

PAPER- 4 – CORPORATE AND ALLIED LAWS

Question No. 1 is compulsory.

Answer any **five** from the rest

Question 1

- (a) PMK Ltd. having a paid up capital of ₹ 65 crore during the preceding financial year has appointed Mr. Z a Chartered Accountant, as CFO of the Company, who is appointed as Key Managerial Personnel under Section 203 of the Companies Act, 2013. The financial position of the company was not good. In the meanwhile, the CEO was given to understand that the company is statutorily required to appoint Internal Auditor and as such the Board had authorized the CEO to appoint a person who must be a Chartered Accountant. CEO wanted to know the followings:
- (i) What are the requirement for appointment of the Internal Auditor by the Company?
 - (ii) Since the financial position of the company was not good, can the company decide to give additional duties of Internal Auditor to Mr. Z to comply with the provision of the Act. Critically analyse the decision of the company. (4 Marks)
- (b) Mr. Abhi was appointed as an additional director of Pioneer Limited on 14th March, 2016. The annual general meeting of the company was scheduled to be held on 29th September, 2016 but due to heavy rains and floods all records of the company were destroyed. In order to rebuild the records, the company approached the Registrar of Companies for extension of time for holding the annual general meeting till 30th December, 2016. In the light of the Companies Act, 2013 advise Mr. Abhi, who was appointed as additional director during the year. (4 Marks)
- (c) The composition of the Board of Directors of a listed company as on 31-03-2017 comprised of
- (i) Mr. A, Director, (ii) Mr. B, Director (iii) Mr. C, Director (iv) Mr. D, Director, (v) Mrs. E, Independent Director, (vi) Mr. F, Independent Director and (vii) Mr. G, Independent Director. Mr. D & Mrs. E vacated their office of Director on 15-03-2017.
- You are required to examine with reference to the provisions of the Companies Act, 2013 and what course of action would you suggest which can be taken up by the Company in this regard? (4 Marks)
- (d) A Car manufacturer before beginning the manufacturing and delivery of newly introduced Cars into the market with effect from February 1999, with the installed capacity of approximately more than 50,000 cars in a year, invited the prospective customers to book the car through dealers. The booking amount demanded by the company was quite high and close to the estimated price finally payable which would include excise duty, sales tax and transportation charges. None of the persons who made the booking or purchased the car, withdrew the deposits with or without interest. However 3 complaints were made before the Commission by persons who claimed that they had intentions to

make the booking but were dissuaded by the high quantum of deposit required for the purpose. Their specific objection was that the demanded amount exceeded the basic price of the car if cess, taxes and transportation cost were left out. According to the complainants, the company has indulged in Unfair Trade Practice by demanding an excessive amount for bookings of cars and by including the likely taxes, cess and transportation cost.

Discuss the case with reference to the provisions of competition laws. (4 Marks)

- (e) *A company "issuer" was in the process of making an offer of Right issue of the specified securities. All the process was completed and the arrangement was complete. Mr. M, a director of the company was categorized as a 'Wilful Defaulter' by a Bank in accordance with the guidelines issued by the RBI. Advise the "Issuer" whether it can proceed to offer the securities through the right issue.*

Will your answer differ, had it been a public issue? (4 Marks)

Answer

- (a) (i) Section 138 of the Companies Act, 2013 requires that such class or classes of companies as may be prescribed shall be required to appoint an internal auditor, who shall either be a Chartered Accountant or a Cost Accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company. Rule 13 of the Companies (Accounts) Rules, 2014, provides that Companies required to appoint internal auditor:

The following class of companies shall be required to appoint an internal auditor or which may be either an individual or a partnership firm or a body corporate, namely:

- (1) Every listed company;
- (2) Every unlisted public company having.
 - (i) paid up share capital of fifty crore rupees or more during the preceding financial year; or
 - (ii) turnover of two hundred crore rupees or more during the preceding financial year; or
 - (iii) outstanding loans or borrowings from banks or public financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year; or
 - (iv) outstanding deposits of twenty five crore rupees or more at any point of time during the preceding financial year; and
- (3) every private company having.
 - (i) turnover of two hundred crore rupees or more during the preceding financial year; or

- (ii) outstanding loans or borrowings from banks or public financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year:

Further, for the purposes of this rule the internal auditor may or may not be an employee of the company.

In given instance, PMK Ltd. is an unlisted public company with the paid up capital of ₹ 65 crore during the preceding financial year. Rule 13 of the Companies (Accounts) Rules, 2014, provides that unlisted public company with paid up share capital of 50 crore rupees or more during the preceding financial year shall be required to appoint an internal auditor which may be either an individual, or a partnership firm or a body corporate. Since PMK Ltd. is in compliance with this rule, so the company shall appoint the internal auditor.

- (ii) **Additional duties of Internal Audit to Mr. Z :** PMK Ltd. appointed Mr. Z, a Chartered Accountant as CFO of the company. He is KMP under the Companies Act, 2013. As the financial position of the company was not good, so it decided to give additional duties of internal audit to Mr. Z. This assigning of additional duties by the company to Mr. Z is valid act as per the explanation provided in Rule 13 of the Companies (Accounts) Rules, 2014 that the internal auditor may or may not be an employee of the company. So, accordingly, company may decide to give the additional duties of internal auditor to Mr. Z and can appoint Mr. Z as an internal auditor of PMK Ltd.

(b) Problem related to appointment of additional director: Section 161(1) of the Companies Act, 2013 provides for appointment of additional director. According to this section:

- (i) The articles of a company may confer on its Board of Directors the power to appoint any person as an additional director at any time.
- (ii) A person, who fails to get appointed as a director in a general meeting, cannot be appointed as an additional director.
- (iii) Additional director shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

As per the stated fact, before the scheduled annual general meeting of 29th September 2016 takes place, due to heavy rains and floods all the record of the company were destroyed. So, company to rebuild the records, approached the Registrar of Companies for extension of time for holding of the Annual General Meeting till 30th December 2016.

