the market as such is somewhat muted. This may be due to the following.

1. The existing insurer leaning to the public sector companies are highly reluctant to sink money in the development of the market which yield significant results. The LIC's activities in this regard are not totally lacking but are significantly misused.

2. This may be due to lack of foresight and vision planning because these institutions have been brought up in a culture of 'inactivity'.

3. Though the coverage of the market in the highly developed urban areas in somewhat visible, there does not seem to be any inclination to develop the rural and the non-urban sector where significant opportunities exist.

4. Education on the concept of insurance and its role in the development of business, capital and the citizens is totally missing.

5. Lack of professionalism in the distribution channels especially the Agency channel has made insurance business not so popular in India. This is primarily due to the minimum educational standards preferred by LIC. Mere 10th class pass was the eligibility criteria for a person to become an Agent. This has also resulted in a not so respectable image for the LIC Agency force India. Today the private companies are recruiting Agency as Advisors and are looking for educated youth and professional to become their business and channel partners.

The concept of insurance is a rather difficult piece of activity, not commonly known to our people. Even the most educated person in India, sometimes belonging to the financial sector does not know that insurance cover can act as additional capital. This is also called as insurance illiteracy.

The spread of business outside the cities in India has came about due to the fact that till now, a large number of policies sold belong to person in cities and urban centres and insurance is bought only under a compulsion - where a government scheme / loan by a bank dictates that the product must have an insurance cover for the period of loan. In the case of life products, only two lines of thought i.e. payment of life premium will result in a tax relief and the death cover under a policy might give money to the member of a family as an instant social relief.

The above fact lead to the conclusion that for the growth of the insurance business in India, life and non-life, systematic measures to recognize, build and develop a market is necessary. The public sector company do not venture into this area. The new insurers all in the private sector, all of them may like to remain also runs and top only the distinct market in the periphery.

Additionally the creation of a demand / market require significant amount to be spent on marketing in the rural areas where not only large number of people reside but also due to the fact that large quantum of investment are made in rural area for various reasons. The insurance companies newly set up with foreign participation in equity till now had been financed mostly by Indian partners while the foreign investor were retained to 26% / 49% / 74% at different parts of time. This in the background of a clear working capital of Rs. 100 core per insurer shut the doors on the development of the markets. Hence we should look for development elsewhere, where else can we go to except the IRDAI whose primary responsibility is not only to regulate but develop and grow the market.

IRDAI collects an annual fee from each of the insurer and has under its contract significant amounts of money that could utilised in the growth of the market by actively moving into the areas where education on the merits of an insurance cover can be spread - by shot films, actual presence in the market of aids that can carry a message on the utility and advantage of a life or non-life cover etc. IRDAI possibly in association with the films division can carry on this in a good measure. In the absence of any pro-activity from the insurer, the activity has to come from the regulators. In fact even at the time of framing of the Act leading to the establishment of IRDAI, its primary role in the development of insurance in India – in the social, rural, agriculture, non-traditional sector were recognised and accepted as part of its charter.

Since the present phase of development of the concepts of insurance in India is not commensurate with the market possibilities, it should be the IRDAI who must move into this area on a priority basis. In this connection, one must motive the presence of the postal life insurance in India. The organization is handled by the Indian postal system having outlets in India including the non-urban areas which we would like to target and a significant progress could be foreseen if a combination of both these institutions is planned and executed. Insurance ultimately should be available, accessible and affordable if the penetration is to increase in India.

Question 3

(a) What is Reinsurance ? How is Reinsurance controlled by IRDAI ?

(b) Are the concepts of deductibles and co-insurance in the insurance industry the same ? Discuss. *(6 marks each)*

Answer 3(a)

In carrying on its business as an insurer, a company assumes a risk of the proposer in regard to life or assets for the payment of premium. Such a risk will arise in the future, in life cases after a long period of time depending on the term of the policy and on non-lives after a little while during the contracted period of cover. The quantum of risks so assumed by an insurer has to be provided for. It may so happen that the quantum of risk so assumed by an insurer may exceed its capacity to bear. In each circumstances, the concept of re-insurance plays a leading role.

Reinsurance is also known as insurance for insurers or stop-loss insurance. Reinsurance is the practice whereby insurers transfer portions of their risk portfolios to other parties by some form of agreement to reduce the likelihood of paying a large obligation resulting from an insurance claim.

The party that diversifies its insurance portfolio is known as the ceding party. The party that accepts a portion of the potential obligation in exchange for a share of the insurance premium is known as the reinsurer.

The agreement or the arrangement for re-insurance is primarily between two insurance companies and the insured does not have any role to play in the arrangement. The insured cannot and does not have any recourse of claim against the re-insurer and as far as the insured is concerned, the liability to discharge any claims under the policy stays wholly and clearly is with the insurer.

The quantum of re-insurance depends on the volume of business underwritten by the primary insurer and also the quality of risks underwritten. In cases, where costly assets are under-written or where the sum assured is beyond the capacity of the insurer to bear, the part or whole of the risk is passed on to one or more re-insurers for the payment of a premium. Where a claim under the policy arises, the insurer will discharge the liability under the policy to the insured and claim contribution from the re-insurer(s).

The assessment of re-insurance pass over is determined by a combination of factor like the financial strength of the insurer, the seriousness of risk, the quantum of the cover etc. The choice of the re-insurance is left to the insurer but IRDAI has the regulatory function in that. The re-insurance programme of an insurer must be submitted to the IRDAI and its clearance obtained before the start of the year. In granting the approval, the IRDAI will go by the character of risks, the type of re-insurance cover contemplated, the portion of the risk that is planned to be passed on, the payment record of the re-insurer and about the availability of re-insurance policies in the Indian market. Care will be taken to see that an insurer does not pass the entire risk, without retaining any part of it, to the re-insurer making a mere conduit in the process's. This will mean that the Indian insurer is only a front and the device adopted by it will mean the presence of a foreign party in the Indian market.

There are two types by of re-insurance arrangement prevalent in the market. Facultative and treaty re-insurance programmes. In the case of the former, an arrangement is entered into between the insurers for every policy that is insured. It is purchased by the leading companies for individual risks for amount in excess of their limits.

A treaty re-insurance means that a leading company and the re-insurer negotiate and execute a contract under which the re-insurer cover a specific share of all the insurance policies issued by the insurer under a particular line of business.

In India, a practice used to exist that all companies wanting to have re-insurance contracts must offer a fixed percentage of the risks to the General Insurance Corporation of India-designated as a national re-insurer. This was meant to save valuable foreign exchange which otherwise uses to the spent on payment of re-insurance premium to the foreign re-insurer and brokers. With the establishment of branches of foreign re-insurers in India after 2015, this feature has been slowly given up. Large risk like Air India, ONGC, Gail, Reliance etc. still continue to be covered by proper re-insurance agreements retaining parts of the risk by the insurer, other Indian companies, GIC etc. The re-insurance market in India is developing on professional lines.

Answer 3(b)

The concepts of deductibles and co-insurance in the insurance industry are not the same and has a distinctive meaning and application.

Deductible is the amount that the insured must payout-of-pocket before the insurer pays its share. It is common in almost all types of insurance policies to stipulate that a definite part of the claim or amount of money will be borne by the insured. The insurer will be liable to any claim beyond that limit / deductible. This is to make the insured more responsible and behave rationally in case of a loss.

Deductible are not found in life policies but are very common to non-life policies like fire, health, marine, motor car etc. They are not present in personal liability insurance policies. Deductible may be of two classes compulsory and voluntary. Voluntary deductibles will result in a discount on the premium charged for the risk.

Co-insurance, on the other hand, result in two or more insurers sharing the risk of the policies because of the character of risks involved or the magnitude of the cover. All co-insurance obligations are agreed upon between/among the insurers before the issue of the policy. Normally one of the insurers who possibly share a greater quantum of the risks is called the lead insurer who generally deals with the insured on behalf of all the underwriters. The co-insurance clause basically is based on the principle of Contribution. It is also called as collective insurance.

Normally each insurer issues a policy with the specification or schedule giving a description of the property insured with a co-insurance clause included therein.

In the event of a claim, all co-insurers will contribute towards settling it to the extent that each one has agreed to share the risk. All the co-insurers will collectively compensate the insured.

Question 4

(a) *An individual proposed to buy a new car for ₹40 lakh. The dealer of the vehicle wants the individual to pay an additional sum of ₹3,40,000 for a comprehensive insurance cover. There is a hesitation on the part of the individual to pay this additional cost and he wants to avoid it to the extent possible.*

As a professional insurer what will be your advice to the individual who wants to buy the car and does not want to pay for insurance cover ?

(b) *S, an individual has a health insurance policy with X Health Insurance Company Limited. The sum insured is ₹15 lakh and the policy has a floater option of ₹5 lakh. The policy was first taken in 2017 and has been current from them with S paying the renewal premium by due dates. In the currency of the policy with X, S has made some claims–small and big but all these have been rejected by the insurer. The policy is due for renewal on 15th December, 2021. S has been approached by Z, an agent of a different company, Y Health Insurance Company Ltd. with a proposal that sounds attractive to S. He wants to change over to Y from X.*

Indicate the option to S and the process involved. Does X Health Insurance Company Ltd. have any role to play in this move ? Discuss.

(6 marks each)

Answer 4(a)

The concept of motor or vehicle insurance is very well-known and it fact in India, this is the most popular and well known cover available in the market issued by all the general insurance companies. The motor insurance premium in India amount to almost one-third of the general insurance premium earned in the country. A motor policy normally consists of three parts:

Section I- called own damage part – is an optional or voluntary cover at the choice of the owner.

Section II and III cover third party damages and personal accident injury which are compulsory and ordered to be taken by a vehicles owner under Motor Vehicles Act.

Third party cover which often is referred to as Act cover is compulsory since someone other than the insured may be affected by an act of the vehicles owner leading to the payment of compensation for injuries or death or damage to third party properties. The motor policy does not provide any benefit to the insured in the third party cover except that it covers the insured's legal liability for death / damage of third parties. The compensation has been imposed by the Motor Vehicles Act on the ground that third parties affected by the usage of the vehicle should not be left uncared and damage to their cause arise not because of their negligence but due to that of others.

A third party cover agrees to indemnify the insured if he is sued or held legally liable for injuries or damages to a third-party.

In the instant case, the buyer of a new vehicle is being asked to pay a comprehensive motor insurance premium of Rs. 3,40,000 which he does not want to pay on the ground that not paying it will be a big saving to him. He can avoid paying a portion of the premium quoted above that relates to "own damages" parts or section I of the policy but will be under compulsion to pay premium relating to section II and III i.e. third party cover and personal accident cover. It is left to the individual to decide whether he would like to save a little sum of money for a vital benefit that will ensure when damage to the vehicle may arise in a situation other than an accident involving a third party.

"Fully comprehensive car insurance gives you the highest level of protection from an accident, regardless of whose fault it was. It can cover repairs, personal injury claims and damage to property - usually for you, your vehicle and any other vehicles involved.

He may well be advised to have a comprehensive cover for the car, especially when he is buying a costly high-end car, as the cost of repairs in case of any eventuality may rise to be very costly in future.

Answer 4(b)

One of the facilities offered to a policy holder under the health insurance policies is the right accorded to a policy holder to transfer the credit gained for pre-existing conditions and time bound exclusions from one insurer to another insurer or from one plan to another plan of the same issuer. It is called portability of an insurance policy.

It is the right conferred on a Policyholder who decides to move from one General or Health insurer to another or to another plan of the same General or Health insurer. Such portability is not applicable to fixed benefits payable under health policies issued by a life insurer. The advantage of portability is the carry forward of the credit accrued on account of having a policy with the previous insurer. Long terms benefits gained under the terms of a policy will not be denied by a switch over to another insurer by the policy holder.

The application for portability will have to be given to the existing insurer who will send it through a portal to the new Insurer who may request for the claims history and other details from the old insurer who shall give them to the new insurer within a period of 7 days from the date of receipt of request. An insurer may reject the request for portability if the policy holder approaches 60 days before or within 45 days of the date of expiry of the insurance policy. However, an insurer may at their option consider the request for renewal even outside the stated period. The new insurer is under obligation to accept or reject within a period of 15 days from the date of receipt of the Portability form.

If the new insurer does not convey any decision with the aforesaid 15 days, the new insurer is deemed to have accepted the request for portability. No charges for portability can be levied either by the previous insurer of the new insurer. No commission shall be paid to any Agent or Intermediary for the policy which is ported from one insurer to another insurer.

In the present case, S obviously is a long standing customer of X health insurance co. ltd. He apparently has accumulated some credits because of the longevity of the policy and his claims profile. Obviously he is not happy with X health insurance co. ltd and wants to move to Y health insurance co. ltd. S possibly feels that his needs may be taken better care by the agent of Y.

In the circumstance, S has the freedom to ask X health insurance co. ltd. to port his policy to Y health insurance co. and Y's agreement within the time schedule as prescribed, it can be done whereby all the accumulated credits and benefits under the policy with X will continue to be enjoyed from Y under the scheme. Neither X or Y or the agent will be entitled to any fees or charges for the portability.

S can be advised to follow the prescribed procedure and seek portability of his health cover from X to Y.

Question 5

(a) *A life insurance policy has been taken by B, an individual on his life for a sum assured of ₹25 lakh from an Indian Insurer on 15th July, 2018. B has opted to pay the premium due on the policy on an annual basis and the policy is current. B approached his current insurers in January, 2021 for the issue of a second policy for a sum assured of ₹15 lakh. The insurer made due enquiries and investigations. It found that in the proposal form for the second policy, B has given a set of information and data that did not match with those given in the existing policy and the insurer concluded that there were some material mis-statements made by B in his proposal form of 2018.*

Indicate options open to the insurance company to deal with the situation arising out of the investigation for the second policy. *(8 marks)*

(b) *Life Insurance Corporation of India was set up in 1956 under a special Act of Parliament to carry on Life Insurance business in India. On the formation of IRDAI, LIC was brought under the regulatory control and guidance of the regulator viz IRDAI.*

The present owner of LIC-The Union Government wants to list LIC on the stock *exchanges in India and in the process permit some element of private holding of shares in the newly formed organisation.*

Indicate clearly whether the process of listing of LIC has to go through the regulatory process of IRDAI ? What changes are to be made in the present structure of LIC to have this effected ? (4 marks)

Answer 5(a)

The first policy existing was taken on 15th July, 2018 for a sum assured of Rs. 25 Lakhs by Mr. B. The Policy is current and premium was paid. Mr. B had made proposal for second policy in January 2021, after about 30 months after the inception of the first policy. Medical examination now made in 2021 reveals a material misstatement in the proposal of July 2018.

