

PAPER- 4 – CORPORATE AND ALLIED LAWS

Question No. 1 is compulsory.

Answer any **five** from the rest

Question 1

- (a) Mr. Vikram, a director of M/s Tubelight Limited has made default in filing of annual accounts and annual returns with Registrar of Companies for a continuous period of 3 financial years ending on 31st March 2016. Examine the validity of the following under the Companies Act, 2013:
- Whether Mr. Vikram can continue to be a director of M/s Tubelight Limited (defaulting company) and also M/s Green Light Limited, where he is also a director? Also state whether he can be re-appointed as director in these two companies.
 - What would your answer be in case Mr. Vikram is a nominee director of a Public Financial Institution?
 - What would be your answer in case the defaulting company (i.e. M/s. Tubelight Limited) is a private limited company? **(4 Marks)**
- (b) During the financial year 2016-17, Universal Limited declared an interim dividend for the second time. After declaration, the Board of Directors decided to revoke the second interim dividend as its financial position was poor, to accommodate the said interim dividend.
- Examine the validity of the Board's decision under the provisions of the Companies Act, 2013.
 - What will be your answer, if the Board proposes to transfer more than 10% of the profits of the company to the reserves for the current year before the declaration of any dividend? **(4 Marks)**
- (c) Mr. Dheeraj, a Chartered Accountant in practice is liable (indebted) to M/s Voice Data Ltd. (a company engaged in telecommunications) for a sum of Rs. 2,00,000 and a sum of Rs. 3,00,000 to Apollo Hospitals Ltd. For the treatment of his parents. Mrs. Rhea (wife of Mr. Dheeraj) is also liable (indebted) for a sum of Rs. 3,00,000 to M/s Aircel Ltd. (the subsidiary of M/s Voice Data Ltd.). Mr. Dheeraj is proposed to be appointed as the statutory auditor of M/s. Voice Data Ltd, M/s Aircel Ltd. and Apollo Hospitals Ltd. for the current financial year 2017-18. Decide as per the provisions of the Companies Act, 2013, whether the proposed appointments are legally valid. **(4 Marks)**
- (d) Mrs. Arshi filed a complaint in the Competition Commission of India against Modern Hospitals, New Delhi for abusing its dominance. She stated in her complaint that she was refused maternity services by the hospital during the 38th week of her pregnancy because she declined to avail the stem cell banking services offered by Celbanks International India, with which the hospital has an exclusive partnership. She contended that the hospital

indulged in unfair practices because the arrangement restricts the choice of consumers. Was her petition maintainable under the Competition Act, 2002? (4 Marks)

- (e) *Mr. T. Raghava has secured admission in a reputed and recognized university in Germany, for the study of higher and technical education, outside India. After arrival in Germany, he has gone ill and wants medical treatment facility in a reputed German hospital. He desires to apply to the Government of India for availing the additional remittance beyond the limit approved for foreign currency exchange facility. He has already enjoyed the permitted facility of foreign exchange for studies abroad, for the said financial year. Decide the following as to the facts given in the question as per the provisions of the Foreign Exchange Management Act, 1999:*
- (i) *As an individual, to what extent Mr. T. Raghava may avail foreign exchange facilities for higher and technical study in Germany.*
- (ii) *Can Mr. T. Raghava avail the facility of additional remittance in foreign exchange, beyond the limit, for the medical treatment. (4 Marks)*

Answer

1. (a) **Disqualifications for Appointment of Director:** According to **section 164(2)** of the Companies Act, 2013, a person who is or has been a director of a company which:

- (A) has not filed the financial statements or annual returns for any continuous three financial years; or
- (B) has failed to repay the deposits accepted by it or pay interest thereon on due date or redeem its debentures on due date or pay interest due thereon or pay any dividends declared and such failure continues for one year or more.

shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so. Further, pursuant to Section 167(1)(a) of the Companies Act, 2013, the office of a director shall become vacant in case he incurs any of the disqualification specified in Section 164. The co joint reading of both the sections i.e 164(2) and 167(1)(a), we may decide the case as under :

- (i) In the first case, Mr. Vikram cannot continue to be director of the defaulting company namely M/s Tubelight Limited. Whereas in Green Light Limited, he can continue as a director because that company is not the defaulting company.

Further, Mr Vikram is a director of Tubelight Limited and Green Light Limited. Tubelight Limited did not file financial statements for a continuous period of three financial years ending 31st March, 2016. This failure constitute a disqualification under section 164 (2) and consequently, Mr. Vikram will not be eligible for reappointment in Tubelight Limited and Green Light Limited for a period of five years from the date on which the said company incurs the default.

- (ii) In Case Mr. Vikram is a nominee director of a Public Financial Institution, then in such case, section 164 is not applicable.
- (iii) **In case Tubelight Limited is a Private Limited Company:** According to section 164(3), a private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2) of section 164.

Thus, in this case the answer would be same as above i.e. Mr. Vikram has to vacate his office of directorship from Tubelight Limited and Green Light Limited and cannot be reappointed in both the companies for a period of five years from the date on which the said company incurs the default.

- (b) (i) According to **section 123(3)** of the Companies Act, 2013, the Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.

Further a dividend when declared becomes a debt and a shareholder is entitled to recovery of the same after expiry of 30 days as prescribed under Section 127 of the Companies Act, 2013. Section 2(14A) of the Act defines dividend to include interim dividend. Therefore dividend once declared becomes a debt and payable within 30 days of declaration.

In the present case, Universal Limited declared an interim dividend for the second time. After declaration, the Board of Directors decided to revoke the second interim dividend as its financial position was poor.

In view of the above, the Board of directors cannot revoke the second interim dividend.

Therefore, decision of the Board to revoke the declared 2nd Interim dividend is invalid.

- (b) (ii) **Transfer to Reserves:** A company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company. Therefore, the company may transfer such percentage of profit to reserves before declaration of dividend as it may consider necessary. Such transfer is not mandatory and the percentage to be transferred to reserves is to be decided at the discretion of the company.

Hence, the Board may transfer more than 10% of the profits of the company to the reserves for the current year before the declaration of any dividend.

- (c) For the purpose of **section 141(3)(d)(ii)** of the Companies Act, 2013, a person who or his relative or partner is indebted to the company or its subsidiary or its holding or associate company or a subsidiary of such holding company, in excess of rupees five lakh shall not be eligible for appointment [Rule 10(4) of the Companies (Audit & Auditor's) Rules, 2014].