As per the third provision to the section 96 of the Companies Act, 2013, Registrar may, for any special reason, extend the time within which any annual general meeting, other than the first annual general meeting, shall be held, by a period not exceeding three months.

So, accordingly Mr. Abhi may continue as an additional director of Pioneer Limited till 30th December, 2016.

(c) The provision of the Companies Act, 2013 governing the appointment of Women Director and Independent Directors are as under:

(i) The second proviso to sub-section 1 of section 149 provides that such class or classes of companies as may be prescribed, shall have atleast one women director. Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one women director –

(a) every listed company;

(b) every other public company having-

paid-up share capital of one hundred crore rupees or more; or

turnover of three hundred crore rupees or more :

It further provides that any intermittent vacancy of a women director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

In this case the Company is a listed and under the provisions of the Companies Act, 2013, it is required to have at least 1 Women Director on its Board.

(ii) The provision of section 149(4) provides that every listed company shall have at least 1/3rd of the total number of Directors as Independent Directors.

As per the facts stated in the question, composition of board of directors of listed company as on 31-3-2017 comprised of total 7 directors. Out of which 4 were directors and 3 were independent directors. Later Mr. D (Director) and Mrs. E (Independent Director) vacated their offices of director on 15-4-2017.

So accordingly, listed company as stated above, shall have at least one women director and one-third of the total number of directors as independent directors in the Board. However, on 15-4-2017, total number of directors left were 5 due to vacation of Mr. D and Mrs. E. Further, Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, provides that if there is an intermittent vacancy of a women director, it shall be filled up by the Board at the earliest but not later than immediate next board meeting or three months from the date of such vacancy whichever is later.

As per the requirement of the above sections, there is compliance of section 149(4) as 1/3rd of the total number of directors comprises of (1/3x5) 1.6 rounded off as 2, which complies with the minimum requirement of 2 independent directors in the board, however, pertaining to women director, Board have to fill up the intermittent

vacancy at the earliest but not later than immediate next board meeting or three months from the date of such vacancy whichever is later.

[Presumption: Date of Vacation of office of Mr. D and Mrs. E will be taken as 15.4.2017 rather than 15.3.2017. There seems to be clerical error.]

- (d) The case study of the given problem is based on Section 66 of the competition Act, 2002 which is a repealed and saving clause in the Act. All such cases stand transferred to the Appellate Tribunal and shall be judged accordingly. In this reference, the case study and its solution may be discussed as follows:

The appellant explained their practice by pleadings which does not controvert, their past experience as automobile manufacturer was limited to heavy vehicles and hence in their initial venture into the car segment, they were not sure of public response and they had decided to plan their production schedule on the basis of reality test of car's demand in the market. For this speculative bookings were required to be discouraged and the same was sought to be achieved by demanding an amount closer to the anticipated price which the customer would be required to pay. According to submissions, such practice could not have promoted the sale of their vehicle rather it was discouraging.

The large response shows peoples' faith in the products of the appellant and also that the interest rate offered by the appellants was appreciable and fair. The second limb of arguments also flows from the definition in Section 36A of the Act. By placing reliance upon judgment of this Court in the case of *Rajasthan Housing Board v. Paravti Devi (Smt)* (2000) 6 SCC 104, it was contended that when supplier and consumer have entered into an agreement then the Commission, in order to hold the supplier guilty of unfair trade practice on the basis of allegations made against it, is required to go into the terms and conditions agreed between the parties for finding out whether there was unfair trade practice so as to require further action on the basis of complaints. On behalf of appellant, reliance was also placed upon judgment of this Court in the case of *M/s Lakhnapal National Limited v. M.R.T.P. Commission & Anr* (1989) 3 SCC 251, particularly, paragraph 7 and 9 thereof. In paragraph 7 it was held that the definition of "Unfair Trade Practice" in Section 36A is not inclusive or flexible, but specific and limited in its contents. The Court also considered the object of this provision with a view to resolve the issue as to whether particular acts can be condemned as unfair practice or not.

A scrutiny of the judgment under appeal discloses that the Commission failed to keep in mind the precise allegations against the appellant with a view to find out whether the facts could satisfy the definition of Unfair Trade Practice(s) alleged against the appellant in the Notice of Enquiry. Hence, we are left with no option but to set aside the order under appeal. Thus there was no Unfair Trade Practice by the Company. *Tata Eng & Locomotive Co. Ltd. v. Director (Research)* [SC]

- (e) **General conditions for public and right issues under the SEBI(ICDR) Regulation 2009:** As per the Regulation 4 of the SEBI(ICDR) Regulation 2009, any issuer offering

specified securities through a public issue and rights issue shall satisfy the conditions of this Chapter at the time of filing draft offer document with the Board and at the time of registering or filing the final offer document with the Registrar of Companies or designated stock exchange, as the case may be.

Further the regulation provides that an issuer making a rights issue of specified securities, shall make disclosures as specified in Part G of Schedule VIII, in the offer document and abridged letter of offer, if the issuer or any of its promoters or directors is a wilful defaulter. Here the promoters or promoter group of the issuer, shall not renounce their rights except to the extent of renunciation within the promoter group.

However, no issuer shall make,

- a public issue of equity securities, if the issuer or any of its promoters or directors is a wilful defaulter; or
- b a public issue of convertible debt instruments if,
 - i. the issuer or any of its promoters or directors is a wilful defaulter, or
 - ii. it is in default of payment of interest or repayment of principal amount in respect of debt instruments issued by it to the public, if any, for a period of more than six months.

So, accordingly issuer can proceed to offer the securities through right issue of specified securities.

Yes the answer will differ in the case of public issue of equity securities if the issuer or any of its promoters or directors is a wilful defaulter. Accordingly, the issuer cannot proceed with the public issue.