An insurance contract between a proposer / insured and the insurance company is a contract where the doctrine of utmost faith is applicable. Either side should not make a statement, claim or disclose that is not fully true and correct. A material statement will affect the very fundamentals of the contract if found to be wrong and can lead to avoidance or cancellation of the contract itself. Material misstatement was a statement, on examination by the person to whom it is made, is found to be erroneous, or a statement that will materially affect the acceptance of a proposal made so as to change the very nature of the agreement or the contract to be proved by documentary evidence where the insurer if only he had been appraised of the nature of risk that it underwrites had been told of a misstatement, false declaration etc. which materially affects the nature of risk sought to be covered or the quality of the risk that is offered for risk protection etc.

Disclosure to information norm - In accordance with Condition 4 “Duty of Fair Disclosure”, the Policy shall be void and all premium paid hereon shall be forfeited to the Insurer, in the event of misrepresentation, mis-description or non-disclosure of any material fact. Notwithstanding anything contained herein or otherwise, no refunds of premium shall be made in respect of the Policy where any Notice is required to be given by the Insured in accordance with Condition 6, or any claim has been admitted by Insurer or has been lodged with the Insurer, or any benefit has been availed by Insured under the Policy

Earlier, before 2015 the Insurance Act under section 45 had provided an insurer with a two year window to cancel a risk or repudiate a claim under a life contract. This period has been extended to 3 years under the 2015 amended law, prohibits a life insurer to avoid a policy on the claim of misrepresentation of facts. Where fraud is established, premium paid till the date of cancellation or repudiation can be forfeited. However, where the misstatements were posed to be unintentional, premium paid till date of repudiation or cancellation may be refunded to the insured. The ground of reason on which repudiation is sought by the insurer must be intimated to the insured. No repudiation of a policy is possible if the facts alleged to have been misrepresented to a life insurer were within the knowledge of the agent who had sourced the policy for the customer.

In the present case, section 45 is available to the insurer to repudiate the life policy issued on 15th July, 2018 since an investigation made in January 2021 in connection with the proposal of a second policy for the same insured revealed material misrepresentation of facts. Insurer has to disclose to B the result of the investigation made by it and how an attempt had been made in 2018 to prompt the insurer to issue a life policy on the strength of misstatement of material facts.

B can prove if the mistake attributed to him, is material or not, fraudulent or otherwise, only when the alleged misstatement in the 2018 proposal form is established by documentary evidence to be of a nature that would affect the decision of the insurance company to accept the policy or not. Insurance company can recourse to section 45 but action proposed is within the time limit set by law.

B can lead evidence on the ground that the misstatement alleged by the insurer is not of such a serious nature that could convert it into a material one but only a minor mistake based on evidence in his possession or of such nature. Secondly, B can also claim that the 2018 policy and the 2021 proposal have been finalized through the same agent of the insurer and hence there could be no allegation of misfeasance or fraudulent act when the agent of the insurer was fully aware of the statements made in the proposal form.

The case has to be decided upon a full examination of all relevant facts both the insured and the insurer have to lead evidence. Section 45 is however available for use.

Answer 5(b)

Life Insurance Corporation of India, a conglomeration of all private insurers in the country in 1956 was formed under a special act of parliament as a corporation. IRDAI Act was passed in 1999 and became operational from 2000 states that insurance business can be carried on in India only by an Indian insurer defined to be a company set up under the Companies Act. Exceptions were covered out in the act to allow existing organisations like LIC to carry on their business but these pre-existing corporations have also to be subjected to rules and regulation of IRDAI. Hence LIC which had a share capital of Rs. 5 Crores had to fall in line with IRDAI's direction to enhance its capital to Rs. 100 Crores.

Insurance regulator IRDA has cleared the initial public offering of the Life Insurance Corporation of India (LIC), paving the way for the public sector behemoth's listing. The report on embedded value (EV) prepared by actuarial firm Milliman will be part of the offer document. The pricing of a life insurance company's shares is usually done as a multiple of their EV. The final tally would be determined at the end of a book-building process.

According to sources, LIC EV is at over Rs. 5.4 lakh crore. Even considering a conservative multiple of 2.5 times, the value of the corporation would be around Rs. 13.5 lakh crore. At this valuation, a 5% dilution would raise Rs. 67,000 crore. The proposed IPO will be the largest in the country. Currently, Paytm's Rs. 18,300-crore IPO in November 2021 holds the record for the largest IPO.

Conversion of LIC into a unit where public will hold a share necessitates its being converted into a company under the Companies Act. Hence LIC has to fall in line with stipulations in both the enactments IRDAI Act / Companies Act. Class of capital - equity shares to enable it to be quoted in the stock exchange, minimum public holding to be gone through.

LIC will have to constitute committees under the Companies Act i.e. Audit committee, Nomination and Remuneration committees, shareholder's grievances committee etc. Though they may exist in some form or other now, the committees to be created under the Act will have statutory recognition and accountability.

One more thing to be done in the new set up, as against the regulatory norm of 90-10% of valuation surplus being shared between the policy holders and the ownership interest, LIC follows the pattern of 95% and 5%. The feature is that out of the owner's share of 5%, LIC remits the whole of it to the government retaining nothing in its books as reserve etc. This aspect has to be looked into or else LIC will continue to function as it is doing now but open to greater public scrutiny and accountability. LIC also represents the ethos of insurance in India. It represents the sentiments and confidence of the people.

Question 6

In Property and Fire Insurance, what is a declaration policy ?

From the following information, ascertain the claim due under the policies taken to cover for a fire loss.

	₹
Value of the stocks at the time of fire	*3 Crore*
Loss assessed	*30 lakh*
Sum insured under Standard Policy A	*1 crore*
Sum insured under Standard Policy B	*60 lakh*
Sum insured under Standard Policy C	*1 crore*

(12 marks)

Answer 6

Declaration Policy - A special policy related to stock owned by the insured issued in the interest of traders who deal in seasonal goods. Stock may have fluctuating values and valuation may peak during seasons. It may result in over / under insurance depending on the seasons and the value put on the goods by the insured.

Feature covered by a declaration policy-

- The sum insured is selected on the basis of the highest stock value.
- Premium on this value is paid provisionally.
- Monthly declarations of stock are made.
- Declaration policy can be issued for a minimum sum insured of Rs. 1 core in respect of goods wholly owned by the issued. In case the policy covers goods stored in different locations, at least on one location the value of goods should be Rs. 25 lakh.

The liability, on the basis of facts given in the problem under the different policies will be as under:

Share under a policy : Insured Value / Value of the property

Share of Policy A = $\frac{\text{1 crore}}{\text{3 crore}}$ x 30 lakh = Rs. 10,00,000

Share of policy B = $\frac{\text{60 lakh}}{\text{3 crore}}$ x 30 lakh = 6,00,000

Share of Policy C = $\frac{\text{1 crore}}{\text{3 crore}}$ x 30 lakh= Rs. 10,00,000

It is seen that the loss remains are unabsorbed even after the claims under policies A, B & C are calculated. Hence the cover under the declaration policy will be invoked.

Declared value Rs. 3 crore

Claims allocable under policies A, B & C ₹ 26 lakh

Excess loss = 4 lakh

Recovery under standard policies A, B & C = 26 lakhs. This will result under in a non-recovery of Rs. 4 lakh under standard policies A, B & C which will cover under declaration policy.

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INTELLECTUAL PROPERTY RIGHTS – LAWS AND PRACTICES
(Elective Paper 9.3)

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 :

The plaintiff, Radio Today Broadcasting Ltd. (RTB), wished to run a radio station on the FM band, known as "Radio Today", and intended to play both film and non-film songs on their radio station. They paid licence fees to the producers of the film and non-film songs, who were members of Phonographic Performance Limited (PPL). However, they did not intend to pay any royalties to the lyricists, composers and other artists, who were members of the Indian Performing Rights Society (IPRS), the defendant. The defendant threatened the plaintiff with violation of copyright law if the songs were played on their radio station, and the plaintiff filed the instant action claiming protection under section 60 of the Copyright Act 1957.

The plaintiff filed the present suit to seek an injunction against the continuance of threats of infringement, and the defendant filed a counterclaim alleging copyright infringement by the plaintiff.

The issue before the High Court of Calcutta was whether the plaintiff radio station was obliged to pay any royalty and/or licence fees to IPRS for the songs broadcasted through its radio station in addition to the licence fees paid to PPL, a society of producers.

The court held, following the Supreme Court decision in IPRS v. Eastern Indian Motion Pictures Association (EIMPA) that though the right of a composer or lyricist in respect of a song that was put into the sound track of a film was "extinguished" when he was paid, he could nonetheless still claim copyright in his song and reserve his right to assign it to others for commercial exploitation of his work in other modes if there was an express agreement between him and the producer of the film reserving his copyright.

In the present case, the plaintiff radio station did not contend that the IPRS members had assigned their exclusive rights to the producers by agreement. The court held that unless it was shown that these exclusive rights of the IPRS members were expressly assigned in favour of the members of PPL, IPRS was entitled to claim royalties from the plaintiff if it wanted to exploit the work by broadcasting the songs on its proposed radio station.

This decision is noteworthy for it affirmed, following the Supreme Court decision in IPRS v. EIMPA, the separate nature of the authorship rights of composers and lyricists in their musical compositions, and the derivative rights of producers in the sound tracks of their movies. It resolved the misunderstanding that the Indian *composers' and lyricists' as authors could not licence their songs for use with other media once they were assimilated into the producers' films as sound tracks. On the facts, the plaintiff radio broadcaster was held to require licences from both IPRS (representing the composers and lyricists) as well as PPL (representing the producers of both "film" and "non-film" songs) in order to secure permission to broadcast all the songs on their radio station. With the liberalization of the broadcasting industry by the Indian government since October 1999 to grant licences for private FM stations to provide entertainment-related broadcasting services, this decision affirmed the necessity for FM broadcasters to seek both IPRS and PPL licences for the broadcast of music (songs) and pay royalties to both.*

Questions :

(a) Discuss briefly the relevant provision of the Copyright Act dealing with the Statutory Licence for Broadcasting of Literary and Musical Works and Sound Recording.

(b) Explain whether the plaintiff was legally right or wrong.

(c) As per Section 60 of the Copyright Act, 1957, discuss whether plaintiff was eligible to get remedy in this case.

(d) Discuss the relevant provision of the Copyright Act dealing with the 'assignment of copyright'. What was observed by the Court in this regard ?

(10 marks each)

Answer 1(a)

Section 31D of Copyrights Act, 1957 deals with the statutory licence for 10 marks broadcasting of literary and musical works and sound recording. According to this Section:

(1) Any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section.

(2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Appellate Board.

(3) The rates of royalties for radio broadcasting shall be different from television broadcasting and the Appellate Board shall fix separate rates for radio broadcasting and television broadcasting.

(4) In fixing the manner and the rate of royalty under sub-section (2), the Appellate Board may require the broadcasting organisation to pay an advance to the owners of rights.

(5) The names of the authors and the principal performers of the work shall, except in case of the broadcasting organisation communicating such work by way of performance, be announced with the broadcast.

(6) No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for

convenience of broadcast, shall be made without the consent of the owners of rights.

(7) The broadcasting organisation shall maintain such records and books of account, and render to the owners of rights such reports and accounts.

Answer 1(b)

Whether the Plaintiff was legally right or wrong

As per the prevailing circumstances, the plaintiff (RTB) was legally wrong. The Supreme Court ruling in IPRS v. EIMPA case stated that though the right of a composer or lyricist in respect of a song that was put into the sound track of a film was "extinguished" when he was paid, he could however still claim copyright in his song and reserve his right to assign it to others for commercial exploitation of his work in other modes if there was an express agreement between him and the producer of the film reserving his copyright. This judgement went in favour of lyricists, composers and other artists, who were the members of the IPRS, the defendant in this case. Also, the plaintiff did not contend that the IPRS members had assigned their exclusive rights to the producers by agreement. The court held that unless it was shown that these exclusive rights of the IPRS members were expressly assigned in favour of the members of PPL, IPRS was entitled to claim royalties from the plaintiff if it wanted to exploit the work by broadcasting the songs on its proposed radio station.

Answer 1(c)

Whether plaintiff was eligible to get remedy

Section 60 of the Copyright Act, 1957 deals with remedy in the case of groundless threat of legal proceedings — where any person claiming to be the owner of copyright in any work, by circulars, advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of an alleged infringement of the copyright, any person aggrieved thereby may, notwithstanding anything contained in section 34 of the Specific Relief Act, 1963, institute a declaratory suit that the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats and may in any such suit –

(a) obtain an injunction against the continuance of such threats; and

(b) recover such damages, if any, as he has sustained by reason of such threats.

However, this section shall not apply if the person making such threats, with due diligence, commences and prosecutes an action for infringement of the copyright claimed by him. In the present case, the defendant (IPRS) allegedly intimidated the plaintiff (RTB) to pay royalty. But this was considered by the Court legal because the alleged intimidation was supported by reasonable grounds. Hence, the plaintiff was not entitled to get remedy in this case as per Section 60.