Appointment of Mr. Dheeraj in M/s Voice Data Ltd.: Mr. Dheeraj is liable to M/s Voice Data Ltd for a sum of Rs. 2,00,000 and his wife Mrs. Rhea is liable for a sum of Rs. 3,00,000 to M/s Aircel Ltd. (the subsidiary of M/s Voice Data Ltd). Accordingly, as per the above stated provision, Mr. Dheeraj's total liability in M/s Voice Data Ltd. is Rs. 5,00,000. Hence, He can be appointed as a statutory auditor in M/s Voice Data Ltd. as the total indebtedness in such company is not in excess of Rs. 5,00,000.

Appointment of Mr. Dheeraj in M/s. Apollo Hospitals Ltd.: Mr. Dheeraj is liable to Apollo Hospitals Ltd. for Rs. 3,00,000. Hence, He can be appointed as a statutory auditor in Apollo Hospitals Ltd. as the total indebtedness in such company is not in excess of Rs. 5,00,000.

Appointment of Mr. Dheeraj in M/s Aircel Ltd.: Mr. Dheeraj's wife Mrs. Rhea is liable for a sum of Rs. 3,00,000 to M/s Aircel Ltd. Mr. Dheeraj is liable to M/s Voice Data Ltd. (the holding company of M/s Aircel Ltd.) for a sum of Rs. 2,00,000. Hence, Mr. Dheeraj's total liability in M/s Aircel Ltd. is Rs. 5,00,000. Hence, He can be appointed as a statutory auditor in M/s Aircel Ltd. as the total indebtedness in such company is not in excess of Rs. 5,00,000.

Therefore the proposed appointments of Mr. Dheeraj in all the said three companies are legally valid.

- (d) According to **Section 4(2)(d)** of the Competition Act, 2002, there shall be abuse of dominant position if an enterprise or a group(s) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In the instant case, Mrs. Arshi filed a complaint in the Competition Commission of India against Modern Hospitals for refusal of maternity services because she declined to avail the stem cell banking services offered by Celbanks International India, with which the hospital has an exclusive partnership.

Accordingly in the given situation, as per the above provision, the Modern hospital has abused its dominant position and hence, petition by Mrs. Arshi is maintainable.

- (e) According to the **Schedule III** of the FEM (current account transactions) Rules, 2000, following shall be the limit for the remittance of Foreign Exchange in the given situations:
- (i) **Remittance of Foreign Exchange for Studies Abroad:** Foreign exchange may be released for studies abroad up to a limit of US \$ 2,50,000 without any permission from the RBI. Above this limit, RBI's prior approval is required.
 - (ii) **Remittance for Medical Treatment:** Remittance of foreign exchange for medical treatment abroad requires prior permission or approval of RBI where the individual requires withdrawal of foreign exchange exceeding USD 2,50,000. The Schedule also prescribes that for the purpose of expenses in connection with medical treatment, the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalized Remittance Scheme, if so required by a medical institute

offering treatment. Such amount shall be reduced from USD 2,50,000 by the amount so remitted.

Therefore, Mr. T. Raghava can draw foreign exchange exceeding USD 2,50,000 by taking prior permission/ approval of RBI.

Question 2

- (a) (i) Referring to the provisions of the Companies Act, 2013, examine the validity of the following appointment of Directors:
- (A) Brown Limited, having a turnover of Rs. 60 crore in the financial year 2016-17 appoints Ms. Rose as the women director on 1st March 2017. Ms. Rose already holds directorship in twelve companies including ten public companies. She is whole time Cost Accountant in practice.
- (B) Ms. Jasmine holds directorship in eight public companies including managing directorship in two companies and directorship in six companies. In addition, she also holds alternate directorship in three companies and independent directorship in three subsidiary companies of Brown Limited. **(4 Marks)**
- (ii) M/s Genesis Paper Ltd. has been incurring business losses for past couple of years. The company, therefore, passed a special resolution for voluntary winding up. Meanwhile, complaints were made to the Tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as the public. In this situation advise whether investigation may be initiated against the company under the provisions of the Companies Act, 2013. **(4 Marks)**
- (b) Mr. Ziyen an Indian citizen holds 25% of the paid up capital of Laurel Steven Limited, a company which was incorporated in Singapore with a paid up capital of 10 million Singapore Dollars. Swaraj Limited a company registered in India holds 30% of the paid up capital of Laurel Steven Limited. Laurel Steven Limited has recently established a share transfer office at New Delhi. The Company seeks your advise as to what formalities it should observe as a foreign company under the Companies Act, 2013. **(4 Marks)**
- (c) Mrs. Preeti, a lady aged about 32 years and Managing Director of M/s Growmore plantations Ltd., has been arrested for an offence covered under section 447 of the Companies Act, 2013 on a complaint made by the Director, Serious Fraud Investigation Officer. Mrs. Preeti seeks your legal advise as to the conditions under which she can be released on bail and the role of Special Court in this regard. **(4 Marks)**

Answer

- (a) (i) **Number of Directorships:** As per **section 165(1)** of the Companies Act, 2013, no person shall hold office as director, including any alternate directorship, in more than 20 companies at the same time.

Out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10. [Proviso to section 165(1)]

Private companies that is either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director.

- (A) In the instant case, Ms. Rose was appointed as a women director on 1st March, 2017 in Brown Limited. She was already holding directorship in twelve companies including ten public companies. She is whole time Cost Accountant in practice.

As Ms. Rose was already a director in ten public companies, her appointment in Brown Limited is not valid as it will lead to her directorship in 11 public companies.

In this case, either she can choose between the companies in which she wishes to continue to hold the office of director or resign her office as director in the other remaining companies.

- (B) In the instant case, Ms. Jasmine holds directorship in eight public companies including managing directorship in two companies and directorship in six companies. In addition, she also holds alternate directorship in three companies and independent directorship in three subsidiary companies of Brown Limited.

Ms. Jasmine was already holding directorship in eight public companies and alternate directorship in three companies (assuming these companies as private) and independent directorship in three subsidiary companies of Brown Limited. Directorship in three subsidiary companies of Brown Limited will be considered as directorship in three more public companies.

Hence, total holding of directorship by Ms. Jasmine in public companies amounts to 11 (8+3) which is invalid.

In this case, either she can choose between the companies in which she wishes to continue to hold the office of director or resign her office as director in the other remaining companies.