Question 2

- (a) *Supreme Ltd. declared dividend @ 10% on its 10 lakh equity shares of ₹10 each on 30th September 2016. The dividend warrants were despatched to all the shareholders except three shareholders, holding in total 50,000 shares, due to dispute regarding title over the shares pending in court. On ascertaining the position on 30th October 2016, it was observed that dividend warrants for ₹ 1.50 lakh were not encashed by the remaining shareholders. Explain, with reference to provisions of the Companies Act, 2013, the actions to be taken by the company to deal with the unpaid/unclaimed amount of dividend. Also state the consequences if default is done in this matter. (8 Marks)*
- (b) *An officer of a company was allotted one room for two years in a guest house owned by the Company at some other city where he used to stay while on tour. It came to notice of the company that he had not vacated the said room after the expiry of two years and is holding the unauthorized possession of that room and has been permitting to stay outsiders in the said room, at a rent of ₹ 500 per day. The record shows that he had permitted the outsider for 45 days and collected ₹ 22,500 and retained the said amount with him. As per the letter of allotment, there was no such clause which can be invoked*

against him for making any recovery on account of such wrongful occupation. The Manager of the company seeks your advice as to whether the recovery can be made from him under any of the provisions of his employment or Companies Act. (4 Marks)

- (c) *Ms. Ashima daughter of Mr. Mittal (an exporter), is residing in Australia since long. She wants to buy a flat in Australia. Since she is unmarried, she wants to make her father Mr. Mittal a joint holder in that flat, for which entire proceeds are to be paid by her.*
- (i) *What are the provisions of FEMA governing such type of transaction?*
 - (ii) *Can Mr. Mittal join her daughter in acquiring such a flat in Australia?*
 - (iii) *Mr. Mittal, wants to receive advance payments against his exports from a buyer outside India. What are the relevant provisions? (4 Marks)*

Answer

- (a) **Section 124 of the Companies Act, 2013 contains provisions regarding unpaid dividend as under:**
- (i) **Declared dividend not paid or claimed to be transferred to the special account:** Where a dividend has been declared by a company but has not been paid or claimed within thirty days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the unpaid Dividend Account.
 - (ii) **Preparing of statement of particulars of the unpaid dividend :** The company shall, within a period of ninety days of making any transfer of an amount to the unpaid Dividend Account, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the website of the company, if any, and also on any other website approved by the Central Government for this purpose in such forms, manner and other particulars as may be prescribed.
 - (iii) **Default in transferring of amount:** If any default is made in transferring the total amount referred to in sub-section (1) or any part thereof to the Unpaid Dividend Account of the company then the company shall pay from the date of such default, interest on so much of the amount as has not been transferred to the said account, at the rate of twelve per cent per annum and the interest accruing on such amount shall ensure to the benefit of the members of the company in proportion to the amount remaining unpaid to them.
 - (iv) **Apply for payment of claimed amount:** Any person claiming to be entitled to any money transferred under sub-section (1) to the Unpaid Dividend Account of the company may apply to the company for payment of the money claimed.

- (v) **Transfer of unclaimed amount to Investor Education and Protection Fund (IEPF):** Any money transferred to the Unpaid Dividend Account of a company in pursuance of this section which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company along with interest accrued, if any, thereon to the Fund established under section 125(1) and the company shall send a statement in the prescribed form of the details of such transfer to the authority which administers the said fund and that authority shall issue a receipt to the company as evidence of such transfer.
- (vi) **Transfer of shares to IEPF:** All shares in respect of which dividend has not been paid or claimed for seven consecutive years or more shall be transferred by the company in the name of Investor Education and Protection Fund along with a statement containing such details as may be prescribed.

Right of owner of shares transferred to IEPF to claim from IEPF:

Provided that any claimant of shares transferred above shall be entitled to claim the transfer of shares from Investor Education and Protection Fund in accordance with such procedure and on submission of such documents as may be prescribed.

Explanation – For the removal of doubts, it is hereby clarified that in case any dividend is paid or claimed for any year during the said period of seven consecutive years, the share shall not be transferred to Investor Education and Protection Fund.

- (vii) **In case of contravention:** If a company fails to comply with any of the requirements of this section, the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Accordingly, Supreme Ltd. has to transfer the unpaid dividend amount of ₹ 50,000 on disputed shares plus ₹ 1.50 lakh on account of unclaimed dividend to a specially opened unpaid Dividend Account within 7 days after 30th October, 2016.

If any default is made in complying with the above provision, the company as well as every officer of the company, who is in default, shall be punishable as mentioned above.

- (b) **Penalty for wrongful withholding of property:** Section 452 of the Companies Act, 2013 provides for Penalty for wrongful withholding of property. According to the section:
- (i) If any officer or employee of a company -
- (a) Wrongfully obtains possession of any property, including cash of the company; or
 - (b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed

or directed in the articles and authorized by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

- (ii) The Court trying an offence may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to 2 years.

Hence as per the provisions of the Companies Act, 2013 and not giving any emphasis on the terms of employment, the manager of the company can recover possession of the room and the cash wrongfully obtained and the benefits that have been derived from such property or cash.

(c) (i) The provisions governing the acquisition and transfer of immovable property outside India.

(1) A person resident in India may acquire immovable property outside India:

- (a) By way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the FEMA or referred to in clause (b) of regulation 4 acquired by a person resident in India on or before 8th July, 1947 and continued to be held by him with the permission of Reserve Bank.
- (b) by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the foreign exchange management (Foreign Currency accounts by a person resident in India) Regulations 2015.
- (c) Jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India.

(2) A person resident in India may acquire immovable property outside India, by way of Inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provision in force at the time of such acquisition.

(3) A Company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

- (ii) In the light of above discussions in 1(c), it is quite clear that Mr. Mittal, a resident in India, can join his daughter who is a resident outside India, In acquiring a Flat at Australia.

(iii) Advance payment against export:

The following are the provisions governing the advance payments against exports :

- (1) Where an exporter receives advance payments (with or without interest) from a buyer/ third party named in the export declaration made by the Exporter, outside India, the exporter shall be under the obligation to ensure that:
 - (i) The shipment of goods is made within one year from the date of receipt of advance payment.
 - (ii) The rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
 - (iii) The documents covering the shipment are routed through the authorised dealer through whom advance payment is received.