Answer (d)

Section relating to 'assignment of copyright and the Court observations

Section 18 of the Copyright Act provides that the owner of the Copyright in an existing work or the prospective owner of the Copyright in a future work may assign to any person the copyright. In both the cases the assignment may be made of the copyright either wholly or partially and generally or subject to limitations and that too for the whole period of copyright or part thereof. However, in case of assignment of copyright in any future work, the assignment has the real effect only when the work comes into existence. If a work is done by an author for a consideration for a publisher, the copyright in it would normally vest in the publisher subject to any contract to the contrary, as is provided by Section 17 of the said Act.

Secondly as provided by Section 18, the copyright could be assigned, and if it is so done it would be vested in the purchaser. In the present case, the plaintiff radio station did not contend that the IPRS members had assigned their exclusive rights to the producers by agreement.

The court held that unless it was shown that these exclusive rights of the IPRS members were expressly assigned in favour of the members of PPL, IPRS was entitled to claim royalties from the plaintiff if it wanted to exploit the work by broadcasting the songs on its proposed radio station.

Question 2

(a) Discuss briefly the grounds for 'opposition to registration' and 'refusal to registration' of a trademark. *(3+3 marks)*

(b) "Developing countries see technology transfer as part of the bargain in which they have agreed to protect intellectual property rights. The TRIPS Agreement aims to achieve the transfer and dissemination of technology as part of its objectives, and specifically requires developed country members to provide incentives for their companies to promote the transfer of technology to least-developed countries".

What is Technology Transfer ? Discuss its significance. Discuss briefly the problems encountered in technology transfer in developing countries.

(2+2+2 marks)

Answer 2(a)

A Trademark can be opposed on the following grounds:

1. Absolute grounds of refusal as provided under Section 9 of the Trade Marks Act, i.e. the Trademark not being distinctive or not being capable of distinguishing the goods/services of the Applicant from those of others.
2. Relative grounds of refusal as provided under Section 11 of the Trade Marks Act, i.e. the Trademark being phonetically, visually, conceptually, confusingly and deceptively similar/identical to the Opponent's Trademark.
3. Other relevant grounds depending on the facts of the matter i.e. the applicants' trademark being well-known.

According to section 9(1), following trademarks cannot be registered:

a) Trademarks which are not capable of distinguishing the goods or services of one person from that of another person.
b) Trademark which consist only of such marks or of such indications which may function in trade to specify the kind, quality, quality, geographical origin, or time of production of goods or services or other characteristics of goods or services.

c) Trademark which consists only of such marks or indication which have become customary in the current language or in bona fide and established practice of trade.

According to section 9(2) following trademarks shall not be registered:

a) If such trademark is likely to deceive the public or can even cause confusion.

b) If such trademark is hurting the religious sentiment of any class or section of Indian citizens.

c) If such trademark contains any kind of scandalous or obscene matters.

d) If the use of such trademark is prohibited under the Emblem & Names (Prevention of Improper use) Act, 1950.

Section 11 also states that a trade mark shall not be registered if, because of— (a) its identity with an earlier trade mark and similarity of goods or services covered by the trade mark; or (b) its similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the trade mark, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.

Further, a trade mark which— (a) is identical with or similar to an earlier trade mark; and (b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered in the name of a different proprietor, shall not be registered if or to the extent the earlier trade mark is a well-known trade mark in India and the use of the later mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark.

Answer 2(b)

Importance of Technology Transfer important

Technology transfer helps develop early stage intellectual property (IP) into tools for direct use by the research community, or into bases for new platforms, products, or services to be made into products for public use. The reason for transfer is to promote public good through the development of IP into useful and usable goods or services that in turn, promote economic growth. Leading universities, primarily from industrialized countries, generate rich IP which then is disseminated to society through private partnerships.

Significance of Technology Transfer:

- Develops a common platform to share ideas.
- Protects intellectual property at international level.
- Promotes economic development through commercializing innovative technology.
- Enhances collaboration between developed and developing economies.
- Provides developing economies the ability to access most recent technical assistance and facilities.

- Accomplishes goals that neither party could achieve on their own through sharing and/or combining resources.

Problems of Technology Transfer in developing countries:

- Lack of pool of scientists and researchers in specific domains.
- Brain drain (the emigration of highly trained or qualified people from a particular country).
- Small market size (Developing economies are labour intensive rather technology intensive).
- Bureaucratic climate (Too many rules and regulations).
- Inability to make public investments in appropriate research and infrastructure.

Question 3

(a) "Most people immediately think of cars when they hear the name Nissan, and this is understandable since the company has used the label since the 1970s. In 1994, however, nissan.com was registered for Nissan Computer Corporation. This was five years before the automobile company decided they wanted the domain. Nissan Motors claimed that the domain name constituted trademark dilution, infringement and cybersquatting. This would typically be a valid claim, but the owner of the domain and corporation is named Uzi Nissan. Uzi's companies are simply titled after his surname. Nissan Motors ended up registering a different domain for their company."

What do you mean by cybersquatting ? Did cybersquatting actually occur in this case ? Critically examine the Legal Scenario of Cybersquatting in India.

(1+1+4 marks)

(b) "Given the present day scenario where the world seems to be living a dual phased physical and digital life the companies have started to assimilate the value of the IP more than ever before and the IP is now a part of all the major transactions such as business decisions and transactions, and that recognition has increased the demand for IP audits in order to assess the potential and to create a level playing field for the competitors in the relevant market sector."

What is IP Audit ? Explain the benefits of conducting IP audit.

(1+5 marks)

Answer 3 (a)

Meaning of 'Cybersquatting

Cybersquatting is registering, selling or using a domain name with the intent of profiting from the goodwill of someone else's trademark. It generally refers to the practice of buying up domain names that use the names of existing businesses with the intent to sell the names for a profit to those businesses.

Did cybersquatting occur in this case?

No. Uzi Nissan companies are titled after his surname 'Nissan' as mentioned in the case. Cybersquatting did not occur in this case.

Legal Scenario of Cybersquatting in India

India has no Domain Name Protection Law and cybersquatting cases are dealt under Trade Mark Act, 1999. The Hon'ble Supreme Court in Satyam Infoway Ltd vs. Sifynet Solutions Pvt Ltd has observed the following: “As far as India is concerned, there is no legislation which explicitly refers to dispute resolution in connection with domain names. But although the operation of the Trade Marks Act, 1999 itself is not extraterritorial and may not allow for adequate protection of domain names, this does not mean that domain names are not to be legally protected to the extent possible under the laws relating to passing off”. In India, victims are provided with the following options to combat Cybersquatting:

- By sending cease-and-desist letters to the Cybersquatters.
- Initiation of arbitration proceedings under ICANN’S rules.
- Option for a trial in a state court.

Answer 3(b)

Meaning of IP Audit : An intellectual property (IP) audit is a tool for identifying a business's potential IP assets. Ideally an audit should be carried out by professional IP auditors, but often a preliminary audit can be done in-house, within a company.

Benefits of IP audit:

Through an IP audit you can make an inventory of your potential IP assets.

This helps you to:

- Uncover unused or under-utilized assets
- Determine ownership of these assets
- Identify any related threats, i.e. IP infringement from your side or by others.

Carrying out an IP audit can add value to the following:

Cost reduction efforts - A well-managed list of IP assets can help you identify obsolete assets. Decisions can then be taken to stop paying maintenance costs for obsolete assets, resulting in significant cost reductions.

Licensing - An IP audit is vital to know which IP assets are core to your business and which are not. Licensing decisions can then be made accordingly. For example, you may decide to license a non-core IP asset in order to create an additional revenue stream.

Mergers and acquisitions - IP assets will play an important role in a third party deciding whether to merge with or acquire your business.

Anti-infringement actions - Knowing the value of your IP assets makes it easier to take decisions on whether it is cost-effective to take action against infringement and in what way this could be done.

Question 4

(a) Industrial Designs establish the language of a product as well as the corporate branding and identity of an enterprise. What is the difference between an industrial design right and a patent ? What are the advantages to any business of protecting its industrial designs ? (2+4 marks)

(b) Ravi Kamal Bali instituted an infringement suit against Kala Tech and Ors seeking an interim injunction preventing the defendant, from making, selling or distributing tamper proof locks/seals as it would be the infringement of his patent. He argued that Kala Tech's perform the same work, in substantially the same manner and gives the same output thereby contributing to the infringement. The plaintiff asked the court to apply Doctrine of Equivalents, while considering the question of infringement of patents.

With reference to this case, discuss the relevant Sections of the Indian Patent Act, 1970. (6 marks)

Answer 4(a)

Difference between an industrial design right and a patent: An industrial design right protects only the appearance or aesthetic features of a product, whereas a patent protects an invention that offers a new technical solution to a problem. In principle, an industrial design right does not protect the technical or functional features of a product. Such features could, however, potentially be protected by a patent.

Advantages of protecting industrial designs

The protection of industrial designs should form an integral part of any business strategy. The main reasons to protect industrial designs are the following:

Return on investments : Protection contributes to obtaining a return on investments made in creating and marketing attractive and innovative products.

Exclusive rights : Protection provides exclusive rights for at least 10 years, so as to prevent or stop others from commercially exploiting or copying the industrial design.

Strengthen brands : Industrial designs can be an important element of a company's brand. Protecting industrial designs contributes to protecting a company's brand.

Opportunity to license or sell : Protection provides rights that may be sold or licensed to another enterprise, which will then be a source of income for the owner of the rights.

Positive image : Protection helps convey a positive image of a company, since industrial designs are business assets which may increase the market value of a company and its products.

Reward : Protecting industrial designs rewards and encourages creativity.

Answer 4(b)

Section 104 to 114 of the Indian Patent Act 1970 provide guidelines related to patent infringement. Two kinds of patent infringement are defined - Direct Patent Infringement and Indirect Patent Infringement (Doctrine of Equivalents). Direct Infringement is the most common type which occurs when a product that is close to any patented product or invention is used commercially or marketed without permission from the owner of the patented product or invention. Patent infringement generally falls into two categories - literal infringement and infringement under the doctrine of equivalents. When each element claimed is identical to the allegedly infringing device or process, it is literal infringement. A claim may be infringed under the doctrine of equivalents if it falls under the "triple test", i.e. equivalence holds when the substituted elements perform substantially the same function in substantially the same way to obtain the same result. The "All Elements", test says that the doctrine of equivalents must be applied to all the individual elements of the claims and not the claimed invention as a whole. It is necessary to prove that every element of the patented invention, or its substantial equivalent, is present in the accused product or process. The elements of the patented invention must have substantial equivalents in the new invention. This means that they must meet the rules of the triple identity test. Equivalency should only be considered after a claim has been filed. It should not occur when an invention is patented.

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 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 equivalents.

Question 5

(a) "Trade secrets, just as other intellectual property rights, can be extremely valuable for a company's growth and sometimes even critical for its survival". Discuss. Also explain what kind of information is protected by trade secrets ? *(3+3 marks)*

(b) In the case of Syed Mohideen v. Sulochana Bai, the Supreme Court of India stated that passing off right is a wider remedy than that of infringement. This is because the passing off doctrine operates on the general principle that no person is entitled to represent his or her business as the business of another person.

Discuss in detail the significant differences between trademark infringement and passing off. *(6 marks)*

Answer 5(a)

Trade secrets and their importance: Trade secrets are intellectual property (IP) rights on confidential information which may be sold or licensed.

In general, to qualify as a trade secret, the information must be:

- commercially valuable because it is secret,
- be known only to a limited group of persons.

Trade secrets are secret practices and processes that give a company a competitive advantage over its competitors. Trade secrets may differ across jurisdictions but have three common traits: not being public, offering some economic benefit, and being actively protected. Trade secrets are widely used by businesses across the economy to protect their know-how and other commercially valuable information and thereby promote competitiveness and innovation.

Information that is protected by trade secrets:

In general, any confidential business information which provides an enterprise a competitive edge and is unknown to others may be protected as a trade secret. Trade secrets encompass both technical information, such as information concerning manufacturing processes, pharmaceutical test data, designs and drawings of computer programs, and commercial information, such as distribution methods, list of suppliers and clients, and advertising strategies. Other examples of information that may be protected by trade secrets include financial information, formulas and recipes and source codes.

Answer 5(b)

Significant differences between trademark infringement and passing off: Infringement

Section 29 of the Trade mark Act, 1999 states about various aspects concerning the infringement. In simple terms, trademark infringement is the unauthorised usage of a mark that is identical or deceptively similar to a registered trademark. The infringement can also be done by the spoken use of the words as well as by the visuals.

Passing Off

Passing off is a common law tort, which can be used to enforce unregistered trademark rights. The law of passing off prevents one person from misrepresenting his goods or services as that of another.

Factor	*Infringement*	*Passing off*
Type of remedy	The statutory remedy under Section 29(1) of the Trade mark Act, 1999	Common-Law remedy.
Registration	It is a pre-requisite.	It is not required.
Proof	Plaintiff is only required to show deceptive similarity, as there is a presumption of conclusion.	Apart from proving deceptive similarity the Plaintiff is also required to prove confusion in public and the likelihood of injury to the plaintiff's goodwill.
Jurisdiction	The registered user of the trade mark can institute the suit where they actually and voluntarily.	Section 20 of the Civil Procedure Code, 1908 would Apply.

Question 6

Section 3(k) of the Indian Patents Act states that "a mathematical or business method, a computer program per se or algorithms" are not considered to be inventions. However, it does not impose a blanket ban on patenting computer-related inventions in India. A software can be granted patent if it is attached with novel hardware, an invention which is unique and capable of industrial use.

Why is software not directly patented in India ? Does this help the Indian software business to grow ? Examine critically (6 + 6 marks)

Answer 6

The term "Software Patent" in India is colloquially used to address patents for computer related inventions in India, as the term "Software Patent" is not defined in any of the Indian Statutes. Instead, the Indian Statutes and Government Guidelines use terminologies like computer programme, algorithms, and computer related inventions, which in layman terms may be interpreted as a software.