Assumption: As nothing is mentioned that whether three companies in which Ms. Jasmine is holding alternate directorship are private or public, we are assuming that these companies are private in nature. Even if the student writes the answer based on assumption that Ms. Jasmine is holding alternate directorship of a public company, conclusion will not change.

- (ii) According to **section 226** of the Companies Act, 2013, an investigation may be initiated notwithstanding, and no such investigation shall be stopped or suspended by reason only of, the fact that—(a) an application has been made under section 241; (b) the company has passed a special resolution for voluntary winding up; or

(c) any other proceeding for the winding up of the company is pending before the Tribunal.

In the instant case, M/s Genesis Paper Ltd. has been incurring business losses for past couple of years. The company passed a special resolution for voluntary winding up. Meanwhile complaints were made to the Tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as the public.

As, the company has passed a special resolution for voluntary winding up of the company, then also the investigation may be initiated against the company under section 226 of the Companies Act, 2013.

- (b) In terms of the definition of a foreign company under section 2 (42) of the Companies Act, 2013 a “foreign company” means any company or body corporate incorporated outside India which:
- (i) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
 - (ii) conducts any business activity in India in any other manner.

According to **Section 386** of the Companies Act, 2013, “Place of business” includes a share transfer or registration office.

Further, **Section 379** states that where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

In the case given in the question, the following facts are given:

- a. Laurel Steven Ltd. was incorporated in Singapore and has a place of business (share transfer office) in New Delhi, hence, it is a foreign company.
- b. Its shareholding comprises of 25% held by Mr. Ziyen who is a citizen of India and 30% by Swaraj Limited which is a company registered in India. Together the two Indian shareholders hold 55% of the share capital of Laurel Steven Ltd.

Therefore, although Laurel Steven Ltd. is a foreign company, due to the holding of more than 50% of its share capital by two Indian entities, it will be covered under section 379 and will be treated as a company incorporated in India or as an Indian Company.

However, it may be noted that under section 379, the application of the Companies Act, 2013 on Laurel Steven Ltd. will be only in respect of business carried by it in India and not in relation to its business anywhere outside India.

Under **Section 380** of the Act, a foreign company is required to file for registration within 30 days of the establishment of a place of business in India the following documents with the Registrar:

- (a) a certified copy of the instrument constituting or defining the constitution of the company.
 - (b) the full address of the registered or principal office of the company;
 - (c) a list of the directors and secretary of the company containing such particulars as prescribed under *Companies (Registration of Foreign Companies) Rules, 2014*;
 - (d) the name and address or the names and addresses of one or more persons resident in India who is authorized for correspondence on behalf of the company.;
 - (e) the full address of the office of the company in India which is deemed to be its principal place of business in India;
 - (f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;
 - (g) declaration that none of the directors of the company or the authorized representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
 - (h) any other information as may be prescribed.
- (c) According to **Section 212(6)** of the Companies Act, 2013, notwithstanding anything contained in the Code of Criminal Procedure, 1973, offence covered under section 447 shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—
- (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
 - (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

A person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.

The Special Court shall not take cognizance of any offence referred to this subsection except upon a complaint in writing made by—

- (i) the Director, Serious Fraud Investigation Office; or

- (ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

Hence, in the instant case, Mrs. Preeti has been arrested for an offence covered under section 447 of the Act on a complaint made by the Director, SFIO.

As Mrs. Preeti is a woman, she may be released on bail if the Special Court so directs.

Question 3

- (a) (i) *Agriculture Instruments Limited is a subsidiary of Hindustan Agro Limited, a Government company. The Comptroller and Auditor General of India (C&AG) appointed Yes & Co, a firm of Chartered Accountants to conduct a supplementary audit of Agriculture Instruments Limited. Discuss under the provisions of the Companies Act, 2013 whether the C&AG's power to authorize such audit for the said subsidiary company is in order.*

(3 Marks)

- (ii) *In respect of a Government company within the meaning of Sec. 2 (45) of the Companies Act, 2013, state the provisions of the Act in respect of the following:*

- (A) *The first authority to appoint the first auditor of a Government company and the period within which the appointment should be made?*
- (B) *Who is the next authority to appoint the first auditor if there is a failure on the part of the first authority to appoint and within what period?*
- (C) *Who is next authority to appoint the first auditor even if there is a failure on the part of the second authority to appoint and within what period?* **(3 Marks)**

- (b) *Nature India Limited filed a petition under the Insolvency and Bankruptcy Code, 2016 with National Company Law Tribunal (NCLT) against Tulip Limited and the petition was admitted. After that, Nature India Limited wanted to withdraw the petition based on a settlement arrived between the parties. Whether it is permissible to withdraw the petition after it has been admitted? Decide.*

Also explain the rules relating to the admission and rejection of application by an adjudicating authority under the Insolvency and Bankruptcy Code, 2016. **(6 Marks)**

- (c) *Manav Kalyan", a charitable organization, opened a current account with M/s ABZ Bank on 1st July, 2012. This account was closed on 30th June, 2016. Referring to the obligations of banking companies under the Prevention of Money Laundering Act, 2002, specify the period upto which the said bank has to maintain records relating to the account of "Manav Kalyan".* **(4 Marks)**

Answer

- (a) (i) **Conduct of Supplementary Audit:** As per facts given in the question, Agriculture Instruments Limited is a subsidiary of Hindustan Agro Limited a Government Company,

which means that Agriculture Instruments Limited is owned or controlled by the Government. In such case, as per the provisions given in section 143(5) and (6) of the Companies Act, 2013, C & AG shall appoint the auditor under section 139 and direct such auditor the manner in which the accounts of the company are required to be audited and thereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor-General of India. He shall within sixty days from the date of receipt of the audit report, have a right to conduct a supplementary audit of the financial statement of the company by such person or persons as he may authorise in this behalf.

So, accordingly C & AG 's power to authorize Yes & Co, a firm of Chartered Accountants to conduct a supplementary audit for the said subsidiary company (Agriculture Instruments Limited), is in order.

- (ii) **Appointment of First Auditor in the Government Company:** According to **Section 139 (7)** of the Companies Act, 2013, in the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government, or Governments, or partly by the Central Government and partly by one or more State Governments, the first auditor shall be appointed by the Comptroller and Auditor-General of India within sixty days from the date of registration of the company and in case the Comptroller and Auditor-General of India does not appoint such auditor within the said period, the Board of Directors of the company shall appoint such auditor within the next thirty days; and in the case of failure of the Board to appoint such auditor within the next thirty days, it shall inform the members of the company who shall appoint such auditor within the sixty days at an extraordinary general meeting, who shall hold office till the conclusion of the first annual general meeting.