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment or towards, no remittance towards refund of un-utilised portions of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve bank of India.

- (2) Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

Question 3

- (a) *There are four directors in Two Squares Ltd. Mr. Rao, being the director in station, has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc. Whether as per provisions of the Companies Act, 2013, he will be treated as managing director of the company? Also narrate the procedure of appointment of a managing director in a company. (8 Marks)*
- (b) *Mr. Z, a director of Southern Highway Tolls Private Limited, is duly authorized by the Board of directors to prepare and file returns, report or other documents to the Registrar of Companies on behalf of the company. Though he filed all the required documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar. State the penal provision under the Companies Act, 2013 ? (4 Marks)*
- (c) *ABC Bank of India, a nationalized bank, acquired on 1st January, 2007 a building, fully occupied by various tenants, from 'Y' the owner of the building in discharge of a term loan advanced to 'Y' who had mortgaged the said building as security with the said Bank*

and failed to repay the loan. The bank wants to keep the building permanently with it and earn the rent from tenants.

Explain with reference to the provisions of the Banking Regulation Act, 1949 whether the said bank can do so. (4 Marks)

Answer

(a) Managing Director [Section 2(54)] : Section 2(54) of the Companies Act, 2013 defines a “Managing Director” as a director who is entrusted with substantial powers of management of the affairs of the company by:

- (i) virtue of articles of a company or
- (ii) an agreement with the company or
- (iii) a resolution passed in its general meeting, or by its Board of Directors, and includes a director occupying the position of the managing director, by whatever name called.

Explanation to Section 2 (54) clarifies that substantial powers of the management shall not be deemed to include the power to do such administrative acts of a routine nature when so authorised by the Board such as:

- (i) the power to affix the common seal of the company to any document or
- (ii) to draw and endorse any cheque on the account of the company in any bank or
- (iii) to draw and endorse any negotiable instrument or
- (iv) to sign any certificate of share or
- (v) to direct registration of transfer of any share.

In the instant case, Mr. Rao, a director in Two Squares Ltd. has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc.

Hence, according to explanation to section 2(54), Mr. Rao will not be treated as managing director of the company as he is authorized to do administrative acts of a routine nature.

Procedure of appointment of a managing director [Section 196(4)]

- (1) Subject to the provisions of section 197 and Schedule V, a managing director shall be appointed, and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting.
- (2) The terms and conditions and remuneration approved by Board of Directors as above shall be subject to the approval of shareholders by a resolution at the next general meeting of the company.

- (3) In case such appointment is at variance to the conditions specified in the Schedule V of the Companies Act, 2013, the appointment shall be approved by the Central Government.
- (4) The notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.
- (5) A return in the prescribed form (Form No. MR.1) along with the prescribed fee shall be filed with the Registrar within sixty days of such appointment.

(b) Penalty for false statements (Section 448 of the Companies Act, 2013)

According to section 448 of the Companies Act, 2013, save as otherwise provided in this Act, if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made there under, any person makes a statement, -

- (a) which is false in any material particulars, knowing it to be false; or
- (b) which omits any material fact, knowing it to be material,

he shall be liable under section 447.

In the present case, Mr. Z, a director of Southern Highway Tools Private Limited filed returns, report or other documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar.

Hence, Mr. Z shall be liable under section 447 for false statements.

Penal Provisions: As per Section 447, any person who is found to be guilty under this section shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud, provided that, where the fraud involves public interest, the term of imprisonment shall not be less than 3 years.

Hence Mr. Z a director of Southern Highway Tools Private Limited shall be punishable with imprisonment and fine prescribed as aforesaid.

- (c) ABC Bank of India, being a nationalized bank is a banking company within the meaning of the Banking Regulation Act, 1949. As per the provisions of Section 9, notwithstanding anything contained in Section 6, no banking company shall hold any immovable property, howsoever acquired, for a period exceeding seven years except:
 - (i) If such property is required for banking company's own use.

- (ii) If the Reserve Bank of India extends the said period of seven years by up to another five years on the ground that such extension would be in the interest of the depositors of the banking company.

Accordingly, ABC Bank of India in this case, would normally be required to dispose off the building acquired from Mr. Y before 1st January, 2014. However, if the Reserve Bank of India on above stated ground grants the extension, then also the said Bank will have to dispose off the same before 1st January, 2019. But in no case, ABC Bank of India can hold it permanently because the building is not for bank's own use.

Question 4

- (a) (i) *Damage Ltd, the Company wanted to suspend Mr. Z, the CFO of the Company during the pendency of an investigation being conducted under the provisions of the Companies Act, 2013 on the order of Tribunal. The Company approached the Tribunal on 3rd January, 2017 for the proposed action. The Company on 15th February, 2017 passed an order of suspension without waiting for the orders from Tribunal. Comment upon the action taken by the Company with reference to the relevant provisions of the Act.*
- (ii) *During investigations conducted on the affairs of a company in the public interest, the inspector observed that the Directors of the company had been acting on the instructions of the holding company and he proceeded to investigate the holding company. Is Inspector permitted to do under the provisions of the Companies Act, 2013?* (8 Marks)
- (b) (i) *Surya, a director in New Age Limited holding Directors Identification Number (DIN) wants to make certain changes in the particulars of his DIN. What procedure would you follow to get changes incorporated in the DIN already allotted to Surya?*
- (ii) *Vijay, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the Registrar of Companies (RoC) within the prescribed time.*
- What would be the status of Vijay if the company fails to intimate about the resignation of Vijay to RoC?* (4 Marks)
- (c) *Sohan Lal, a farmer, was found involved in embezzlement of opium cultivated by him. State the punishment that can be awarded to him under the Prevention of Money Laundering Act, 2002.* (4 Marks)

Answer

- (a) (i) Section 218 of the Act deals with the Protection of Employees during Investigation and relevant provisions are as under:
- (1) **Approval of tribunal to take action against the employee:** Notwithstanding anything contained in any other law for the time being in force, if-