Copyright and patent are two Intellectual Property (IP) protections for a software product. Copyright is the most common method of protecting software program as writing source code and programs is similar to writing any type of literary or artistic work. Patent is the strongest way to protect an IP but there are many stringent criteria to be fulfilled in order to get a patent for software. Patent laws create an exception with scientific discoveries, mathematical formulae, and algorithms. Computer programs are considered as a form of applied mathematics. Thus, in India, software is not directly patented but it can be granted patent if it is attached with novel hardware, an invention which is unique and capable of industrial use.

According to RBI's annual survey, export of India's software services increased by 11.6% to $108.4 billion in 2017-18. However, there is still no law that specifically and exclusively deals with software and computer programs. Software is protected under copyright, patents and at sometimes under the trade secrets. Even though we have legal provisions for IP protection, but the country fails in having a developed jurisprudence and therefore, American approach is applied majority of the times in dealing with such cases. Even the amended Information Technology Act does not talk about the IP protection of computer software and programs.

Whether its helps or hinders Indian software business grow:

The fast growing software industry and a faster pace of technological advancements have made it essential to protect the intellectual property (IP) vested in the software, programs and all those machines that use such programs and software. Software and computer programs face a cutthroat competition in the market and are pretty vulnerable to suffer undue economic loss as it might be accessed by users without payment and also, software are vulnerable to piracy and being copied.

Further, due to fierce competition, there is a serious threat of being outdated very soon as the competitors might bring a competing product quickly. Protection of software under IPR (Intellectual Property Rights) mechanism will not just protect the economic interest of the owner but also will promote innovation and creativity. In such an advancing and growing digital era, having such limited options for protection of one's original work in the field of software and computers might lead to lack of innovation and creativeness coming forward. Hence, it is essential that all these laws which are so scattered and vaguely made, be developed and put in place for better protection of the creator's work.

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LABOUR LAWS & PRACTICE
(Elective Paper 9.4)

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *Answer* ***ALL*** *Questions.*

Question 1

Case Study :

ABC & Associates, Company Secretaries (ABC Firm) is a partnership firm having 5 partners. Each of the partners are Fellow member of the Institute of Company Secretaries of India. ABC is having presence in Mumbai.

All the 5 partners (all male) are having industry exposures and specialised in Secretarial Audits, Direct and Indirect Taxation, Company Formation, RoC related matters, FEMA and all other compliances related matters. All the partners are also Insolvency Professionals and Registered Valuers enrolled with the Insolvency and Bankruptcy Board of India.

The ABC Firm is also having some management trainees and paid employees and total staff strength is 38 (20 Management Trainees and 18 Professional employees).

Among the 20 Management Trainees (MT), Shanaya, one of the MT, who is a young lady, takes leave on and often, pretending some stories. The work assigned to her also used to get suffer and her immediate boss was also not satisfied with her working. In every CS Exam time, she used to take leave of at least one month in advance, but with no good result. Even in office hours, it was being observed that she used to chat with her friends on mobile and surfing on social sites on the office PCs/Laptops.

Shanaya was given a task to collect data from some of the clients in order to file their GST Returns. But as usual, she did not collected the required information and due to this the clients were fined for delayed filing of the returns. Her boss Narendra warned her not to repeat such incidences and be serious in attending the official work.

The ABC Firm used to have an office meeting on every Saturday at 4 pm. On 9th October, 2021, the office meeting was scheduled and all the MTs and employees were present to show their report card i.e. 'Work Done Report' during the week, and Plan for the next week. Each of the MT/Employee was categorically analysed individually and appropriate instructions were being given. When the Shanaya's turn came, Narendra (her boss) expressed his displeasure regarding the working of Shanaya and narrated the financial loss suffered by the clients. The Managing Partner (Vikram Singh) of the firm asked Shanaya, to be more vigilant in meeting out the statutory obligations, in order to maintain the reputation of the firm.

This time, Shanaya took it very seriously and after a few days later, she approached

Vikram Singh (Managing Partner of the ABC Firm) alleging that Narendra is sexually harassing her. She denied of not given the task of collecting and filing of the GST Returns and delayed filing of returns, was the sole responsibility of Narendra and not of her. She said that Narendra on and often calls her, in his cabin and speaks the un-desirable languages. She also showed some WhatsApp chat which was shared from Narendra's Mobile to Shanaya's Mobile, containing some explicit languages. Due to these reason, she does not like to come in the office and feel ashamed.

Vikram Singh, calmly listened her and asked her to make a written complaint. He called on Narendra in the evening (when all the office staff left) and discussed the matter in length and to submit his comments.

Incidentally, the whole of the office was under the supervision of the CCTV cameras. The recordings were kept safely in a separate device. The comments of the other MTs and the Staff were also recorded. From the CCTV recordings, a video footage was observed. Narendra was called by one client on his mobile asking for some information for which Shanaya was having the information. So Narendra came out of his cabin and handed over his mobile to Shanaya, to talk with that client. Shanaya took the advantage of this moment and sent some explicit language from Narendra's Mobile to her own mobile and then deleted the messages from Narendra's mobile.

Shanaya was showed this CCTV footage, when she was holding the mobile of Narendra and typing something. She later committed that it was done by her only, since Narendra has made negative comments on her working in the office meeting. Base on the above facts, answer the following questions :

(a) Whether the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH) is applicable to the office of Company Secretaries ?

(b) Who shall be termed as 'employer' in this case ?

(c) What is the meaning of 'sexual harassment' as prescribed in the Act ?

(d) The provisions of the POSH Act are applicable only when the aggrieved woman is employed. Do you agree with this ? Comment.

(e) What are the consequence, if any wrong complaint is made by woman ?

(8 marks each)

Answer 1(a)

In order for a woman to claim protection under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, the incident of sexual harassment should have taken place at the 'workplace'.

According to section 2(o) of the Act, "workplace" includes –

a. any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;

b. any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainmental, industrial, health services or financial activities including production, supply, sale, distribution or service;

c. hospitals or nursing homes;

d. any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

e. any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey;

f. a dwelling place or a house;

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 applies to both the organized and unorganized sectors (self-employed or having less than 10 workers) in India. It inter alia, applies to government bodies, private and public sector organizations, non-governmental organizations, organizations carrying out commercial, vocational, educational entertainment industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals and also applies to a dwelling place or a house.

Therefore, the Sexual Harassment of women at Workplace Act, 2013 also applies on the offices of Company Secretaries.

Answer 1(b)

In terms of Section 2(g) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, "employer" means:' -

(i) in relation to any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate Government or a local authority, the head of that department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit or such other officer as the appropriate Government or the local authority, as the case may be, may by an order specify in this behalf;

(ii) in any workplace not covered under sub-clause (i), any person responsible for the management, supervision and control of the workplace. Explanation. - For the purposes of this sub-clause "management" includes the person or board or committee responsible for formulation and administration of polices for such organisation;

(iii) in relation to workplace covered under sub-clauses (i) and (ii), the person discharging contractual obligations with respect to his or her employees;

(iv) in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of domestic worker, irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker.

In the given case the Managing Partner(s) of the ABC Firm shall be treated as employer.

Answer 1(c)

In terms of section 2(n) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, "sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely: -

i. physical contact and advances; or

ii. a demand or request for sexual favours; or

iii. making sexually coloured remarks; or

iv. showing pornography; or

v. any other unwelcome physical, verbal or non-verbal conduct of sexual nature;

The Act has defined what constitutes sexual harassment under Section 2 (n) and under Section 3, has further widened the definition of sexual harassment by providing that any of the following circumstances, related to sexual harassment, may also amount to Sexual Harassment:

1) implied or explicit promise of preferential treatment in the victim's employment;

2) implied or explicit threat of detrimental treatment in the victim's employment;

3) implied or explicit threat about the victim's present or future employment status;

4) interferes with the victim's work or creating an intimidating or offensive or hostile work environment for her and

5) humiliating treatment likely to affect the victim's health or safety

Answer 1(d)

The Preamble of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 reads as under:

"An Act to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto.

In terms of Section 2(a)(i) of the Act, an 'aggrieved woman' in relation to a workplace, is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment. As per the definition, it does not necessitate that the woman to be an employee, even a customer/ client who may be sexually harassed at a workplace can claim protection under the Act. In order for a woman to claim protection under the Act, the incident of sexual harassment should have taken place at the 'workplace'.

So going by the Preamble and definition of aggrieved woman, the Act is applicable for aggrieved woman where incident of sexual harassment had taken place at workplace. Such a woman need not be employee.

Therefore, the comment, "the Provisions of POSH Act are applicable only when the aggrieved woman is employed" is not agreeable where incidence of sexual harassment took place at workplace.

However, the Act defines aggrieved woman in relation to a dwelling place or house, as a woman of any age who is employed in such a dwelling place or house [Sec 2(a)(ii)]. Therefore, POSH applies for sexual harassment at dwelling place only if woman is employed in that dwelling place.

Answer 1(e)

Punishment for false or malicious complaint and false evidence is prescribed under section 14 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Section 14(1) of the Act provides that where the Internal Committee or the Local Committee, as the case may be, arrives at a conclusion that the allegation against the respondent is malicious or the aggrieved woman or any other person making the complaint has made the complaint knowing it to be false or the aggrieved woman or any other person making the complaint has produced any forged or misleading document, it may recommend to the employer or the District Officer, as the case may be, to take action against the woman or the person who has made the complaint under section 9, as the case may be, in accordance with the provisions of the service rules applicable to her or him or where no such service rules exist, in such manner as may be prescribed. However, a mere inability to substantiate a complaint or provide adequate proof need not attract action against the complainant under this section.

Further, the malicious intent on part of the complainant shall be established after an inquiry in accordance with the procedure prescribed, before any action is recommended.

Section 14(2) of the Act provides that where the Internal Committee or the Local Committee, as the case may be, arrives at a conclusion that during the inquiry any witness has given false evidence or produced any forged or misleading document, it may recommend to the employer of the witness or the District Officer, as the case may be, to take action in accordance with the provisions of the service rules applicable to the said witness or where no such service rules exist, in such manner as may be prescribed.

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013

Rule 10 provides for action for false or malicious complaint or false evidence which is applicable in cases where service rules do not exist. Where the Complaints Committee arrives at the conclusion that the allegation against the respondent is malicious or the aggrieved woman or any other person making the complaint has made the complaint knowing it to be false or the aggrieved woman or any other person making the complaint has produced any forged or misleading document, it may recommend to the employer or District Officer, as the case may be, to take action in accordance with the provisions of Rule 9 i.e. including a written apology, warning, reprimand or censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service or undergoing a counselling session or carrying out community service.

Question 2

(a) *Romesh was a godown keeper in a textile factory and in the course of his employment he committed theft of cotton bales worth Rs. 1.50 lakh and sold them in the market. This act of Romesh was caught red handed through the CCTV footage and physical inspection of the godown. Romesh was dismissed from his services immediately without paying gratuity to him. Whether the act of the employer is justified in forfeiting the amount of gratuity ? Narrate your answer as per the appropriate provisions of the Law.*

(b) *Prakash Kumar advised workers in his factory to work on all Sundays in a month by compensating the weekly holiday on Wednesdays. Veena, a worker without availing the weekly holidays, claimed double of the wages for working on Sundays and normal wages for working on Wednesdays.*

Whether the claim of Veena is correct ? Justify your answer with reasons.

(6 marks each)

Answer 2(a)

According to Section 4(1) of the Payment of Gratuity Act, 1972, 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:

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease.

Forfeiture of Gratuity

The Act deals with this issue in two parts.

(i) Section 4(6)(a) provides that the gratuity of an employee whose services have been terminated for any act of wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, gratuity shall be forfeited to the extent of the damage or loss or caused. The right of forfeiture is limited to the extent of damage. In absence of proof of the extent of damage, the right of forfeiture is not available.

(ii) Section 4(6)(b) deals with a case where the services of an employee have been terminated:

   (a) for riotous and disorderly conduct or any other act of violence on his part, or

   (b) for any act which constitutes an offence involving moral turpitude provided that such offence is committed by him in the course of his employment.

In such cases the gratuity payable to the employee may be wholly or partially forfeited. Where the service has not been terminated on any of the above grounds, the employer cannot withhold gratuity due to the employee.

In view of the above, the employer can forfeit the gratuity to the extent of loss i.e ? 1.5 lakh due to theft.

Answer 2(b)

Section 52 of the Factories Act, 1948 provides that there shall be holiday for the whole day in every week and such weekly holiday shall be on the first day of the week. However, such holiday may be substituted for any one of the three days immediately before or after the first day of the week provided the manager of the factory has:

(i) delivered a notice at the office of the Inspector; and

(ii) displayed a notice in the factory to this effect.

The effect of all this is that subject to above said conditions (i) and (ii) there shall be a holiday during ten days. In other words, no adult worker shall work for more than ten days consecutively without a holiday for the whole day.

Compensatory Holidays : Section 53 provides that where, as a result of the passing of an order of the making of a rule under the provisions of this Act exempting a factory or the workers therein from the provisions of section 52, a worker is deprived of any of the weekly holidays for which provision is made in that section, he shall be allowed, within the month in which the holidays were due to him or within the two months immediately following that month, compensatory holidays of equal number to the holidays so lost.

Extra wages for overtime : Further, Section 59 provides that where a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages. The ordinary rate of wages here means the basic wages plus such allowances, including the cash equivalent of the advantage accuring through the concessional sale to workers of food grains and other articles, as the worker is for the time being entitled to, but does not include a bonus and wages for overtime work.

Thus, in terms of section 52 of Factories Act, 1948, Veena should not be allowed to work for more than 10 days consecutively without a holiday for the whole day. Further, in terms of section 59 where she has worked for all the day in a month, she should be given the extra wages for the overtime.

Question 3

(a) Ruchika is working in an establishment and she legally adopted a girl child aged one month. She claimed for the maternity leave and other benefits but her employer denied since she has not given the birth, but adopted a child. Ruchika approaches to you for the opinion. Discuss whether Ruchika is entitled for the maternity benefits as provided under the relevant law. (6 marks)

(b) Saurabh is working in an Iron and Steel Factory. Due to the nature of his job, he has to deal with the hot iron (in semi liquid position) and due to continuous operations in this area, he was graduallyloosing the vision in his eyes. Due to low vision, one day, he could not visualise properly and his left hand was burnt badly and as a result his left hand fingers were cut down and doctors advised him not to perform such nature of work in the establishment as it may cause permanent blindness in coming days.