In the light of above provision, following are the answer in the given cases:

- (A) First authority to appoint the first auditor of a government company is **Comptroller and Auditor-General of India within sixty days** from the date of registration of the company.
- (B) Next authority, on his failure to appoint the first auditor, lies with the Board of Directors of the company to appoint such auditor within the next thirty days.
- (C) In case of failure of next authority to appoint first auditor, final authority is with the **members of the company** who shall appoint such auditor **within the sixty days** at an extraordinary general meeting.
- (b) **Withdrawal of Application/ Petition:** As per the facts given in the question, Nature India Limited filed a petition under the Insolvency and Bankruptcy Code, 2016 with NCLT against the Tulip Limited and the petition was admitted. After that Nature India Limited wanted to withdraw the same due to settlement between the parties.

As per *Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*, the Adjudicating Authority may permit withdrawal of the application made

under rules 4 (Application by financial creditor), 6 (Application by operational creditor) or 7 (Application by corporate applicant), as the case may be, on a request made by the applicant before its admission.

Since in the given instance, Nature India Limited wanted to withdraw the petition after it was admitted by the adjudication authority. So it was not permissible to withdraw the petition after been admitted.

Provisions related to admission or rejection of application by an adjudicating authority in the Insolvency and Bankruptcy Code, 2016-

The Adjudicating Authority shall, on the receipt of the application within the given time period under the relevant provisions, ascertain the existence of a default and pass the order [under Section 9(5) of the IBC, 2016].

Where the Adjudicating Authority is satisfied, either—

Admit application when -	Reject application when-
<ul style="list-style-type: none"> • a default has occurred and, • and the application is complete • no disciplinary proceedings pending against the proposed resolution professional 	<ul style="list-style-type: none"> • default has not occurred or • the application is incomplete • any disciplinary proceeding is pending against the proposed resolution professional • Adjudicating Authority shall, before rejecting the application, give a notice to the applicant to rectify the defect.

Further, the Adjudicating Authority shall communicate order of admission or rejection of such application within given time, as the case may be.

- (c) **Obligation of Banking Companies, Financial Institutions and Intermediaries: Section 12** of the Prevention of Money Laundering Act, 2002 provides for the obligation of Banking Companies, Financial Institutions and Intermediaries. According to sub-section (1), every Banking Companies, Financial Institutions and Intermediaries shall maintain the records referred to in clause (a) of sub-section (1) for a period of five years from the date of transaction between a client and the reporting entity. For the records referred to in clause (e) of sub-section (1), it shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

As per the facts given in the questions, Manav Kalyan, a charitable organization opened current account with ABZ Bank on 1st July, 2012 and closed the account on 30th June 2016.

As per the above provisions, ABZ Bank shall maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

So, accordingly the ABZ Bank has to maintain the records relating to the account of “Manav Kayan” till 30th June, 2021.

Question 4

- (a) (i) *An allegation was levelled against Drone Limited that the funds of the company are being misused. Mr. Ram, one of the directors of the company wants to inspect the books of accounts of the company in order to ascertain whether the allegation was true. But since Mr. Ram does not have the knowledge of accounting, appoints Mr. Joe his friend and a practicing Chartered Accountant to go through the books of accounts of the company on his behalf and report him the true status. The company has challenged the appointment of Mr. Joe to inspect in books of accounts of the company as invalid. Advise Mr. Ram keeping in view the provisions of the Companies Act, 2013. What would be your answer, if Mr. Ram had been a shareholder holding 76% of shares and not a director in Drone Limited?* **(4 Marks)**
- (ii) (A) *Mr. Vinay Kumar, applied for the first time for allotment of a Directors identification Number (DIN) on 1st November, 2016 as he is planning to incorporate a private limited company in Form No. DIN-3 under the Companies Act, 2013. The status of his DIN applications presently is showing as "Put Under Resubmission". He seeks your guidance as to whether his application has been rejected and is he required to obtain a fresh DIN. Advise.* **(2 Marks)**
- (B) *Explain the process and relevance of back office in MCA-21 Program of the Ministry of Corporate Affairs.* **(2 Marks)**
- (b) *Remedial Pharma Limited, over the years, enjoys a high reputation in the market and its general reserves are ten times more than the paid up capital of the company. There is a serious apprehension of cornering the share of the company by a group of unscrupulous persons likely to result in change in the Board of directors which may be prejudicial to the public interest. The company seeks your advice as to how it can block the transfer of shares of the company under the provisions of the Companies Act, 2013.* **(4 Marks)**
- (c) *"Under the Securities and Exchange Board of India (SEBI) Act, 1992 an Asset Management Company, which fails to comply with the regulations, shall be liable to a penalty of one lakh rupees for each day or one crore rupees whichever is less". Whether such Legal provision is directory or mandatory? Explain briefly the distinction between mandatory and directory provisions in interpreting a statute.* **(4 Marks)**

Answer

- (a) (i) **Inspection of Books of Accounts of the Company** - According to **section 128(3)** of the Companies Act, 2013, the books of account and other books and papers maintained by the company within India shall be open for inspection at the registered office of the company or at such other place in India by any director during business hours.

According to the said provision, Mr. Ram, a director of Drone Limited, can do inspection at the registered office of the company or at such other place in India of the books of account and other books and papers maintained by the company, during business hours. Mr. Ram cannot appoint Mr. Joe to go through the books of accounts on his behalf. As per Rule 4 of the *Companies (Accounts) Rules, 2014* the financial information shall be sought by the director himself and not through a power of attorney holder or agent or representative.

So, the act of Mr. Ram of appointing Mr. Joe to inspect the book of accounts of the company is invalid.

Whereas, if Mr. Ram has been a shareholder holding 76% of shares and not a director in Drone Ltd., he will be having no right to carry out an inspection of the books of accounts of the company despite the fact that he holds 76% of the shares of Drone Ltd. because as per the sections 128(3) and 206 of the Companies Act, 2013, following persons have the right to carry out the inspection of the books of accounts of the company.

- (i) Directors of the Company [Section 128(3) of the Companies Act, 2013]
- (ii) Registrar of Companies [Section 206 of the Companies Act, 2013]
- (iii) Such officer of Government as may be authorised by the Central Government in this behalf (Section 206 of the Companies Act, 2013).
- (iv) Such officers of SEBI as may be authorised by SEBI [Section 206 read with Section 24 of the Companies Act, 2013].