- (a) **during the course of any investigation of the affairs** and other matters of or relating to a company, other body corporate or person under section 210, section 212, section 213 or section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under section 216; or
- (b) **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 –
 - to discharge or suspend any employee; or
 - to punish him whether by dismissal, removal, reduction in rank or otherwise; or
 - 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.
- (2) **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 the 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 action taken by Damage Ltd. to suspend Mr. Z, the CFO of the company is valid as the company approached the Tribunal on 3rd January, 2017 for the proposed action and on 15th February, 2017 passed an order of suspension without waiting the orders from Tribunal (after 30 days of making the application)

- (ii) **Investigation into affairs of related companies :** Section 219 of the Companies Act, 2013, provides for power of Inspector to conduct investigation into the affairs of related companies etc., if an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, to investigate also the affairs of:-
 - (a) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company;

- (b) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company;
- (c) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or
- (d) any person who is or has at any relevant time been the company's managing director or manager of employee, he shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the company for which he is appointed.

Therefore, the inspector shall subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the Managing Director or Manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the Company for which he is appointed. In view of above, the Inspector is permitted to investigate the holding company.

(b) (i) Intimation of changes in particulars specified in DIN application

- (1) According to Companies (Appointment and Qualification of Directors) Rules, 2014, every individual who has been allotted a DIN under these rules shall, in the event of any change in his particulars as stated in Form DIR-3, intimate such change(s) to the Central Government within a period of thirty days of such changes(s) in form DIR – 6 in the following manner, namely:
 - (i) The applicant shall download Form DIR – 6 from the portal, fill in the relevant changes, verify the Form (DIR-7) and attach duly scanned copy of the proof of the changed particulars and submit electronically.;
 - (ii) The form shall be digitally signed by a Chartered Accountant in practice or a Company Secretary in practice or a Cost Accountant in practice;
 - (iii) The applicant shall submit the Form DIR -6.
- (2) The Central Government, upon being satisfied, after verification of such changed particulars from the enclosed proofs, shall incorporate the said changes and inform the applicant by way of a letter by post or electronically or in any other mode confirming the effect of such change in the electronic database maintained by the Ministry.
- (3) The DIN cell of the Ministry shall also intimate the change(s) in the particulars of the director submitted to it in Form DIR-6 to the concerned Registrar(s)

under whose jurisdiction the registered office of the company(s) in which such individual is a director is situated.

- (4) The concerned individual shall also intimate the change(s) in his particulars to the company or companies in which he is a director within 15 days of such change.

(ii) Resignation of Director (Section 168 of the Companies Act, 2013)

A director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same. The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in *Form DIR -12* and post the information on its website, if any.

Such director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in *FORM DIR-11* along with the prescribed fee. The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

In the present case, Vijay, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the RoC within the prescribed time.

If the company fails to intimate about the resignation of Vijay to RoC, even then the resignation of Vijay shall take effect from the date on which the notice is received by the company or the date, if any, specified by Vijay in the notice, whichever is later.

- (c) Section 4 of the Prevention of Money Laundering Act, 2002 provides for the punishment for Money-Laundering. Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and shall also be liable to fine. But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to 10 years instead of 7 years.

Paragraph 2 of Part A of Schedule to the Prevention of Money Laundering Act, 2002, covers Offences under the Narcotic Drugs And Psychotropic Substances Act, 1985 Whereby, embezzlement of opium by cultivator (section 19) is covered under paragraph 2 of Part A.

In the present case, Sohan Lal, a farmer, who was involved in embezzlement of opium cultivated by him shall be liable for the rigorous imprisonment for a term which may extend to 10 years and shall also be liable to fine.

Question 5

- (a) (i) 17th Board meeting of Jai Entertainment Ltd. was held at its registered office situated at B-17, Industrial Area, Suncity. While discussing the matter of appointment of Mr. Kaabil as Managing Director of the company, certain defamatory remarks were made by Mr. X, one of the directors. The draft minutes submitted by the Company Secretary also incorporated the indecent remarks of Mr. X. The chairman wants to remove those undesirable remarks from the minutes. Can he do so?
- (ii) Draft the minutes of above referred meeting containing the matter regarding appointment of Managing Director in addition to the usual items. (8 Marks)
- (b) ResLab Ltd. with an object to expand its production capacity, offered a public issue of ₹ 200 crore to the public which was fully subscribed. Out of the said amount, a sum of ₹ 170 crore was spent in project "A" and the balance of ₹ 30 crore earlier envisaged for buying a machinery could not be materialized and as such the said amount of ₹ 30 crore remained unutilized. In the mean while a team of consultants suggested the company to go for establishing Research Labs at different part of the country which would be more beneficial to the company.
- The Chairman of the company approach you to advise the company as to whether the un-utilized amount of ₹ 30 crore collected from Public Issue can be diverted in the manner as suggested by the consultants with reference to the provision of the Companies Act or SEBI Act. (4 Marks)
- (c) There are several provisions under the, Companies Act, 2013 which start with the words 'not withstanding' and 'without prejudice'. Explain the nature and significance thereof, applying the principles of Statutory Interpretation. (4 Marks)

Answer

- (a) (i) The minutes of a meeting are a written record of the business transacted; decisions and resolutions arrived at the meeting.
- Section 118 of the Companies Act, 2013, deals with Minutes of Proceedings of General Meeting, Meetings of Board of Directors and Other Meetings and Resolutions Passed by Postal Ballot. The section provides certain exemptions to matters from inclusion in the minutes.
- Exemptions from inclusion in minutes of the meeting:** There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting, -
- is or could reasonably be regarded as defamatory of any person; or
 - is irrelevant or immaterial to the proceedings; or
 - is detrimental to the interests of the company.

Absolute discretion of chairman: The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds as specified above.

Hence, the Chairman can exercise his discretion of not including the undesirable remarks from the minute of the 17th Board meeting of Jai Entertainment Ltd.