The employer then posted him in clerical section of the factory where no such *manufacturing activities are being carried on. Saurabh claimed compensation from the employer since his nature of work was the only reason, due to which, he got serious injury of loosing fingers of left hand. Whether the employer is liable to pay any compensation to Saurabh ? If so, under which provisions of the Act and on what grounds ?* *(6 marks)*

Answer 3(a)

In terms of section 5 of the Maternity Benefit Act, 1961, every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day.

A woman shall be entitled to maternity benefit if she has actually worked in an establishment of the employer from whom she claims maternity benefit, for a period of not less than eighty days in the twelve months immediately preceding the date of her expected delivery.

A woman who legally adopts a child below the age of three months or a commissioning mother shall be entitled to maternity benefit for a period of twelve weeks from the date the child is handed over to the adopting mother or the commissioning mother, as the case may be.

In the given case, since Ruchika has legally adopted a girl child, which is below the age of 3 months, hence she is entitled to get the maternity leave and other benefits.

Answer 3(b)

The Employees' Compensation Act, 1923, does not define the word disablement, but, it defines the partial and total disablement.

The Act has classified disablement into two categories, viz.

(i) Partial disablement, and (ii) Total disablement.

(i) **Partial disablement** : Partial disablement can be classified as temporary partial disablement and permanent partial disablement.

a) Where the disablement is of a temporary nature: Such disablement as reduces the earning capacity of an employee in the employment in which he was engaged at the time of the accident resulting in the disablement; and

b) Where the disablement is of a permanent nature: Such disablement as reduces for all time his earning capacity in every employment which he was capable of undertaking at the time. [Section 2(1)(9)]. But every injury specified in Part II of Schedule -I shall be deemed to result in permanent partial disablement.

(ii) Schedule I contains list of injuries deemed to result in **Permanent Total/Partial disablement.**

Temporary partial disablement : In case of temporary partial disablement, the disablement results in reduction of earning capacity in respect of only that employment in which he was engaged at the time of accident. This means the employee's earning capacity in relation to other employment is not affected.

Permanent partial disablement : But in case of permanent partial disablement, the disablement results in reduction in his earning capacity in not only the employment in which he was engaged at the time of accident but in all other employments.

After reading the partial or total disablement as defined under the Act one may presume that disablement is loss of earning capacity by an injury which depending upon the nature of injury and percentage of loss of earning capacity will be partial or total.

Whether the disablement is temporary or permanent and whether it results in reduction of earning capacity, the answer will depend upon the fact of each case, except when the injury is clearly included in Part II of Schedule I of the Employees' Compensation Act, 1923.

In the given case, four fingers of one hand is the loss, which is mentioned in Part II of Schedule I which means it is Permanent partial Disablement, hence Saurabh can claim compensation from his employer.

Question 4

(a) Jagrati Co-operative Society (JCS) is engaged in the manufacturing and selling of Papad and Pickles and has employed 35 female workers belonging to the nearby villages. The JCS is registered with the Registrar of Co-operative Society under the Co-operative Societies Act, 1912 and is having its works/administrative office in Palghar, Maharashtra. The JCS is providing salary to its female workers, but is not deducting any Provident Fund. One day, Sandhya, a female worker of the JCS, made a complaint to the PF Dept. of that area for not deducting the PF from her salary. So the JCS received a notice from the PF Dept. The JCS has approached you for the legal advise. What will be your answer ?

(b) Labour should not be treated as commodity and the peace could only be established, if it is based on social justice.

Describe the fundamental principles and measures to attain peace, which were adopted during the peak of the second world war, under the leadership of Edward Phelan.

(6 marks each)

Answer 4(a)

Section 16(1) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 provides that the Act shall not apply to certain establishments as stated thereunder. Such establishments include-

(a) establishments registered under the Co-operative Societies Act, 1912, or under any other law for the time being in force in any State relating to co-operative societies, employing less than 50 persons and working without the aid of power; or

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits; or

(c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits.

Since Jagrati Co-operative Society (JCS) has only 35 lady workers working without aid of power and registered with the Co-operative Societies Act, 1912, hence there is no requirement to deduct any Provident Fund as per the provisions of Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

Answer 4(b)

Edward Phelan, who took over the International Labour Organisation (ILO) leadership, had played an important role during the Philadelphia meeting held in the peak of Second World War. The meeting saw the important adoption of the Charter of Philadelphia, which was adopted on 10th may, 1944. It encompasses the aims and objectives of the ILO, and the principles upon which its policies should be made. The declaration is divided into five parts.

Part 1

It talks about the fundamental principles upon which the organisation is based, namely

a. labour is not a commodity;
b. freedom of expression and of association are essential to sustained progress;
c. poverty anywhere constitutes a danger to prosperity everywhere;
d. the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

Part 2

This part reaffirms that, lasting peace could only be established if it is based on social justice. The conference confirmed that

a. all human beings, irrespective of race, creed or sex, have the right to pursue both their material wellbeing and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity:
b. the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;
c. all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;

d. it is a responsibility of the International Labour Organization to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;

e. in discharging the tasks entrusted to it the International Labour Organization, having consider all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.

Part 3

It talks about requirements that need to be addressed by all member nations, believing them to be the solemn obligation of the ILO.

Part 4

It talks about how better utilization of resources is primary for achieving the objectives set by the declaration.

Part 5

This part ensures that principles included in the declaration are to be applicable to all the people. The manner of application of these principles, are to be dependent upon socio-political development of the people.

Question 5

(a) The Supreme Court of India, in a leading case, determined the triple test for determining any establishment as an 'industry' and the criteria for its dominant nature. Keeping in view of this, define the meaning of 'industry' as provided under the relevant law.

(b) Comment on the significant role of Company Secretary in Labour Audit and how does it strengthen the industrial relations ? (6 marks each)

Answer 5(a)

In terms of Section 2(j) of the Industrial Disputes Act, 1947, "Industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling service, employment, handicraft, or industrial occupation or avocation of workmen.

This Section 2(j) has been amended by the Amendment Act of 1982, but has not been notified yet.

The Supreme Court carried out an in-depth study of the definition of the term industry in a comprehensive manner in the case of *Bangalore Water Supply and Sewerage Board* v. *A Rajiappa, (Bangalore Water Supply case)*, after considering various previous judicial decisions on the subject and in the process, it rejected some of them, while evolving a new concept of the term "industry".

Tests for determination of "industry”

The Supreme Court, has laid down the following tests to determine whether an activity is covered by the definition of "industry” or not.

It is also referred to as the triple test. Where there is:

(i) systematic activity,

(ii) organised by co-operation between employer and employee,

(iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g., making, on a large scale, prasad or food) prima facie, there is an industry" in that enterprise.

Absence of profit motive or gainful objective is whether the undertaking is operating in the public, joint, private or other sector. The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

If the organisation is a trade or business, it does not cease to be one because of philanthropy animating the triple test, cannot be exempted from scope of definition of industry.

Hence, the Supreme Court observed that professions, clubs, educational institutions, co-operatives, research institutes, charitable projects and other kindred adventures, if they fulfil the triple tests listed above cannot be exempted from the scope of Section 2(j).

A restricted category of professions, clubs, co-operatives and gurukulas and little research labs, may qualify for exemption if, in simple ventures, substantially and going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

Answer 5(b)

Labour Audit envisages a systematic scrutiny of records prescribed under labour legislations by an independent professional like Company Secretary in Whole Time Practice (hereinafter referred to as PCS), who shall report the compliance and non-compliance/extent of compliance and conditions of labour in the Indian industry/Factory/ Other Commercial Establishments. The Report should ideally, be addressed to the appropriate government. The appropriate government may provide for filing fees for such report on the lines of filing fees charged by Registrar of Companies for the documents filed with them.

Scope of Labour Audit

The audit should cover all labour legislations applicable to an Industry/factory or other commercial establishments. If a particular piece of labour legislation is not applicable to a specific employer, the same should distinctly be disclosed in the report of an Independent Professional like Company Secretary in Whole Time Practice.

Benefits to the Labour

a. Introduction of Labour Audit will boost the morale of the workers to a large extent.

b. It will increase their Social Security.

c. It will inculcate a sense of belongingness in workers towards their employer.

d. It will secure timely payment of wages, gratuity, bonus, overtime, compensation etc. of the workers.

e. Timely payment of entitlements will reduce absenteeism in the organisation.

Benefits to Employer

a. Increased productivity in view of lower absenteeism in the enterprise. Higher the productivity, higher will be the profit.

b. Status in the society for the employer will increase, in view of the recognition that may be bestowed on them by the Government.

c. Strict compliance of all labour legislations will be ensured by each of the employers, which, in turn, will reduce or even eliminate penalties / damages / fines that may be imposed by the Government.

d. Co-operation of and understanding with the workers will improve labour relations. The congenial atmosphere is indispensable for good corporate governance.

Benefits to the Government

a. Reduction in the number of field staff for inspection of Industries/Factories/ Commercial Establishments as most of their work will be done by an Independent Professional like Company Secretary in Whole Time Practice.

b. Compulsory Labour Audit will ensure compliance of past defaults.

c. In case the Government seeks to introduce filing fees for Compliance Report under Labour Legislation, the revenue of the Appropriate Government will rise phenomenally.

d. India's image before the International Labour Organisation will improve as a country with negligible non-compliance of labour legislation.

Question 6

The Code on Wages, 2019 is a complete code to amend and consolidate the laws relating to wages, bonus and matters related thereto. Substantiate your answer with salient features of the code. *(12 marks)*

Answer 6

The Code on Wages, 2019 has been passed by both Houses of the Parliament and assented to by the Honourable President of India on 08.08.2019.

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.

Salient features of the Code on Wages, 2019

a. It provides for all essential elements relating to wages, equal remuneration, its payment and bonus;

b. The provisions relating to wages shall be applicable to all employments covering both organised as well as unorganised sectors;

c. The power to fix minimum wages continues to be vested in the Central Government as well the State Government in their respective sphere;

d. It enables the appropriate Government to determine the factors by which the minimum wages shall be fixed for different category of employees. The factors shall be determined taking into account the skills required, the arduousness of the work assigned, geographical location of the workplace and other aspects which the appropriate Government considers necessary;

e. The provisions relating to timely payment of wages and authorised deductions from wages, which are presently applicable only in respect of employees drawing wages of twenty-four thousand rupees per month, shall be made applicable to all employees irrespective of wage ceiling. The appropriate Government may extend the coverage of such provisions to the Government establishments also;

f. It provides that the wages to employees may also be paid by cheque or through digital or electronic mode or by crediting it in the bank account of the employee. However, the appropriate Government may specify the industrial or other establishment, where the wages are to be paid only by cheque or through digital or electronic mode or by crediting the wages in the bank account of the employee;

g. It provides for floor wage for different geographical areas so as to ensure that no State Government fixes the minimum wage below the floor wage notified for that area by the Central Government;

h. In order to remove the arbitrariness and malpractices in inspection, it empowers the appropriate Government to appoint Inspectors-cum-Facilitators in the place of Inspectors, who would supply information and advice the employers and workers;

i. It empowers the appropriate Government to determine the ceiling of wage limit for the purpose of eligibility of bonus and calculation of bonus;

j. In the place of number of authorities at multiple levels, it empowers the appropriate Government to appoint one or more authorities to hear and decide the claims under the proposed legislation;

k. It enables the appropriate Government to establish an appellate authority to hear appeals for speedy, cheaper and efficient redressal of grievances and settlement of claims;

l. It provides for graded penalty for different types of contraventions of the provisions of the proposed legislation,

m. It provides that the Inspector-cum-Facilitator shall give an opportunity to the employer before initiation of prosecution proceedings in cases of contravention, so as to comply with the provisions of the proposed legislation. However, in case of repetition of the contravention within a period of five years such opportunity shall not be provided;

n. It provides for the appointment of officers not below the rank of Under Secretary to the Government of India or an officer of equivalent level in the State Government to dispose of cases punishable only with fine up to fifty thousand rupees, so as to reduce the burden on subordinate judiciary;

o. It provides for compounding of those offences which are not punishable with imprisonment;

p. It provides that where a claim has been filed for non-payment of remuneration or bonus or less payment of wages or bonus or on account of making deduction not authorised by the proposed legislation, the burden shall be on the employer to prove that the said dues have been paid to the employee;

q. It enables the appropriate Government to constitute Advisory Boards at Central and State level to advice the Central Government and the State Governments, respectively, on matters relating to wages, women employment, etc.;

r. The period of limitation for filing of claims by a worker has been enhanced to three years, as against the existing time period varying from six months to two years, to provide a worker more time to settle his claims.

Therefore, Code on Wages 2019 is a complete code to amend and consolidate the laws relating to wages, bonus and matters related thereto.

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INSOLVENCY - LAW AND PRACTICE

(Elective Paper 9.5)

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *Answer **ALL** Questions*

Question 1

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

DK Swan Limited (DK) was subject to Corporate Insolvency Resolution Process (CIRP) initiated by an Operational Creditor under Section 9 of Insolvency Bankruptcy Code, 2016 (IBC). During the CIRP, claims were invited by the Interim Resolution Professional (IRP). Sunrise filed its claim in Form C as a financial creditor for a sum of ₹62.60 lakh on 15th June, 2017. Thereafter, Sunrise filed a revised Form C for a sum of ₹119.11 lakh on 25th June, 2017. Sunrise had filed the revised claim Form on the basis of an alleged Memorandum of Understanding dated 17th September, 2010 executed with the Corporate Debtor, which stated that Inter Corporate Deposits (ICDs) of ₹36.55 lakh have been granted to the Corporate Debtor by Sunrise bearing interest of 24% repayable in terms of the mutual agreement between the parties.