Since Mr. Ram does not fall in any of above mentioned categories, he is not eligible to carry out the inspection.

According to **Regulation 89(ii) of the Table F of the Schedule I** of the Companies Act, 2013, a member shall have right of inspecting any account or book or document of the company only if conferred by law or authorized by the Board or by the company in general meeting by an ordinary resolution. Even then, Ram has to exercise his right personally and not through a proxy.

- (ii) (A) **Allotment of DIN** : According to **Section 154** of the Companies Act, 2013, the Central Government shall, within one month from the receipt of the application under section 153, allot a Director Identification Number (DIN) to the applicant in such manner as may be prescribed.

The status of the DIN applications showing “Put under resubmission”:

According to *Rule 10 of the Companies(Appointment and Qualifications of Directors) Rules, 2014* of the Companies Act, 2013, if the DIN application is put under Resubmission due to following reasons, one can submit additional documents for rectifying DIN application, within a period of 15 days from the date on which it is marked as Resubmission

- (i) Proof of Identity/ residence is not enclosed or expired.
- (ii) Proof of Date of Birth is not enclosed.
- (iii) Supporting documents are not properly attested.
- (iv) Non-submission of affidavit (if required).

On resubmitting with the additional documents, same DIN will be approved, if documents are found in correct order as per marked in resubmission.

So, accordingly the application of Mr. Vinay Kumar has not been rejected and does not require to obtain a fresh DIN.

(B) Process and Relevance of back office in MCA 21 Programme: The back office process relates to:

- ◆ Dynamic routing of documents that have been electronically filed to the concerned official within MCA based on the type of service request.
 - ◆ Electronic workflow systems to support speed and certainty in service delivery
 - ◆ Supporting all routine tasks such as registrations and approvals
 - ◆ Storing of all approved documents of companies as part of electronic records, including provision of access to electronic records for the stakeholders
 - ◆ Enhancing identification of defaulters
 - ◆ Increasing efficiency of Technical Scrutiny
 - ◆ Ensuring close follow-up on matters related to compliance management including prosecutions
 - ◆ Enabling quicker responses to investor grievances
 - ◆ Providing alerts when the tasks are not carried out within stipulated period
- (b) Where it appears to the NCLT, in connection with any investigation under **Section 216** of the Companies Act, 2013 or on a complaint made by any person in this behalf that there is good reason to find out the relevant facts any securities issued or to be issued by the company and the Tribunal is of the opinion that such facts cannot be found out unless certain restrictions as it may deem fit are imposed, the Tribunal may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding 3 years as be specified in the order.

Where securities in any company are issued or transferred or acted upon in contravention of an order of the Tribunal under sub section (1), the company shall be punishable with fine which shall not less than one lakh rupees but which may extend to 25 lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than twenty five thousand rupees but which may extend to 5 lakh rupees or with both. **[Section 222(2)]**

The facts given in the question squarely fall within the provision of Section 222 of the Companies Act, 2013. The management of Remedial Pharma Limited may make a complaint to the NCLT and convince that the transfer of shares in favour of the group of unscrupulous persons would change the composition of the Board of directors of the company which shall be prejudicial to the public interest and if the NCLT is convinced with the pleas of the company, it may pass an order as stated above which would block the transfer of shares as stated in the question.

- (c) Mandatory provisions are the provisions which must be strictly complied with, whereas directory provisions are that which would be sufficient if substantially complied with. Non-observance of mandatory provisions involves the consequences invalidating. But non-observance of directory provision does not entail the consequence of invalidating, whatever other consequences may occur.

No general rule can be laid down for deciding whether any particular provision on a statute is mandatory or directory. In each case the court has to consider not only the actual word used, but has to decide the legislatures intent.

Where a specific penalty is provided in a statute itself for non-compliance with the particular provision of the Act no discretion is left to the court to determine whether such provision is directory or mandatory - it has to be taken as mandatory.

In the given question, as per the SEBI Act, 1992, Asset management Company which fails to comply with the regulations, shall be liable to a penalty of one lakh rupees for each day or one crore rupees whichever is less.

Since the specific penalty is provided in a statute itself for non-compliance with the particular provision of the Act, so it is a mandatory provision.

Question 5

- (a) *Venus Limited is a widely held, listed company having two executive directors who are technocrats. The company has suffered losses in the last four years. The company wants to enhance the remuneration of the executive directors to Rs. 6,00,000 per month from existing remuneration of Rs. 4,00,000. The audited balance sheet as on 31st March 2016 reveals that the paid up capital of the company is Rs. 15 crores, accumulated losses Rs. 11 crores and secured long term borrowings Rs. 5 crores. Besides, the company has long term investments of Rs. 11 crores. The company's remuneration committee has recommended the proposal and the company is regular in repayment of its debts. Analyse the proposition with reference to the provisions of the Companies Act 2013. (6 Marks)*

(b) *SR Limited, a listed company wishes to issue equity shares on preferential basis pursuant to a scheme approved under Corporate Debt Restructuring framework specified by Reserve Bank of India to various persons selected by the Board of directors of the company. Following information relevant to the preferential issue is available:*

- (i) *Total number of equity shares to be issued: 30 lakhs equity shares of Rs. 10 each out of which 10 lakh equity shares will be allotted on 30th June as fully paid up and balance 20 lakh equity shares shall be allotted on the same date but paid up to Rs.5 each and balance Rs. 5 shall be called upon at a later date and shall be paid up on 30th November, 2017.*
- (ii) *Out of the proposed allottees some persons are holding their shares in physical form and not in dematerialized form and some persons had sold their entire shareholding in January 2017.*
- (iii) *The meeting of general body of shareholders for approving the preferential issue was held on 15th December 2016.*

Based on the above information you are required to answer the following queries with reference to the SEBI (ICDR) Regulations:

- (i) *What would be the lock-in period for the shares allotted on preferential basis?*
- (ii) *Who are the persons not entitled for allotment of shares on preferential basis?*

(6 Marks)

(c) *Mr. Shukla is working as General Manager (Finance and Accounts) in Target Limited. The Board of directors of the said company propose to entrust him with the duty of ensuring compliance with the provisions of the Companies Act, 2013 so that the books of accounts, balance sheet statement of profit and loss and the cash flow statements can be prepared and maintained in accordance with law.*

Draft a Board Resolution for the said purpose. Also point out the consequences in case of default when such a resolution is passed.