(ii) Draft Minutes

Minutes of 17th meeting of the Board of Directors of Jai Entertainment Limited held on _____ the _____ 2017, at B-17, Industrial Area, Suncity

Present :

1. _____ Chairman
2. _____ Director
3. _____ Director

In attendance Secretary

Item No. 1 : Leave of Absence

Leave of absence was granted to _____ Director.

Item No. 2 : Confirmation of minutes of the 16th Board meeting :

The minutes of the 16th meeting of the Board of Directors held on _____ were considered and confirmed.

Item No. 3: Appointment of Managing Director:

The Board noted the appointment of Mr. Kaabil, director of the company as the Managing Director of the company. In this connection, the following resolutions were passed:

“Resolved that Mr. Kaabil who fulfils the conditions specified in Parts I and II of Schedule V to the Companies Act, 2013, be and is hereby appointed as the Managing Director of the company for a period of five years effective from _____ and that he may be paid remuneration by way of salary, commission and perquisites in accordance with Part II of Schedule V to the Act.

Resolved further that the Secretary of the Company be and is hereby directed to file the necessary returns with the registrar of Companies and to do all acts and things as may be necessary in this connection.”

Item No. 4: Next Board Meeting:

The next meeting of the Board will be held on _____ the _____ 20____ at the registered office of the company. The meeting ended with a vote of thanks to the chair.

- (b) Chapter VI- A of SEBI (Issue of Capital and Disclosure Requirements), 2009 as amended by the SEBI Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2016, provides for conditions and manner of providing exit opportunity to dissenting shareholders.

The provisions of this Chapter shall apply to an exit offer made by the promoters or shareholders in control of an issuer to the dissenting shareholders in terms of section 13(8) and section 27(2) of the Companies Act, 2013, in case of change in objects or variation in the terms of contract referred to in the prospectus.

The SEBI (Issue of Capital and Disclosure Requirements), 2009 provides that the promoters or shareholders in control shall make the exit offer in accordance with the provisions of this Chapter, to the dissenting shareholders, if the amount to be utilized for the objects for which the prospectus was issued is less than 75% of the amount raised (including the amount earmarked for general corporate purposes as disclosed in the offer document).

Thus, the shareholders of ResLab Ltd shall not be provided with exit offer as ₹ 170 crores i.e. more than 75% of the amount raised ($200 \times 75\% = 150$ crores) has been spent on project 'A'.

Further, according to section 27 of the Companies Act, 2013, ResLab Ltd. cannot vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued, except subject to the approval of, or except subject to an authority given by the company in general meeting by way of special resolution and following other formalities as provided in the Companies Act, 2013.

Hence, ResLab Ltd has to follow the above provisions if they want to utilize the unutilized amount of ₹ 30 crores in the manner as suggested by the consultants.

- (c) A provision containing the words 'notwithstanding' is generally termed as 'non obstante clause'. The provision containing the word 'notwithstanding' has an overriding effect on the other provision, i.e., such provision shall prevail over the other provision. In other words, if there is any inconsistency or departure between the non obstante clause and another provision, it is the non obstante clause which will prevail.

Accordingly, a non obstante clause restricts the operation and effect of all the contrary provisions. For example, Section 163 of the Companies Act, 2013 provides option to adopt principle of proportional representation for appointment of directors. It reads as – "Notwithstanding anything contained in this Act,...". The effect of the non obstante provision is that the appointment of directors under Section 163 is not to be affected by any other provision of Companies Act, 2013. In other words, the directors can be appointed by way of proportional representation even if such appointment would not be permissible under any other provision of the Act.

Where a section contains the word 'notwithstanding', it over-rides the other provisions as specified in the section. This can be explained as under: Where a provision is framed as

“Notwithstanding anything contained in this Act,...”, it over-rides the entire Act, e.g., Section 163 of the Companies Act, 2013.

The words ‘without prejudice’ are used in an Act as follows: (a) An expression containing the words ‘without prejudice to the generality of ...’ indicates that anything contained in the provision following such words is not intended to cut down the generality of the meaning of the preceding provision. It means a provision enacted ‘without prejudice’ to another provision has not the effect of affecting the operation of the other provision and any action taken under it must not be inconstant with such other provision. [*Central Bank of India vs. State of Kerala (2009) Sc*]

Question 6

- (a) Examine the following with reference to the provisions of the Companies Act, 2013:
- (i) Mr. Narayan, a Director of KPR Limited who is proceeding on a long foreign tour, appointed Mr. Shankar as an alternate director to act for him during his absence. The Articles of the company provide for appointment of alternate directors. Mr. Narayan claims that he has a right to appoint an alternate director.
 - (ii) The Board of Directors of Sakthi Limited decides to appoint on its Board, Mr. Ravi as a nominee director upon the request of a bank which has extended a long term financial assistance to the company. The Articles of Association of the company do not confer upon the Board any such power. Also, there is no formal agreement between the company and the bank for any such nomination.
 - (iii) The Chairman of Evergreen Limited convened a board meeting and two weeks' notice was served on all directors of the company. Two of the independent directors on the board objected on the grounds that no proper agenda for the meeting was circulated.
 - (iv) Sunshine Limited proposes to hold its board meeting at a shorter notice through video conferencing. (8 Marks)
- (b) Shoki Internl Ltd. has a network of six branches scattered all over the world out of which two are in India. The net-worth of the company is ₹ 650 crores. Since the net profits of the company were in downward trends, Mr. Nikunj a retired General Manager of a Bank was appointed by the company to analyse the financial health of the company. Among the other points having been reported by Mr. Nikunj, the CEO of the company seeks your advice, particularly on the application of the provisions of CSR under the Companies Act, 2013 based on the following:
- (i) The Net profit of the company in the financial year 2012-13 was ₹ 18 crores which was contributed by the branches located in India and outside in the ratio of 35 : 65.
 - (ii) Since 2013-14 onwards, all the branches located in India have not earned any profit.