However, Sunrise has submitted that it has granted ICDs of ₹76.00 lakh (approx.) to the Corporate Debtor between July, 2008 and February, 2012. Out of this amount, Sunrise is claiming a principal amount of ₹33.00 lakh. The balance amount of ₹53.60 lakh was credited in the account of XYZ, which is a wholly owned subsidiary of Sunrise. The total claim of Sunrise has increased to ₹119.11 lakh in 7 years on account of interest at the rate of 24%

XYZ filed its claim before the IRP in Form F as a creditor other than a financial creditor or operational creditor for a sum of ₹103.90 lakh on 15th June, 2017. Thereafter, XYZ filed a revised claim in Form C as a financial creditor for a sum of ₹119.72 lakh on 28th June, 2017. It had entered into a Development Agreement dated 6th April, 2011 with the Corporate Debtor for a sale consideration of ₹42.80 lakh to purchase development rights in a project. On 30th November, 2011, the Development Agreement was terminated and an Agreement to sell, along with a Side Letter, was executed between XYZ and the Corporate Debtor for purchase of flats. The sale consideration for the Agreement to sell was enhanced to ₹96.01 lakh from ₹42.80 lakh under the Development Agreement. XYZ paid a sum of ₹53.06 lakh as advance payment under the Agreement to Sell. This amount was adjusted out of the ICDs payable to Sunrise as noted above. The claim of XYZ is with respect to the principal amount of ₹53.06 lakh, which along with interest at the rate of 18% increased to ₹119.72 lakh in 5 years.

Phantom is also a financial creditor of the Corporate Debtor and is a part of Committee of Creditors (CoC). Its claim is based on a registered Deed of Assignment in its favour dated 2nd January, 2015, pursuant to which, Karnataka Bank Limited had assigned the non-performing assets relating to the credit facilities granted to the Corporate Debtor. The voting share of Phantom was reduced to 3.58% on account of XYZ and Sunrise being included in the CoC.

The CoC was constituted on 27th June, 2017. On 30th June, 2017, the IRP rejected the claim of Sunrise, inter alia, on the ground that the claim was not in the nature of a financial debt in terms of Section 5(8) of IBC since there was an absence of consideration for the time value of money, i.e., the period of repayment of the claimed ICDs was not stipulated

The IRP also rejected the claim of XYZ on the ground that its claim as a financial creditor in Form C was filed after the expiry of the period for filing such a claim.

The IRP in his letter dated 30th June, 2017 has noted that as per the ledger provided by Sunrise, no interest was claimed on the alleged debt and no adjustment was made regarding the payment of principal or interest by the Corporate Debtor to Sunrise. It has been submitted in the written submissions filed on behalf of Sunrise and XYZ that the auditors of the Corporate Debtor had been putting a note in its balance sheets stating that the interest of 12% was not being paid to Sunrise due to a dispute.

Aggrieved by the rejection of their claim as financial creditors, XYZ and Sunrise filed applications before the National Company Law Tribunal (NCLT) to be included in the CoC. The NCLT by its order dated 5th July, 2017 allowed the applications. However, none of the other financial creditors, such as Phantom and YES Bank, were parties to these proceedings. The NCLT observed that XYZ's original claim in Form F was filed on time and it has only amended its claim as one under Form C. The NCLT further observed that the amount given by Sunrise in the form of ICDs has been received as a deposit and is attracting interest as reflected in Form '26AS', deducting TDS on interest. Thus, NCLT allowed Sunrise and XYZ to submit their claims as financial creditors with a direction to the IRP to consider the claims.

On 6th July, 2017, a meeting of the CoC took place which was attended by YES Bank and Phantom, and also by the newly approved financial creditors, XYZ and Sunrise. Following the meeting, YES Bank and Phantom filed applications in the NCLT for the exclusion of XYZ and Sunrise from the CoC on the ground that they are related parties.

The applications filed under Section 60(5) by Phantom also sought similar reliefs for:

(i) The removal of Sunrise and XYZ from the CoC; and

(ii) Directing the constitution of the CoC in terms of the Insolvency and Bankruptcy (Amendment) Ordinance 2018 (IBC Ordinance 2018).

As noted by NCLT, the Memorandum of Understanding dated 17th September, 2010, on the basis of which Sunrise had filed its claim in Form C before the IRP, was signed two years after the commencement of the purported transaction. The execution of the Memorandum of Understanding was sought to be explained on the basis that a formal document was created for specifying the rate of interest on the ICDs given by Sunrise to the Corporate Debtor. However, despite the creation of a formal document, the rate of interest being charged on the ICDs was 12% as mentioned in the claim before the IRP, which is half of the interest rate of 24% stipulated in the Memorandum of Understanding.

NCLT in its judgement dated 24th August, 2018 said :

(a) That Sunrise and XYZ did not qualify to be considered as financial creditors.

(b) *In relation to the second issue, NCLT held that it "does not require a reply" in view of its above-mentioned finding. However, it took note of the first proviso to Section 21(2) of the IBC, which was introduced with effect from 6th June, 2018. Under the first proviso, inter alia, a financial creditor who is a related party of the corporate debtor shall not have the right of representation, participation or voting in the CoC.*

In appeal, the National Company Law Appellate Tribunal (NCLAT) proceeded of its decision to observe that admittedly Sunrise and XYZ are the financial creditors of the corporate debtor. Having stated so, the Appellate Tribunal proceeded to enquire into whether XYZ and Sunrise are related parties within the meaning of Section 5(24) of the IBC. Answering the above issue in the affirmative, the NCLAT held that Sunrise and XYZ are related parties of the Corporate Debtor since :

(a) *XYZ was a partner of the Corporate Debtor.*

(b) *During the transaction period of 2009 to 2012, Sunrise led by Kunal Kumar was making substantial financial arrangements on the basis of advice provided by the Corporate Debtor led by its Management and Directors.*

(c) *The Corporate Debtor was acting on the directions/instructions of Kunal Kumar who, along with his family, is the majority shareholder in Sunrise, of which XYZ is a whollyowned subsidiary.*

(d) *On the basis of the same reasons, Kunal Kumar was also held to be a person participating in the policy-making process of the Corporate Debtor.*

Aggrieved by order of NCLAT, Phantom approached the Hon'ble Supreme Court. Referring the relevant case and relevant provisions of IBC, its Rules and Regulations made thereunder, answer the following questions :

(a) *Explain whether Sunrise and XYZ are financial creditors of the Corporate Debtor?*

(b) *Explain based on Supreme Court's decision, if Sunrise and XYZ are related parties of the Corporate Debtor ?*

(c) *Whether Sunrise and XYZ have to be excluded from the CoC ?*

(d) *Section 21(2) of the IBC provides that the Committee of Creditors (CoC) shall comprise of all financial creditors of the corporate debtor. In light of this statutory provision what will be your answer, if there are no financial creditors or all the financial creditors are related party to the Corporate Debtor ?*

(10 marks each)

Answer 1(a)

The facts of this case is similar to the Supreme Court decided case of *Phoenix Arc Private Limited* vs. *Sunrise Financial Services Limited & Ors. (Supreme Court Of India, Civil Appeal No. 2842 of 2020)*.

Under Section 5(7) of the Insolvency & Bankruptcy Code (IBC), a person can be categorised as a financial creditor if a financial debt is owed to it. Section 5(8) of the IBC stipulates that the essential ingredient of a financial debt is disbursal against consideration for the time value of money.

Further, the Supreme Court, in *Swiss Ribbons Pvt. Ltd.* v. *Union of India* has held:

"A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority."

The above discussion shows that money advanced as debt should be in the receipt of the borrower. The borrower is obligated to return the money or its equivalent along with the consideration for a time value of money, which is the compensation or price payable for the period of time for which the money is lent.

The execution of the Memorandum of Understanding was sought to be explained on the basis that a formal document was created for specifying the rate of interest on the ICDs given by Sunrise to the Corporate Debtor (CD). However, despite the creation of a formal document, the rate of interest being charged on the ICDs was 12% as mentioned in the claim before the IRP, which is half of the interest rate of 24% stipulated in the Memorandum of Understanding.

Moreover, even interest of 12% was not being paid to Sunrise. As noted that as per the ledger provided by Sunrise, no interest was claimed on the alleged debt and no adjustment was made regarding the payment of principal or interest by the Corporate Debtor to Sunrise. Also it is to be noted that no Board Resolution was passed by Sunrise approving the grant of ICDs to the CD. The MOU does not contain the exact period of repayment of ICDs. Based on the above, we can say that there was no commercial contract between Sunrise and the CD and hence Sunrise is not a financial creditor of the CD.

It has been noted that XYZ and the Corporate Debtor had entered into multiple agreements regarding the same property without giving any explanation or rationale regarding variation in the consideration. This showed that the transactions were collusive in nature entered with the purpose of diverting properties of the Corporate Debtor to XYZ.

Since the commercial arrangements between Sunrise and XYZ, and the Corporate Debtor were collusive in nature, they would not constitute a 'financial debt. Hence, Sunrise and XYZ are not financial creditors of the Corporate Debtor.

Answer 1(b)

The definition of the expression 'related party' in Section 5(24) of the Insolvency & Bankruptcy Code is exhaustive, since the expression is defined to "mean" what is set out in clauses (a) to (m).

The NCLAT decision was right on following reasons:

a. XYZ was a partner of the Corporate Debtor in accordance with Section 5(24)(a).
b. In accordance with Section 5(24)(f), during the transaction period of 2010 to

2013, Sunrise led by Kunal Kumar was making substantial financial arrangements on the basis of advice provided by the Corporate Debtor led by its Management and Directors.

c. In accordance with Section 5(24)(h), the Corporate Debtor was acting on the directions/instruction of Kunal Kumar who, along with his family, is the majority shareholder in Sunrise, of which XYZ is a wholly-owned subsidiary.

d. On the basis of the same reasons as (iii), Kunal Kumar was also held to be a person participating in the policy-making process of the Corporate Debtor in accordance with Section 5(24)(m) (i).

Similarly, there is no hesitation in accepting the NCLAT'S conclusion that Sunrise entered into two transactions on the basis of the advice/instructions/directions of the board/directors of the Corporate Debtor under Section 5(24)(f).

Therefore, it is easy to conclude that Sunrise and XYZ were related parties of the Corporate Debtor during the relevant period when the transactions on the basis of which Sunrise and XYZ claim their status as financial creditors took place.

Answer 1(c)

Section 21(1) of the Insolvency & Bankruptcy Code requires the IRP to form the CoC for the CIRP of the Corporate Debtor. The membership of the COC is determined in accordance with Section 21(2), which reads thus:

"(2) The committee of creditors shall comprise all financial creditors of the corporate debtor: Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub section (6-A) or sub-section (5) of Section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date."

Hence, the first proviso states that any financial creditor, barring the exceptions provided in the second proviso, shall not have any right of representation, participation and voting in the meeting of the CoC, if it is a related party of the Corporate Debtor.

Under Section 28, the Resolution Professional is required to take the prior approval of the COC specifically on certain aspects. Section 28(1) provides as follows: (f) Undertake any related party transaction;

The Supreme Court elucidates the two way relationship in related parties that "The definition describes a commutative relationship, meaning that X can be a related party of Y, if either X is related to Y, or Y is related to X. The definition of 'related party' under the IBC is significantly broad. The intention of the legislature in adopting such a broad definition was to capture all kinds of inter-relationships between the financial creditor and the corporate debtor."

The COC is comprised of financial creditors, under loan and debt contracts, who have the right to vote on decisions. The aim of the COC is to enable coordination between various creditors so as to ensure that the interests of all stakeholders are balanced, and the value of the assets of the entity in financial distress is maximised.

The objects and purposes of the Code are best served when the CIRP is driven by external creditors, so as ensure that the CoC is not sabotaged by related parties of the corporate debtor. This is the intent behind the first proviso to Section 21(2) which disqualifies a financial creditor or the authorised representative of the financial creditor under sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, from having any right of representation, participation or voting in a meeting of the committee of creditors.

It is pertinent to note that disqualification of related parties from being members of the CoC, has also been recommended in the UNCITRAL Legislative Guide on Insolvency law.

"The insolvency law should specify the creditors that are eligible to be appointed to a committee. Creditors who may not be appointed to a creditor committee would include related persons and others who for any reason might not be impartial. The insolvency law should specify whether or not a creditor's claim must be admitted before the creditor is entitled to be appointed to a committee."

Hence it is right to exclude Sunrise and XYZ from the CoC in accordance with the first proviso of Section 21(2).

Answer 1(d)

Yes, it is true in terms of section 21(2) of the Insolvency & Bankruptcy Code provides that the Committee of Creditors (COC) 1(d) shall comprise of all financial creditors of the corporate debtor. However, in case there are no financial creditors or all the financial creditors are related party to the Corporate Debtor, then the Regulation 16 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall apply, which reads as under:

(1) Where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation.

(2) The committee formed under this Regulation shall consist of members as under:

   (a) eighteen largest operational creditors by value:

   Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;

   (b) one representative elected by all workmen other than those workmen included under sub-clause (a); and

   (c) one representative elected by all employees other than those employees included under sub-clause (a).

(3) A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

Explanation – For the purposes of this sub-regulation, total debt' is the sum of

(a) the amount of debt due to the creditors listed in sub regulation 2(a):

(b) the amount of the aggregate debt due to workmen under sub-regulation 2(b); and

(c) the amount of the aggregate debt due to employees under sub-regulation 2(c).

(4) A committee formed under this Regulation and its members shall have the same rights, powers, duties and obligations as a committee comprising financial creditors and its members, as the case may be.

Question 2

(a) An Application for initiation of Corporate Insolvency Resolution Process (CIRP) was filed against a Corporate Debtor (CD) and the following four Banks submitted their claims as under :

A Bank Limited	*14 crore,*
B Bank Limited	*3.26 crore,*
C Bank Limited	*18.27 crore, and*
D Bank Limited	*8.99 crore.*

It was the case of consortium finance.