(4 Marks)

Answer

According to **Section 197** of the Companies Act, 2013,

1. If, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including any managing or whole- time director or manager, by way of remuneration any sum exclusive of any fees payable to directors except in accordance with the provisions of Schedule V and if it is not able to comply with such provisions, with the previous approval of the Central Government. [Sub- section 3]
2. In cases where Schedule V is applicable on grounds of no profits or inadequate profits, any provision relating to the remuneration of any director which purports to increase or has the effect of increasing the amount thereof, whether the provision be contained in the company's memorandum or articles, or in an agreement entered into by it, or in any

resolution passed by the company in general meeting or its Board, shall not have any effect unless such increase is in accordance with the conditions specified Schedule V and if such conditions are not being complied, the approval of the Central Government had been obtained. [Sub section 11]

However, in case of a managerial person who is functioning in a professional capacity, no approval of Central Government is required, if such managerial person is not having any interest in the capital of the company or its holding company or any of its subsidiaries directly or indirectly or through any other statutory structures and not having any, direct or indirect interest or related to the directors or promoters of the company or its holding company or any of its subsidiaries at any time during the last two years before or on or after the date of appointment and possesses graduate level qualification with expertise and specialised knowledge in the field in which the company operates. [Item B of Section II of Schedule V]

Further the limits specified under Section II of Schedule V shall apply, if-

- (i) payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of section 178 also by the Nomination and Remuneration Committee.
- (ii) the company has not committed any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of 30 days in the preceding financial year before the date of appointment of such managerial person and in case of a default, the company obtains prior approval from secured creditors for the proposed remuneration and the fact of such prior approval having been obtained is mentioned in the explanatory statement to the notice convening the general meeting.

Since, the company has suffered losses in the last four years, the company will pay remuneration to its directors in accordance with the provisions of Schedule V to the Companies Act, 2013.

The total remuneration that Venus Limited is intending to pay to two technocrats is 144 lakhs per annum, from the current remuneration of 96 lakhs per annum. However, since the two executive directors are technocrats (working in professional capacity) and the remuneration has been proposed by the remuneration committee and the company is regular in payment of debts, no approval of Central Government is required. Also, since the given situation is compliant of Schedule V, Central Government approval will not be required even when there is increase in remuneration payable.

Assumption: The term technocrat used for the directors has been interpreted as that the directors are 'functioning in a professional capacity'.

(b) (i) **Lock-in period for the Shares allotted on Preferential Basis: Regulation 78(4), SEBI, (ICDR) Regulations, 2009.**

As per the aforesaid regulation, the equity shares issued on preferential basis pursuant to a scheme of corporate debt restructuring as per the Corporate Debt Restructuring framework specified by the Reserve Bank of India shall be locked-in for a period of one year from the date of trading approval. Provided that partly paid up equity shares, if any, shall be locked-in from the date of trading approval and the lock-in shall end on the expiry of one year from the date when such equity shares become fully paid up. Accordingly, the first lot of 10 lakhs full paid equity shares issued on 30th June, 2017 will have a lock-in period of 1 year from the date of trading approval i.e. till 30th June, 2018. In respect of the second lot, of partly paid 20 lac equity shares, the lock in period will be till 30th November, 2018 being the date on which the calls shall be paid up on 30th November, 2017.

(ii) **Persons not entitled for allotment of shares on preferential basis (Regulation 72)**

- (1) A listed issuer may make a preferential issue of specified securities, if:
 - (a) a special resolution has been passed by its shareholders;
 - (b) all the equity shares, if any, held by the proposed allottees in the issuer are in dematerialized form;
 - (c) the issuer is in compliance with the conditions for continuous listing of equity shares as specified in the listing agreement with the recognized stock exchange where the equity shares of the issuer are listed;
 - (d) the issuer has obtained the Permanent Account Number of the proposed allottees.
- (2) The issuer shall not make preferential issue of specified securities to any person who has sold any equity shares of the issuer during the six months preceding the relevant date.

As per **Regulation 71**, in case of preferential issue of equity shares pursuant to a scheme approved under the Corporate Debt Restructuring framework of Reserve Bank of India, the date of approval of the Corporate Debt Restructuring Package shall be the relevant date. i.e., 15th December 2016 in the given case.

Since, in the given question the said persons had already sold their entire shareholding in SR Ltd. in January 2017 i.e. after the date of approval of the Restructuring package (i.e. 15th December, 2016), they will not fall within the purview of time limit as provided under Regulation 72 (Persons not entitled for allotment of shares on preferential basis). Hence, only the persons who are not holding their shares in SR Ltd. in dematerialized form, shall not be entitled for preferential allotment of shares.

(c) Board Resolution

Resolution passed at the meeting of board of directors of Target Limited held at its registered office situated at on(date) at (Time).

“Resolved that pursuant to section 128(6) and 129 of the Companies Act, 2013, Mr. Shukla, who is already the General Manager (Finance and Accounts) of the company, be and is hereby entrusted with additional duties of ensuring compliance with the provisions of the Companies Act, 2013 so that the books of accounts, balance sheet, statement of profit and loss and the cash flow statements are maintained in accordance with the provisions of law.”

“Further Resolved that the said Mr. Shukla be and is hereby entrusted with the authority to do such acts things or deeds as may be necessary or expedient for the purpose of discharging his above referred duties.”

Sd/

Board of Directors

Target Limited

Consequences in case of Default: According to Section 128(6)-

- (a) The following persons are responsible for the maintenance of proper books of account-
- (1) The managing director, the whole-time director in charge of finance, the Chief Financial Officer; or
 - (2) any other person of a company charged by the Board.
- (b) If any of the persons mentioned above contravenes such provisions, they shall be punishable with:
- (1) Imprisonment for a term which may extend to 1 year; or
 - (2) Fine which shall not be less than ` 50,000 but which may extend to `5 lakh; or
 - (3) With Both.

Question 6

- (a) (i) Pursuant to Section 210 of the Companies Act, 2013 an Inspector was appointed to investigate the affairs of Sterling Trading Limited. Mr. Ahmed the General Manager (Operations) who is aware of certain misdeeds of the management, desires to know whether he is entitled to any protection against dismissal by the company if he discloses the misdeeds during the course of examination by the Inspector. Advise him explaining the relevant provisions of the Companies Act, 2013. **(3 Marks)**

(ii) What do you understand by the terms “Mediation” and “Conciliation”? Mention the provisions regarding Mediation and Conciliation Panel under the Companies Act, 2013. **(3 Marks)**

(b) M/s Jai Industries Limited earned net profit for the last three years as under:

Financial Year	Net Profit (Rs. in Crores)
2013-14	30
2014-15	40
2015-16	50

During the financial year 2016-17, the Board of Directors of the company contributed to a Charitable Fund Rs. 1.25 crores in July, 2016. Again in January 2017, the Board of Directors passed resolution to contribute to another Charitable Fund Rs. 1.00 crore.