- (iii) *The Financial Statements for the year 2015-16 revealed that there was net profit of ₹ 7 crore to the company and the total expenses on travelling abroad were ₹ 2.5 crore.*
- (iv) *The company has borrowed loan at a very high rate of interest which needs to be swapped with low financing cost.*
- (v) *During the year 2016-17, the company has so far spent CSR expenses to the tune of 1.10 percent of the average net profits of the company made during the three preceding immediately financial years which in his view need special attention.* (4 Marks)
- (c) *Explain the meaning of the following terms used in the Securities Contracts (Regulation) Act, 1956:*
 - (i) *Option in Securities*
 - (ii) *Spot delivery contract* (4 Marks)

Answer

- (a) (i) According to section 161 (2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

Hence, the Board of Directors of KPR Ltd. may appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence, as:

- (a) The Articles of KPR Limited provides for appointment of alternate director.
- (b) Mr. Narayan, director of company is proceeding for a long foreign tour.

However, the power to appoint alternate director lies with the Board of Directors and not with the director himself. Hence, Mr. Narayan cannot himself appoint Mr. Shankar as an alternate director to act for him during his absence.

[Presumption: The duration of 'long foreign tour' is not less than three months.]

- (ii) According to section 161 (3) of the Companies Act, 2013, subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

The Articles of Association of Sakthi Limited do not confer upon the Board of Directors any such power. Hence, the Board cannot appoint Mr. Ravi as a nominee

director even on the request of a bank which has extended a long term financial assistance to the company.

- (iii) According to section 173 (3) of the Companies Act, 2013, a meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

According to the question, two of the independent directors on the Board has objected on the grounds that no proper agenda for the meeting was circulated.

The Companies Act, 2013 does not specifically provide for sending agenda along with the notice of the meeting. However, generally as a good secretarial practice, the notice is accompanied with the agenda of the meeting. Thus, the contention of the independent directors objecting on the grounds that no agenda for the meeting was circulated, does not hold good.

Further, the Chairman of Evergreen Limited has convened the Board meeting by serving a two weeks' notice (i.e. more than 7 days). Hence, the meeting shall be valid.

- (iv) According to section 173 of the Companies Act, 2013,

- (a) The directors can participate in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Further, Central Government may provide for matters which cannot be dealt in a meeting through video conferencing or other audio visual means.
- (b) A meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company.

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, in case the independent directors are not present at such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Hence, Sunshine Limited can hold a board meeting at a shorter notice through video conferencing, for transacting urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, if the independent directors are absent from the meeting of the Board, decision taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

(b) The applicability of the provisions of CSR to the Company is as under:

As per section 135 of the Companies Act, 2013, every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee and the Board of every such company shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy, provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities.

It is further provided that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

The definition of net profits under Rule 2(f) means the net profit of a company as per its Financial Statement prepared in accordance with the applicable provisions of the Act, but does not include the following namely:

- (a) Any profit arising from any overseas branch or branch of the company, whether operated as a separate company or otherwise; and
- (b) Any dividend received from other companies in India which are covered and complying with the provisions of section 135 of the Act.

As per point no (ii) reported by Mr. Nikunj, states that all the branches located in India have not earned any profit since 2013-14 onward, meaning thereby all the net profits being earned by the Company pertains to the overseas branches. As provided in the definition of net profit, under the CSR Rules, it does not include the net profit earned by the overseas branch(s); therefore, the provisions of CSR for incurring expenses during the Financial Year 2016-17 are not applicable.

In view of the above, it is clear that though the company has spent 1.10 per cent of the average net profits of the Company made during the three preceding immediately financial years, which is not statutorily required for the Company to spend and as such there is no violation of the provisions of the Companies Act.

- (c) (i) **“option in securities”** means a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes a teji, a mandi, a tejimandi, a galli, a put, a call or a put and call in securities;
- (ii) **“Spot delivery contract”** means a contract which provides for –
 - (a) actual delivery of securities and the payment of a price therefor either on the same day as the date of the contract or on the next day, the actual period taken for the dispatch of the securities or the remittance of money therefor the

post being excluded from the computation of the period aforesaid if the parties to the contract do not reside in the same town or locality

- (b) transfer of the securities by the depository from the account of a beneficial owner to the account of another beneficial owner when such securities are dealt with by a depository.

Question 7

Answer any **four** of the following:

- (a) *Some applicants consented to become shareholders of a company on the condition that their suggestions should be included in the memorandum and articles of association. Their suggestions, however, were not carried out by the promoters but the applicants signed usual applications for shares allotted to them and thereby become shareholders of the company. The company went into liquidation.*
 - (i) *What shall be the fate of the applicants who had consented to become shareholders on certain conditions?*
 - (ii) *What shall be the amount to be borne by the secured creditors out of the expenses incurred by the liquidator if:*
 - (a) *The value of the security of secured creditors of a company is ₹ 1.00 lac.*
 - (b) *Total amount of workmen's due is ₹ 1.00 lac and*
 - (c) *Debts due from the company to its secured creditors is ₹ 3.00 lacs.*
 - (d) *The liquidators incurred ₹ 10,000 for the preservations of the security before it is realized by the secured creditors.*
- (b) *Mr. D was appointed as a Technical Member of the National Company Law Tribunal (NCLT) on 1st July, 2012 for a period of 5 years. He will be completing 62 years on 30th June, 2017.*

Whether he can be re-appointed on the NCLT on completion of his tenure in 2017?

- (c) *A group of shareholders holding 20% of the issued share capital of DEF Limited have filed a petition before the Tribunal alleging the following:*
 - (i) *Various acts of illegal, invalid and irregular transactions entered into the name of the company.*
 - (ii) *Losses incurred due to mismanagement by the board of directors.*
 - (iii) *Non-declaration of dividend despite having sufficient profits in the past years.*

Examine the merits of the above petitions made under Section 241 of the Companies Act, 2013 in the light of the judicial pronouncements made in this regard.