The Corporate Debtor filed an appeal before National Company Law Appellate Tribunal (NCLAT) challenging the order of admission of CIRP, which was ultimately upheld by Supreme Court. NCLAT in another order, directed the Resolution Professional (RP) to keep the company as a going concern and the bankers were also directed to co-operate with the Resolution Professional in this regard.

The banks allowed continuous operations in the company's account through which the company was also routing all the business cash in the normal course of its business.

In the course of these operations, the Corporate Debtor's outstanding dues under the said accounts got gradually liquidated through its surplus cash flows accruing out of its increasing cash profits. As the Corporate Debtor was making good profit and had accumulated adequate cash balance, the erstwhile RP opted to reduce the utilization of the Fund-based facilities and thus squared off the Cash Credit (CC) facilities with all the banks. In the meantime, in one of the meeting of the Committee of Creditors (CoC), new RP was proposed, which was approved by the Adjudicating Authority. The new RP asked the banks to reverse the amounts remitted by the previous RP while discharging his duties as per the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC) and its Regulations thereof. The lenders consortium contended that the operation in the accounts was allowed as per the directions of Tribunal and that the credit was received in the normal course of business. Meanwhile the Resolution Plan was also approved by Adjudicating Authority.

In light of the above facts, discuss, whether the contention of lenders consortium is correct ? *(6 marks)*

(b) Solver Ltd., the Operational Creditor (OC), supplied Jute bags to Atren Ltd., the Corporate Debtor (CD) through 12 invoices for ₹78.63 lakh during a period of May 2015 to November 2016.

The OC claimed its amount from the date of acknowledgement i.e. 12th December, 2017 with interest. The CD sent a Legal Notice (Notice of Dispute) on 20th September, 2018 after that it was assured that the outstanding amount will be paid within a month, but no outstanding debt was paid. It also mentioned that past payments and return of material were not factored in raising the demand.

The OC raised demand notice under Section 8 of the IBC again on 12th October, 2018 which was delivered on 27th October, 2018. The CD sent a reply on 31st October, 2018 to the aforesaid demand notice wherein it mentioned that the material worth ₹10.65 lakh were returned on 23rd June, 2017, owing to the quality issue and the same were duly received and acknowledged by the Operational Creditor, so dispute was raised.

The National Company Law Tribunal (NCLT) rejected the application of OC. The OC referred the matter before the National Company Law Appellate Tribunal (NCLAT). Referring the relevant case, explain whether the OC will succeed before NCLAT ? *(6 marks)*

Answer 2(a)

The facts of the case are similar to the case of *Bank of India* vs. *Bhuban Madan R.P. (Principal Bench, Delhi) – No. 590 of 2020*. The National Company Law Appellate Tribunal (NCALT), vide its order held as under:

Section 14(1) of the Insolvency & Bankruptcy Code reads as under;

(1) Subject to provisions of sub-sections (2) and (3), on the Insolvency Commencement Date, the Adjudicating Authority shall by order declare 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 judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of 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;

(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."

National Company Law Appellate Tribunal, New Delhi (NCALT) in Company Appeal

(AT) NO. 267 of 2017 in *'Indian Overseas Bank'* vs. *'Mr. Dinakar T. M.Venkatsubramaniam, Resolution Professional for Ambtek Auto Ltd.'* held as follows:

"... Once Moratorium has been declared, it is not open to any person including 'Financial Creditor and the Appellant Bank to recover any amount from the account of the Corporate Debtor', nor it can appropriate any amount towards its own dues" ...

As per Section 17(1)(d) of the Insolvency & Bankruptcy Code, the Financial Institutions maintaining the accounts of the Corporate Debtor' have to act on the instructions of the Interim Resolution Professional in relation to such accounts and furnish all information relating to the Corporate Debtor'.

However, Section 14 of the Insolvency & Bankruptcy Code overwrites any other provision contrary to the same and any amount due prior to the date of CIRP cannot be appropriated during the moratorium period.

Hence, it was held that merely because the 'Corporate Debtor had enough liquidity to run the Company as a going concern, the act of the appellant Banks to adjust the credit balance in the Cash Credit Account towards the debit balance after CIRP commenced, cannot be justified.

Answer 2(b)

As per *Solenis Chemicals (India) Pvt. Ltd.* vs. *Arjun Pulp and Paper (India) Private Limited Company Appeal (AT) (Insolvency) No. 2(b) 707 of 2020* the Adjudicating Authority has rightly dismissed the Application under Section 9 of the IBC filed by the Appellant holding that there is pre-existing dispute prior to issuance of Demand Notice. Section 5(6) of IBC which defines the term 'dispute' which includes a suit or arbitration proceedings relating to-

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty."

As per Section 9(5) (ii) (d) the Adjudicating Authority may reject the application and communicate such decision to the operational creditor and the corporate debtor, if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility.

The Letter dated 20th September 2018, sent by Respondent through Advocate, clearly shows that the dispute existed prior to issuance of Demand Notice.

Having regard to the foregoing discussion, the Appellant has failed to demonstrate that the impugned order suffers from any legal infirmity. The Appeal is dismissed.

Hence, if there is any pre-existing dispute, the claim of the Operational Creditor cannot be entertained by the Adjudicating Authority.

Question 3

(a) A Bank extended credit facility to M/s. Jaiveer Construction (JC), a proprietary firm of the appellant. The loan amount was disbursed to JC, the Principal

Borrower. Gupta Foods Ltd. (GFL), of which the appellant is also a Promoter/ Director, had offered guarantee to the loan accounts of JC, the Principal Borrower. The loan accounts of JC were declared NPA on 30th January, 2011.

During the pendency of the stated action initiated by the Financial Creditor (FC), JC the Principal Borrower had repeatedly assured to pay the outstanding amount, but the commitment remained unfulfilled.

The FC eventually wrote to GFL in December, 2018 in the form of a purported notice of payment. The GFL replied to the said notice of demand vide letter dated 8th January, 2019, inter alia, clarifying that it was not the Principal Borrower, nor owed any financial debt to the financial creditor and had not committed any default in repayment of the stated outstanding amount.

The FC then proceeded to file an application on 23rd March, 2019 under Section 7 of the Code for initiating Corporate Insolvency Resolution Proceeding (CIRP) against the GFL, before the National Company Law Tribunal (NCLT). This application came to be resisted on diverse counts and in particular, on the preliminary ground that it was not maintainable because the Principal Borrower was not a "Corporate Person"; and further, it was barred by limitation, as the date of default was 30th January, 2011, whereas, the application had been filed on 23rd March, 2019 i.e., beyond the period of three years.

Examine in light of decided case, whether two objections made by GFL were sustainable or not? (6 marks)

(b) Operational Creditor (OC) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiation of Corporate Insolvency Resolution Process (CIRP) against Corporate Debtor (CD). The Adjudicating Authority (AA) dmitted the application.

The CD challenged the order on the ground that the application under Section 9 of IBC was filed fraudulently with malicious intent for the purpose, other than for the resolution of insolvency or liquidation and attracts penal amount in terms of Section 65(1) of the IBC.

The OC is claiming the amount, on the basis of two Memorandum of Understanding(s), (MOUs), first one is for claim against invoices raised and the second one is for reimbursement of custom duty, paid to the relevant authorities.

As per CD, he offered 100% of the amount actually payable in terms of the first MOU on account of the invoices raised by the OC, but the OC declined to settle the amount and asked for more.

Further, the OC also demands for customs duty paid to the relevant authorities. However, no such arrangement has been made as per the MOU terms.

CD appealed to, the National Company Law Appellate Tribunal (NCLAT). During the proceedings, NCLAT, on request of CD, allowed CD to pay entire amount as mentioned in 1st MOU, and also to pay certain additional amount. However, the OC refused to accept the same and asked for more interest.

Discuss, whether the appeal filed by the CD at NCLAT, will be maintainable ? (6 marks)

Answer 3(a)

The facts of the case are similar to the case of *Laxmi Pat Surana* vs. *Union Bank Of India & Anr* (In The Supreme Court Of India, Civil Appellate Jurisdiction Civil Appeal No. 2734 OF 2020) decided on 26th March 21.

Two central issues arise for our determination in the given question:

(i) Whether an action under Section 7 of the Insolvency and Bankruptcy Code, 2016 can be initiated by the financial creditor (Bank) against a corporate person (being a corporate debtor) concerning guarantee offered by it in respect of a loan account of the principal borrower, who had committed default and is not a "corporate person" within the meaning of the Code?

(ii) Whether an application under Section 7 of the Code filed after three years from the date of declaration of the loan account as Non-performing Asset being the date of default, is not barred by limitation?

   (i) Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) propounds the manner in which Corporate Insolvency Resolution Process (CIRP) may be initiated by the "financial creditor" against a "corporate person being the corporate debtor".

Section 7 is an enabling provision, which permits the financial creditor to initiate CIRP against a corporate debtor. The corporate debtor can be the principal borrower. It can also be a corporate person assuming the status of corporate debtor having offered guarantee, if and when the principal borrower/debtor (be it a corporate person or otherwise) commits default in payment of its debt.

Actually, a right or cause of action would ensure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt.

For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. Thus, action under Section 7 of the Code could be legitimately invoked even against a (corporate) guarantor being a corporate debtor.

The principal borrower may or may not be a corporate person, but if a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression "corporate debtor" in Section 3(8) of the Code.

Whereas, upon default committed by the principal borrower, the liability of the company (corporate person), being the guarantor, instantly triggers the right of the financial creditor to proceed against the corporate person (being a corporate debtor), therefore, there is no substance in the argument that since the loan was offered to a proprietary firm(Principal borrower - not a corporate person), action under Section 7 of the Code cannot be initiated against the corporate person even though it had offered guarantee in respect of that transaction.

Therefore, the first argument by GFL is not sustainable.

(ii) Notably, the provisions of Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. For, Section 238A predicates that the provisions of Limitation Act shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as the case may be.

In the present case, acknowledgments were made by the principal borrower as well as the corporate guarantor after declaration of NPA from time to time and lastly on 8th January 2019, which was the basis of filing of subject application under Section 7 of the Code on 23rd March, 2019. The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt.

Section 18 of the Limitation Act, however, posits that a fresh period of limitation shall be computed from the time when the party against whom the right is claimed acknowledges its liability. The financial creditor has not only the right to recover the outstanding dues by filing a suit, but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is coextensive with that of the principal borrower and more so when it activates from the written acknowledgment of liability and failure of both to discharge that liability.

Suffice it to conclude that there is no substance even in the second ground urged by the appellant regarding the maintainability of the application filed by the respondent financial creditor under Section 7 of the Code on the ground of being barred by limitation.

A fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower from time to time and in particular the (corporate) guarantor/corporate debtor vide last communication dated 8th January, 2019. Thus, the application under Section 7 of the Code filed on 23rd March, 2019 is within limitation.

Answer 3(b)

The facts of the above are similar to the case of *IRK Raju* vs. *Immaneni Eswara Rao & Ors. (1058 of 2019)* decided on 30th January, 2020.

Section 5(20) defines 'Operational Creditor (OC)' whereas, section 5(21) of IBC defines 'Operational Debt which includes goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority. The statutory dues are payable under law to the Central Government for which the Central Government can claim to be the OC. The OC in present case, does not come within the meaning of 'Operational Creditor for the purpose of Custom Duty.

The NCLAT held that it is a glaring example that the OC moved an application under Section 9 fraudulently with malicious intent for extracting more amount, not for the liquidation or resolution as covered by Section 65 and as such calls for penal action. The Adjudicating Authority has failed to notice the aforesaid fact.

Fraudulent or malicious initiation of proceedings

Section 65 of the Insolvency and Bankruptcy Code, 2016 provides that if any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, AA may impose upon a such person a penalty which shall not be less than One Lakh Rupees, but may extend to One Crore Rupees. Whereas, if any person initiates voluntary liquidation proceedings with the intent to defraud any person, AA may impose upon such person a penalty which shall not be less than One Lakh Rupees, but may extend to One Crore Rupees.

The Appellate Authority opined to release CD from all the rigours of CIRP and was allowed to function through its Board of Directors with immediate effect. The 'Interim Resolution Professional (IRP) will hand over the assets and records to the Board of Directors.

Hence, the appeal is allowed with aforesaid observations and directions.

Question 4

(a) An Appeal is filed by the Appellant-Anil Sharma, Resolution Professional (RP) of S. K. Oils Ltd. under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC) against the impugned order passed by the Adjudicating Authority (AA). The grievance of the Appellant-RP is that, despite lapse of 985 days from the date of filing of the Application seeking broadly to consider passing orders for liquidation of the Corporate Debtor (CD) i.e. S. K. Oils Ltd., as no Resolution Plan has been approved by the Committee of Creditors (CoC) before the maximum period permitted for the Corporate Insolvency Resolution Process ('CIRP') under Section 12 of the IBC, instead the AA has dismissed the Application as not maintainable and being infructuous.

The Appellant-RP has sought the following reliefs :

(i) Allow the instant appeal and set aside/quash the impugned order passed by the AA.

(ii) Pass an order initiating liquidation of the Corporate Debtor M/s. S. K. Oils Ltd., under Section 33(1) of IBC. Discuss based on decided case law, whether Appellant-RP will succeed in getting relief ? (6 marks)

(b) M/s ABC through Ankit, the proprietor, approached you as professional, to seek direction about its business. He says, that the business is in distress and there are heavy debts, thus unable to run the business. He wants to find solution to the debts, so that he can run the business smoothly. He shares following details about his business

(i) Gross annual turnover Rs. 50,000

(ii) *Aggregate Value of Assets* *Rs. 20,000*

(iii) *Value of Debts incurred in last two months* *Rs. 32,000*

(iv) There is no dwelling unit owned by him

(v) There is no insolvency resolution process, bankruptcy process or fresh start process subsisting against him.

Based on above details, advise him to get rid of his debts and to re-start his business smoothly. (6 marks)

Answer 4(a)

The facts of the case relates to *Kuldeep Verma, Resolution Professional S.K Oils Ltd. VIS State Bank of India & Others, (98 4(a) of 2021)* decided on 16th March, 2021.