Decide the validity of the decision of the Board of Directors regarding the contribution on both the occasions with reference to the provisions of the Companies Act, 2013.

(6 Marks)

(c) On completion of 60 years of age as on 31st March 2014, Mr. Jain retired as Professor from a university. From 1st April 2014, he was appointed as Chairman of the Securities and Exchange Board of India for a period of three years. Under the provisions of the Securities and Exchange Board of India Act, 1992, decide whether he can be re-appointed on the same post after expiry of the original tenure? Also state whether it could be possible for him to relinquish the office before expiry of his tenure? **(4 Marks)**

Answer

(a) (i) According to **Section 218** of the Companies Act, 2013, if during the course of any investigation of the affairs and other matters of or relating to a company under section 210, or during the pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company under Chapter XVI, such company, other body corporate or person proposes—

- (i) to discharge or suspend any employee; or
- (ii) to punish him, whether by dismissal, removal, reduction in rank or otherwise; or
- (iii) to change the terms of employment to his disadvantage,

the company, other body corporate or person, as the case may be, shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.

Action against Employee: If the company, other body corporate or person concerned does not receive within thirty days of making of application under sub-

section (1), the approval of the Tribunal, then and only then, the company, other body corporate or person concerned may proceed to take against the employee, the action proposed.

In the instant case, the above mentioned protection is available to Mr. Ahmed, the General Manager of Sterling Trading Limited.

- (ii) **Mediation and Conciliation:** In common parlance Mediation means intervention of some third party in a dispute with the intention to resolve the dispute.

Conciliation means the process of adjusting or settling disputes in a friendly manner through extra judicial means.

Section 442 of the Companies Act, 2013 deals with the constitution and functioning of the mediation and conciliation panel in order to dispose the matter. According to the section:

- (1) **Central Government to maintain the Panel of Mediators:** The Central Government shall maintain a panel of experts to be known as Mediation and Conciliation Panel for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

Hence, it is important that the case should be pending before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

- (2) **Panel consisting of Experts:** The Panel shall consist of such number of experts having such qualification as may be prescribed.
- (3) **Filing of Application:** Application for mediation and conciliation can be made by:
- (i) any parties to the proceedings. (It shall be accompanied with such fees and in such form as may be prescribed.)
 - (ii) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, *suo motu* refer any matter pertaining to such proceeding to such number of experts as it may deem fit.
- (4) **Appointment of expert/s from Panel:** The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may appoint one or more experts from the Panel as may be deemed fit.
- (5) **Fees, terms and conditions of the experts:** The fee and other terms and conditions of experts of the Mediation and Conciliation Panel shall be such as may be prescribed.
- (6) **Procedure for the disposal of matter:** In order to dispose the matter, the Mediation and Conciliation Panel shall follow such procedure as may be prescribed.

- (7) **Period for the disposal of matter:** The Mediation and Conciliation Panel shall dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.
- (8) **Filing of objection on the recommendation of the panel:** Any party aggrieved by the recommendation of the Mediation and Conciliation Panel may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.
- (b) According to **Section 181** of the Companies Act, 2013, the Board of Directors of a company may contribute to bona fide charitable and other funds.

Prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceeds five per cent of its average net profits for the three immediately preceding financial years.

In the instant case, the average Net Profit of M/s Jai Industries Limited in the three immediately preceding financial years (2013-14, 2014-15 and 2015-16) is 40 Crores $[30+40+50/3]$.

Thus, if M/s Jai Industries Limited wants to contribute more than Rs. 2 crores $[40 \text{ crores} * 5\%]$ in Charitable fund, it has to take the prior permission of the company in general meeting.

In July 2016, the Board of Directors of M/s Jai Industries Limited contributed to a Charitable Fund Rs. 1.25 crores. This contribution is within the limit of Rs. 2 crore, thus no prior permission of the company in general meeting shall be required.

In January 2017, the Board of Directors passed resolution to contribute to another Charitable Fund Rs. 1.00 crore. For this contribution, prior permission of the company in general meeting shall be required as the aggregate contribution in Charitable Fund in the year 2017 is Rs. 2.25 crores which is exceeding Rs. 2 Crore. $[Rs. 1.25 \text{ crores} + Rs. 1 \text{ Crore}]$.

- (c) **Appointment of Chairman:** As per **Section 5** of the SEBI Act, 1992 and the rules prescribed under the SEBI Act, 1992, the Chairman may hold office for a period of three years subject to the maximum age limit of 65 years and can be re-appointed by the Central Government.

Also, as per **Section 4(5)** of the Act, the Chairman shall be persons of ability, integrity and standing who have shown capacity in dealing with problems relating to securities market or have special knowledge or experience of law; finance; economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to the Board.

In the instant case, Mr. Jain retired as professor from a university on completion of 60 years of age as on 31st March, 2014 appointed as Chairman of SEBI from 1st April, 2014 for a period of 3 years.

This appointment is valid as on the date of appointment, he is of 60 years of age and he, as a retired professor, is a person of ability, integrity and standing and have special knowledge or experience of law; finance; economics, accountancy, administration or in any other discipline.

If Mr. Jain is reappointed as a chairman after expiry of the original tenure of 3 years, he can be re-appointed but only upto 65 years of age i.e. upto 31st March, 2019 (i.e. only for two years).

Right to Relinquish the office: The Chairman shall equally have the right to relinquish office at any time before the expiry of their tenure by giving a notice of three months in writing or salary and allowances in lieu thereof to the Central Government.

Question 7

Answer any **four** of the following:

- (a) *Star Limited proposes to acquire 15% equity shares of Gain Investments (P) Limited for 45 lakhs which has a face value of Rs. 35 lakhs. Star Limited has an outstanding loan of Rs. 15 lakhs to a public financial institution and had not defaulted in the repayment of loan instalments stipulated in the loan agreements. Based on the following financial data. Advise Star Limited about the legal position regarding the allowability of the proposed investment under the provisions of the Companies Act, 2013.*

	(Rs. In Crores)	
	Star Ltd.	Gain Investment (P) Ltd.
<i>Authorized Capital</i>	1.00	3.00
<i>Paid up Share Capital</i>	0.50	2.00
<i>Free Reserves</i>	0.20	1.50

As on the date of proposition, Star Ltd. does not hold any shares of any company.