(d) *The shareholders and creditors of Superfine Limited, in a meeting convened for approval of a scheme of reconstruction of the company, passed resolutions. The scheme of reconstruction provided for the following:*

- (i) *Sale of plant and machineries and appropriation of proceeds for payment of outstanding wages, tax dues and repayment of loan.*
- (ii) *Unsecured creditors to forego 60% of their claims against the company and receive debentures for the balance amount. A few shareholders and creditors raised objections against the said arrangements.*

Advise the directors about the steps to be taken to give effect to the proposed scheme under the Companies Act, 1956.

(e) *Popular Limited defaulted in the repayment of term loan taken from a Bank against security created as a first charge on some of its assets. The bank issued notice pursuant to Section 13 of the SARFAESI Act, 2002 to the Company to discharge its liabilities within a period of 60 days from the date of the notice. The company failed to discharge its liabilities within the time limit specified.*

Explain the measures to be taken by the Bank to enforce its security interest under the said Act. (4 x 4 = 16 Marks)

Answer

(a) (i) Some applicants consented to become shareholders of a company on the condition that their suggestions should be included in the memorandum and articles of association. Their suggestions, however, were not carried out by the promoters but the applicants signed usual applications for shares allotted to them and thereby become shareholders of the company. The company went into liquidation.

In *East Bengal Sugar Mills Ltd.*, it was held that it was not open to shareholders to object subsequently to their being shareholders of the company on the ground that the condition had not been fulfilled.

(ii) **Workmen's portion of the security =**

$$\text{Value of security} \times \frac{\text{Workmen's dues}}{\text{Workmen's dues} + \text{Secured loan}}$$

$$1,00,000 \times \frac{1,00,000}{1,00,000 + 3,00,000} = 1,00,000 \times \frac{1}{4}$$

$$= ₹ 25,000$$

Therefore, workmen's portion of the value of security is ₹ 25000.

If the liquidators incurs ₹ 10,000 for the preservation, then:

$$\text{Whole of expenses} \times \frac{\text{Workmen's portion}}{\text{Value of the Security}} = ₹ 1,00,000 \times \frac{10,000 \times 25,000}{1,00,000}$$

= ₹ 10,000 – 2,500

= ₹ 7,500. This is the amount to be borne by the secured creditors.

- (b) According to Section 413(1) of the Companies Act, 2013 the President and every other Member of the Tribunal shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re appointment for another term of five years.

Under section 413 (2), a Member of the Tribunal shall hold office as such until he attains, -

- (i) in the case of the President, the age of sixty-seven years;
- (ii) in the case of any other Member, the age of Sixty-five years.

In the instant case, Mr. D was appointed as a technical Member of the NCLT on 1st July, 2012 for a period of 5 years. He will be completing 62 years on 30th June, 2017. He can also be re-appointed after his initial term of five years is over. But since he shall be attaining the age of 65 years as on 30th June, 2020, he will have to step down from the post on his attaining the age of 65 years i.e. on 30th June, 2020.

- (c) According to Sections 244 of the Companies Act, 2013, a group of shareholders of DEF Limited must hold atleast 10% of the issued share capital of the Company or satisfy other requirements under section 244 of the Companies Act, 2013. Since the group holds 20% of the issued share capital they are entitled to file a petition before the Tribunal under Section 241 of the Companies Act, 2013 by alleging that the affairs of the Company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members of the Company. However, on the basis of *Sheth Mohanlal Ganpatram vs. Shri Sayaji Jubilee Cotton and Jute Mills Company Ltd.*, mere illegal, invalid or irregular transactions entered into in the name of the company do not constitute a ground for invoking the provisions of section 241 unless it is proved that they are oppressive to any shareholder or prejudicial to the interest of the company or to the public interest.

Similarly, losses incurred due to mismanagement by the board of directors, cannot, by itself, be regarded as oppression (*Ashok Betelnut Co. P. Ltd. vs. M.L. Chandrakanth*).

Also, failure to declare dividends or payment of low dividends also does not amount to oppression. (*Thomas Veddor V.J. vs. Kuttanad Robber Co. Ltd.*).

Thus, in the present case, the petition filed by the group of shareholders will fail unless they can prove to the satisfaction of the Tribunal that the acts complained of in the petition are oppressive and prejudicial to the interest of the company and the public interest.

- (d) **Reconstruction Scheme of Company:** The provisions contained in sections 391 to 394 of the Companies Act, 1956 are applicable to Superfine Limited as it can be considered as a company liable to be wound up within the meaning of section 390 of Companies Act,

1956. The Proposed scheme involves a compromise or arrangement with members and creditors and it attracts section 391 of the said Act.

While the Company or any creditor or member can make application to the Court/Tribunal under section 391, it is usual for the company to make an application. On such application the Court/Tribunal may order that a meeting of creditors and/or members be called and held as per the directions of the Court/Tribunal.

The company must send notice of meeting to every creditor/member containing a statement setting forth the terms of compromise or arrangement explaining its effect. Material interest of directors, Managing Director or manager of the company in the scheme and the effect of scheme on their interest should be fully disclosed (Section 393). At the meetings convened as per directions of the Court/Tribunal majority in number representing at least $\frac{3}{4}$ in value of creditors/members present and voting must agree to compromise or arrangement. Thereafter, the company must present a petition to the Court/Tribunal for confirmation of the compromise or arrangement.

The notice of application made by the company will be served on the Central Government and the Court will take into consideration representation, if any, made by the Central Government (Section 394A). The Court/Tribunal will sanction the scheme, if satisfied, after considering all relevant matters.

Copy of order issued by the Court/Tribunal must be filed with the Registrar of Companies and then only the order will come into effect. Copy of the said order must be annexed to every Memorandum of Association issued thereafter. The scheme sanctioned by the Court/Tribunal shall be binding on all members and creditors even those who were dissenting.

(e) **Sub-section (4) of section 13 of SARFAESI Act, 2002**, provides that if the borrower fails to discharge his liability in full within the 60 days, the secured creditor may take recourse to one or more of the following measures to recover his secured debt:

- (i) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
- (ii) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

- (iii) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

- (iv) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

In the instant case, the Bank may take the above mentioned procedure to enforce its security interest in case Popular Limited has failed to discharge its liabilities within the time limit specified.