It is observed that even after the lapse of 985 days and repeated compliance by the RP of the direction of the AA; the AA has not yet considered initiation of Liquidation as per Section 33 of the IBC. It was observed that neither the AA nor the Appellate Authority is supposed to look into the commercial wisdom of CoC or to reverse the Commercial wisdom of CoC.

Section 12 of the Code requires completion of CIRP within a period of 180 days from the date of submission of the Application whereas in this case even on completion of 985 days from the date of CIRP commencement the Appellant filed for appropriate order to be passed by AA under Chapter - III of the Code, the AA has erred in not passing Liquidation order but has dismissed the application as not maintainable & infructuous.

It is held that from the above observations it is in the fitness of situation to allow the appeal and set aside the impugned order passed by the AA and initiate Liquidation of the CD M/S. S.K.Oils Ltd. under Section 33(1) of the Code. Hence, the Appeal is allowed and the impugned order passed by the AA is set aside and at the same time the order for initiation for liquidation of the Corporate Debtor M/s. S.K. Oils Ltd is also allowed.

Answer 4(b)

M/s ABC can be advised to take recourse of Fresh Start Process under Insolvency and Bankruptcy Code, 2016 (IBC Code). Following are the brief provisions of Fresh Start Process (FSP):

1. As per the given facts of case, M/s ABC is eligible to take of Fresh Start Process (FSP), under section 80 of IBC Code.
2. An application u/s 81 can be filed for FSP by M/s ABC itself or through Resolution Professional with prescribed fees containing the following information supported by an affidavit, namely: –
   (a) a list of all debts owed by the debtor as on the date of the said application along with details 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) a list of security held in respect of any of the debts,

(d) the financial information of the debtor and his immediate family 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;

(h) the confirmation that no previous fresh start order under this Chapter has been made in respect of the qualifying debts of the debtor in the preceding twelve months of the date of the application.

3. Where an application under section 80 is filed by the debtor through a resolution professional, the Adjudicating Authority (AA) shall direct the Board within seven days of the date of receipt of the application and shall seek confirmation from the Board that there are no disciplinary proceedings against the resolution professional who has submitted such application. On receipt of confirmation from Board, AA shall confirm appointment of RP.

   Where an application under section 80 is filed by the debtor himself and not through the resolution professional, the Adjudicating Authority shall direct the Board within seven days of the date of the receipt of an application to nominate a resolution professional for the fresh start process. On nomination by Board within 10 days, AA shall appoint RP.

4. The RP will examine application and submit report to AA, recommending acceptance or rejection of application u/s 83, within 10 days of his appointment.

5. AA will pass order u/s 84, based on report by RP to admit or reject the application, with 14 days from submission of report by RP.

6. On the date of admission of the application, the moratorium period shall commence in respect of all the debts. The moratorium ceases to have effect at the end of the period of one hundred and eighty days beginning with the date of admission unless the order admitting the application is revoked under sub-section (2) of section 91.

7. Any creditor mentioned in the order of the Adjudicating Authority under section 84 to whom a qualifying debt is owed may, within a period of ten days from the date of receipt of the order under section 84, file his objections to RP only on the following grounds, namely: - (a)inclusion of a debt as a qualifying debt; or (b) incorrectness of the details of the qualifying debt specified in the order under section 84.

8. As per section 92, the RP will prepare a final list of qualifying debts and submit such list to AA. Based on that AA will pass discharge order w.r.t. qualifying debts.

Question 5

(a) XYZ Bank has given loan of ₹20 crore to AB Ltd. The loan is duly guaranteed by personal guarantee of two relatives of directors. The loan went in to default and the Bank decided to file application against personal guarantors u/s 95 of Insolvency and Bankruptcy Code, 2016 (IBC), to initiate insolvency resolution process.

The Resolution Professional (RP) has filed a report under Section 99 of the IBC recommending approval of application filed u/s 95 of the IBC by the Bank against personal guarantors to the Corporate Debtors (CD).

The CD says that the Debt Recovery Tribunal (DRT) have no right to entertain the present petition as the guarantors are resident, which falls within territorial jurisdiction of other DRT, and also the RP had not complied with the procedure as envisaged in Section 99(2) which mandates the RP to require debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing the proof of the same. Hence the RP has not followed the mandate of Section 99(2) of the IBC.

Based on the above facts answer the following questions :

(a) Whether issue of territorial jurisdiction was appropriate ?

(b) Whether objection about RP, not complying with mandate of Section 99(2) of IBC was sustainable ? *(6 marks)*

(b) A Ltd. and the B Ltd. had jointly submitted the Resolution Plan for taking over the Company. The same was approved unanimously by the Committee of Creditors (CoC), and after that, the Resolution Plan was further approved by the Adjudicating Authority (AA).

The approved Resolution Plan got executed, and the shares were allotted as per the terms of the approved Plan. All money in respect of 34% shares were paid by the A Ltd. and B Ltd. got 51% paid-up equity shares.

Later, after 13 months of completion of Corporate Insolvency Resolution Plan (CIRP), the AA, on an application of B Ltd. made changes in Plan, thus increasing its shareholding to 75% and reducing the shareholding of A Ltd. to 10%. This was done as typographical/ clerical error brought to notice of AA.

Discuss, based on case laws, whether A Ltd. will succeed in Appeal ?
(6 marks)

Answer 5(a)

The above facts relates to *Keb Hana Bank (Petitioner)* vs. *Rohit Nath (CD) (IBC SR.NO 2643/2020)* decided on 22nd October, 2020 at Debt Recovery Tribunal-II, Chennai.

(a) The contention of the applicant is that as per section 60 of the IBC, the insolvency resolution has to be initiated before adjudicating authority having territorial jurisdiction over the place where the registered office of the corporate person is located. However, this contention was unfounded as section 60 deals with proceedings initiated against the corporate debtor whereas have separate forum is clothed with the power to adjudicate. The present proceedings are against guarantor to the corporate debtor alone. As far as the proceedings before this Tribunal is concerned, under section 60 of IBC code have no application.

The present application is filed by the applicant showing the address of the respondent where they have been served with the communications and the same falls within the territorial of the jurisdiction of this Tribunal. Hence, this Tribunal is of the view that there is no force in contention of the respondent that this Tribunal lacks territorial jurisdiction to entertain this matter

(b) As per section 99 of IBC, the resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application.

Section 99(2) provides that where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing –

(a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;

(b) evidence of encashment of a cheque issued by the debtor; or

(c) a signed acknowledgment by the creditor accepting receipt of dues.

As per section 99(2), it is crystal clear that the resolution professional may require the debtor to furnish the details about the repayment and there is nothing to suggest that it is made mandatory to the RP to call for from the debtor the details of repayment. The word used "may" cannot be construed as mandatory one and it gives only discretionary however to the RP. In view of section 99(2), which does not create a mandatory obligation on the RP, the contention of the respondent is that non-compliance of section 99(2) vitiates the proceedings is unfounded.

Having entered into the above findings, it is viewed that the application filed by the applicant under section 95 of the Act can be admitted and accordingly the same is admitted.

Answer 5(b)

The facts of the case are similar to the case of *QVC Exports Pvt. Ltd.* vs. *United Tradeco FZC National Company Law Appellate Tribunal, New Delhi Company Appeal (AT) (Insolvency) No. 1351 of 2019*.

When approved Resolution Plan was submitted by A Ltd. and B Ltd. jointly, then one party had no right to move the rectification of the said Resolution Plan, without the consent of another party. But the Adjudicating Authority has allowed this Application without any cogent reasons.

It is pertinent to mention that the joint Resolution Plan was approved unanimously by the CoC and after that, the same was approved by the Adjudicating Authority.

It shows that the Board of B Ltd, had also acknowledged and approved the allotment of 51% in terms of approved Resolution Plan to B Ltd.

After the Board Resolution, B Ltd. had no right to say that there was a typographical/ clerical error in the Resolution Plan. After the acknowledgement by the Board of the B Ltd, there was no justification to allege that due to typographical error, 51,00,000 shares is erroneously typed, instead of 75,00,000 shares in the approved Resolution Plan, in the account of B Ltd.

It is important to mention that Hon'ble Supreme Court has not permitted the change in resolution plan after attaining the finality as decided in case of *Rahul Jain* vs. *Rave Scans (P) Ltd., (2019) 10 SCC 548: 2019*.

It is important to point out that the Tribunal in Company Appeal No.509 of 2018 in case of *RGG Vyapar Pvt. Ltd.* vs. *Arun Kumar Gupta*, has held that the Adjudicating Authority has no jurisdiction to reopen resolution process under section 31 of the Code.

The Adjudicating Authority failed to consider that the approved Resolution Plan which was a joint Resolution Plan by the A Ltd. and B Ltd. whereas the Application for rectification of the Resolution Plan is moved only by B Ltd. The Adjudicating Authority had no jurisdiction under Section 31 to allow the rectification in the approved Resolution Plan.

Question 6

(a) The Insolvency and Bankruptcy Board of India (IBBI) had issued 'Show Cause Notice' (SCN) to Suresh Kumar, Insolvency Professional (IP) under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 for accepting the assignment as Resolution Professional (RP) in the Corporate Insolvency Resolution Process (CIRP) of Crane India Ltd, a Corporate Debtor (CD) after 31st December, 2019, without holding a valid Authorisation for Assignment (AFA) issued to him by his Insolvency Professional Agency (IPA).

In this case Suresh Kumar was ratified to act as RP in the meeting of Committee of Creditors (CoC) held on 19th January, 2020. However, consent for CIRP assignment by RP was given in June, 2018 and CIRP commenced in November, 2019. The IBBI alleged that, Suresh Kumar had accepted assignment as the RP in CIRP of the CD after 31st December, 2019 without having valid AFA which is in the contravention of Section 208 of IBC.

However, the RP replied to the SCN that the assignment was accepted to act as RP before 31st December, 2019 by him and the same was admitted by Hon'ble National Company Law Tribunal (NCLT). He further stated that he did not have any malafide intention for not obtaining the AFA and apologized for the same.

But it was referred to Disciplinary Committee (DC) by the IBBI for disposal of the SCN in accordance with the Code and Regulations made thereunder.

Whether the RP is liable on the basis of above facts ? (6 marks)

(b) UN Commission on International Trade Law on cross-border insolvency, was adopted in 1997. Since then the subject was deliberated in various statutes in India and abroad and finally as per the Banking Law Reforms Committee (BLRC) Report, the Insolvency and Bankruptcy Code, 2016 (IBC) was enacted which contains the provisions relating to the question of cross-border insolvency. In

this context describe the provisions of cross-border insolvency as contained in the IBC. *(6 marks)*

Answer 6(a)

The above facts are similar to the case of U. Balakrishna Bhat, Insolvency Professional (IP), decided on 11th January, 2021.

The credibility of the processes under the Insolvency & Bankruptcy Code (IBC) depends upon the observance of the Code of conduct by the IRP/RP during the process.

Section 208 of the IBC casts an obligation on Insolvency Professional (IP) to abide by the code of conduct and comply with all requirements and terms and conditions specified in the byelaws of the IP agency of which he is a member. Section 208(2) which relates to the functions and obligations of insolvency professionals, states that every insolvency professional shall abide by the following code of conduct: -

(a) to take reasonable care and diligence while performing his duties;

(b) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member; and

(c) to perform his functions in such manner and subject to such conditions as may be specified."

It was further noted that the certificate of registration granted to an IP is subject to the condition that he should follow at all times the provisions of the Code and Regulations and the bye-laws of Insolvency Professional Agency of which the IP is a member and also follow the Code of Conduct specified in the First Schedule to the IP Regulations including maintaining of integrity and professional competence for rendering professional service, representation of correct facts and correcting misapprehension, not to conceal material information and not to act with mala fide or with negligence.

In the present matter, Mr. Suresh Kumar had given consent to accept the assignment as IRP in June, 2018 in the CIRP of the CD and the CIRP commenced in November, 2019. However, it is also observed that Mr. Suresh Kumar was ratified as RP in the CIRP of the CD in the 1st meeting of the CoC held on 19th January, 2020, i.e., after the threshold date of 31st December, 2019 without having a valid AFA. Mr. Suresh Kumar has submitted that since the provision relating to AFA was newly inserted and made effective on 1st January, 2020, he was under the impression that it was not applicable for the ratification to act as RP.

Though acceptance of assignment was given prior to cut off date, i.e., 31st December, 2019, however, it was held that notification for AFA was issued on 23rd July 2019, hence RP was having sufficient time to apply for AFA.

In the above case, the IP has not complied with the section 208 of the IBC, therefore an order has been passed against the IP by the DC of IPA for accepting assignment as RP after 31st December, 2019 without holding a valid AFA in the CIRP of the CD and it has been decided that IP is guilty of Professional Misconduct and a penalty of Rs. 10,000/- has been imposed.

Answer 6(b)

UN Commission on International Trade Law (UNCITRAL) Model Law on cross-border insolvency was adopted in 1997. The Model Law is designed to provide a harmonized approach to the treatment of cross-border insolvency proceedings, facilitate cooperation between the courts and office holders involved in the insolvency in different jurisdictions, and provide for the mutual recognition of judgements and direct access of foreign representatives to the courts of the enacting state. India has not adopted the model law.

In its current form, the Insolvency & Bankruptcy Code contains only two provisions under section 234 and 235 that may possibly enable and assist the liquidator with respect to a company having assets in a foreign jurisdiction.

Agreement with Foreign countries - Section 234

(1) This section provides that the Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.

Letter of request to a country outside India in certain cases - Section 235

(1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.

(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.

The current cross border insolvency framework in India is dependent on India entering bilateral agreements with other countries. Finalisation of bilateral agreements is a long drawn process as it involves long term negotiations and thus takes a lot of time. Moreover, every trade is distinct and thus it would be difficult for the adjudicating authorities to enforce the agreements/treaties entered into with other countries.

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