(4 Marks)

- (b) *Standard International Ltd. who is a foreign trade creditor having its office in Hong Kong wanted to file a petition under the Insolvency and Bankruptcy Code, 2016 on default of the debtor in India. It moved a petition u/s 9 of the Code seeking commencement of insolvency process. The foreign company was not having any office or bank account in India. Because of this, it could not submit a "Certificate from a financial institution" as required under the Code. Whether the petition is permissible under the Insolvency and Bankruptcy Code, 2016? Decide.*

(4 Marks)

- (c) *Examine whether the office of the director of the below mentioned producer company shall fall vacant in the following circumstances under the Companies Act, 1956/2013.*
- (i) *Mr. Right a director of Strawberry Limited a producer company has made a default in payment of loan taken from a company and the default continued for 60 days.*
- (ii) *Mr. Pure a director of the above company could not call an annual general meeting for the company due to some natural "calamity occurred three days before the scheduled date. (4 Marks)*
- (d) *Mr. Joy took a life insurance policy on 1st January 2010 and nominated his close friend as a nominee to whom the money is secured by the policy in the event of his death. Later, before the maturity of the policy, he cancelled the original nomination and made a new nomination in favour of his fifteen year old son. With reference to the provisions of the Insurance Act, 1938, explain the provisions regarding nomination by Life Insurance policyholder. State whether a minor can be nominee in a Life Insurance policy? (4 Marks)*
- (e) *Sharp Health Clinic Limited had availed the credit facilities from the United Bank Limited. The company made repayment of loan to some extent but not entirely and accordingly the Bank took recourse under the provisions of Section 13(2) the SARFAESI Act, 2002. Consequently, possession of the mortgaged property was taken up and it was duly advertised. The company also filed an application under Section 17(1) of the SARFAESI Act, 2002 before the Debts Recovery Tribunal, which was dismissed by the impugned order. Being aggrieved, the company approached court. Will the company succeed in its petition referring to in the SARFAESI Act, 2002 ? (4 Marks)*

Answer

- (a) According to **Section 186(2)**, no company shall directly or indirectly acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

Where the giving of any loan or guarantee or providing any security or the acquisition exceeds the limits specified in Section 186(2), prior approval by means of a special resolution passed at a general meeting shall be necessary. [Sub-section (3)]

According to **Section, 186(5)**, no investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained.

However, prior approval of a public financial institution shall not be required where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit as specified in sub-section (2), and there is no default in repayment of loan instalments or

payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

In the given question, Star Limited has proposed to acquire 15% equity shares of Gain Investments (P) Limited for Rs. 45 lakhs.

Star Limited can make a maximum investment of Rs. 42 lakhs $[(0.5+.2)*60\% \text{ or } (.2)*100\%]$, whichever is more]. Since, the investment proposed by Star Limited in Gain Investment (P) Limited is 45 lakhs, prior approval by means of a special resolution passed at a general meeting shall be necessary.

Further, though Star Limited has not defaulted in the repayment of loan instalments of the loan taken from public financial institutions, but the amount of investment proposed exceeds the limit calculated in accordance with the provision specified in section 186(2), it will have to take prior approval of the public financial institution also.

- (b) As per the definition of the Creditor given in **Section 3(10)** of the Insolvency and Bankruptcy Code, 2016, it means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree holder. So, Standard International Ltd. is a creditor under the purview of the Code.

As per the facts given in question, Standard International Ltd., is a foreign trade creditor. He wanted to file a petition under the under **Section 9** of the Insolvency and Bankruptcy Code, 2016 for commencement of Insolvency process against the defaulter in India. Standard International Ltd. was not having any office or bank account in India.

As per the requirement of section 9 of the Code, along with application certain documents were needed to be furnished by the creditor to the Adjudicating authority. Being a foreign trade creditor, Standard International Ltd was also required to provide a copy of certificate from the financial institutions maintaining accounts of the creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Since, Standard International Ltd. was not having any office or bank account in India, it cannot furnish certificate from financial institution. So, Petition under Section 9 of the Code is not permissible.

- (c) (i) In the question default is made by Mr Right, the director and hence he is covered in **Section 581Q(1)(c)** of the Companies Act, 1956 which provide that the office of the director of a producer company shall become vacant if he has made default in repayment of any advances or loans taken from the producer companies in which he is a director. Assuming that 'a company' referred in the question is Strawberry Limited, a producer company where he is a director, he vacates the office even when the default is for 60 days.
- (ii) The office of director of a producer company shall become vacant if the Annual General Meeting or extraordinary general meeting of the producer company, in which he is a director, is not called in accordance with the provisions of this Act except due to natural calamity or such other reason. In the given case, since the Annual General

Meeting could not be held due to some natural calamity, the office of Mr. Pure, the director shall not fall vacant.

(d) Minor as a Nominee

According to **section 39(1)** of the Insurance Act, 1938, the holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death. However, where any nominee is a minor, it shall be lawful for the policyholder to appoint any person in the manner laid down by the insurer, to receive the money secured by the policy in the event of his death during the minority of the nominee.

Sub section (2), any such nomination in order to be effectual shall, unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records relating to the policy and any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement or a further endorsement or a will, as the case may be, but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurer shall not be liable for any payment under the policy made bona fide by him to a nominee mentioned in the text of the policy or registered in records of the insurer.

Thus, in the given question, Mr Joy can before the maturity of the policy, cancel the original nomination and make a new nomination in favour of his minor son. But such nomination shall be effective only when notice in writing of any such cancellation or change has been delivered to the insurer, then the insurer shall be liable for any payment under the policy made bona fide by him to a nominee mentioned in the text of the policy or registered in records of the insurer. Further, Mr Joy while nominating his minor son a nominee, has to appoint any adult person in the manner laid down by the insurer, to receive the money secured by the policy in the event of his death during the minority of the nominee.

(e) According to Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with prescribed fees to the Appellate Tribunal within 30 days from the date of receipt of the order of Debts Recovery Tribunal.

Further, no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than 25% of debt.

Thus, in the given situation Sharp Health Clinic Limited can appeal to the Appellate Tribunal (Now to NCLAT) by following the above provisions.