

PAPER- 4 – CORPORATE AND ECONOMIC LAWS

Question No. 1 is compulsory.

Answer any **four** from the rest

Question 1

(a) *The Board of Directors of M/s. Diya Steels and Aluminium Limited, a listed Company having a paid up equity share capital of ₹ 15 crore and preference share capital of ₹ 1 crore and 1100 small shareholders holding equity shares, seeks your advice on the following:*

- (i) *Is it mandatory for the Company to appoint a Director to represent Small Shareholders?*
- (ii) *If the Company decides to appoint such a Director, the procedure to be followed by the Company for such appointment and the tenure for which such appointment can be made.*
- (iii) *Whether such a Director be considered as an Independent Director?*
- (iv) *When does a person appointed as a small shareholders Director vacate his office?*

Advise suitably in the light of the provisions of the Companies Act, 2013 and the rules framed thereunder. (8 Marks)

(b) *Primex Securities (P) Ltd. is a Company involved in stock broking and is registered with SEBI. The said broking Company failed to:*

- *Redress the grievances of the investors within the stipulated time.*
- *Segregate securities or money of clients and used the same for self use or for any other clients.*

The Securities and Exchange Board of India issued an Order against the said Company for committing the above offences. The Managing Director of the Company seeks your advice and the following under the provisions of the Securities Contract (Regulation) Act, 1956.

- (i) *What is the penalty for the above offences?*
- (ii) *Whether the offence committed by the stock broking company is compoundable? If so, by whom?*
- (iii) *Whether this offence can be compounded after institution of proceedings against the stock broking Company? (6 Marks)*

(c) (i) *An Appellate Tribunal consisting of two members was formed to hear the appeal preferred by Mr. Hari, being aggrieved by an Order made by the Adjudicating Authority under the Prevention of Money Laundering Act, 2002. Two members of the Bench differ in their opinion on a particular point referred in the appeal.*

Explain the next course of action to be followed by the Bench members under the said Act. (2 Marks)

- (ii) *Mr. Narayan willfully gives false information, refuses to give evidence and to sign statement made by him in the course of proceedings under the provisions of Prevention of Money Laundering Act, 2002. Explain the penal provisions and mode of recovery of fine or penalty enumerated under the said Act. (4 Marks)*

Answer

- (a) (i) According to section 151 of the Companies Act, 2013, a listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.

So, it is not mandatory for the company to appoint a director to represent small shareholders.

- (ii) **Procedure for appointment:** The Board of Directors of M/s Diya Steels and Aluminium Limited is advised that:

The *Companies (Appointment and Qualification of directors) Rules, 2014* provides for the procedure for appointment of Small shareholders' director according to which:

- (1) A listed company, may upon notice of not less than

- (a) one thousand small shareholders; or
(b) one-tenth of the total number of such shareholders,

whichever is lower, have a small shareholders' director elected by the small shareholders.

However, a listed company may opt to have a director representing small shareholders *suomotu* and in such a case the provisions of sub-rule (2), given below, shall not apply for appointment of such director.

- (2) The small shareholders intending to propose a person as a candidate for the post of small shareholders' director shall leave a notice of their intention with the company at least fourteen days before the meeting under their signature specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing such person for the office of director.

However, if the person being proposed does not hold any shares in the company, the details of shares held and folio number need not be specified in the notice.

- (3) The notice shall be accompanied by a statement signed by the person whose name is being proposed for the post of small shareholders' director stating-
- (a) his Director Identification Number;
 - (b) that he is not disqualified to become a director under the Act; and
 - (c) his consent to act as a director of the company.

Tenure: A small shareholders' director shall not, for a period of three years from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

- (iii) **Small shareholder director as Independent Director:** Such director shall be considered as an independent director subject to, his being eligible under sub-section (6) of section 149 and his giving a declaration of his independence in accordance with sub-section (7) of section 149 of the Act.
- (iv) **Vacation of office by small shareholder director:** A person appointed as small shareholders' director shall vacate the office if -
- (a) the director incurs any of the disqualifications specified in section 164;
 - (b) the office of the director becomes vacant in pursuance of section 167;
 - (c) the director ceases to meet the criteria of independence as provided in sub-section (6) of section 149.
- (b) The Managing Director of Primex Securities (P) Ltd. is advised that:
- (i) (a) Broking company fails to redress the grievances of the investors within the stipulated time [Section 23C of the Securities Contract (Regulation) Act, 1956]: Fine of at least INR 1,00,000 but may extend to INR 1,00,000 per day during which such failure continues, subject to a maximum of INR 1 crore.
 - (b) Broking company fails to segregate securities or money of client and used the same for self-use or for any other clients [Section 23D of the Securities Contract (Regulation) Act, 1956: Penalty of at least INR 1,00,000 but it may extend to INR 1 crore.
- (ii) **Composition of certain offences (Section 23N):** Any offence punishable under this Act, not being an offence punishable 'with imprisonment' only, or 'with imprisonment and also with fine' may either before or after the institution of any proceeding, be compounded by SAT or a court before which such proceedings are pending.
- Hence, the offence committed by the stock broking company is compoundable by SAT or a Court.
- (iii) Yes, this offence can be compounded after institution of proceedings against the stock broking company but only by SAT or a Court before which such proceedings are pending.

(c) (i) **Decision to be by majority [Section 38 of the Prevention of Money Laundering Act, 2002]**

If the Members of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairman who shall either hear the point or points himself or refer the case for hearing on such point or points by third Member of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it.

In the instant case, the above procedure has to be followed by the Bench members.

(ii) **Punishment for false information or failure to give information, etc. [Section 63 of the Prevention of Money Laundering Act, 2002]**

1. Any person willfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall on conviction be liable for imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees or both.

2. If any person,-

(a) refuses to give evidence and

(b) refuses to sign statement made by him in the course of proceedings

he shall pay, by way of penalty, a sum which shall not be less than 500 rupees but which may extend to 10,000 rupees for each such default or failure.

Mode of Recovery of fine or penalty [Section 69]

Where any fine or penalty imposed on any person under section 13 or section 63 is not paid within six months from the day of imposition of fine or penalty, the Director or any other officer authorised by him in this behalf may proceed to recover the amount from the said person in the same manner as prescribed in Schedule II of the Income-tax Act, 1961 for the recovery of arrears and he or any officer authorised by him in this behalf shall have all the powers of the Tax Recovery Officer mentioned in the said Schedule for the said purpose.

Question 2

- (a) (i) *The shareholders of Kumar Ltd. passed a special resolution that the affairs of the Company ought to be investigated. The Company submitted the special resolution to the Central Government. Examine, explaining the relevant provision of the Companies Act, 2013, whether the power of the Central Government to order an investigation is mandatory or discretionary?*

- (ii) Enumerate the procedures to be followed by the Serious Fraud Investigation Office to arrest a person who has been found guilty of an offence committed under Section 447 of the Companies Act, 2013. **(7 Marks)**
- (b) An investigation was ordered by the Central Government under Section 216 of the Companies Act, 2016, against PKR Limited for determining the true membership of the Company. In connection with this investigation, it appears to the Tribunal that there is good reason to find out the relevant facts about 9% Redeemable Cumulative Preference Shares (RCPS) issued by the Company on 15.10.2017 and the Tribunal is of the opinion that unless restriction is imposed on further issue of such shares, the purpose cannot be solved. Accordingly, the Tribunal, by an Order dated 15.08.2018, directed the Company that the further issue of RCPS shall be subject to restrictions for a period of four years. Despite the Order of the Tribunal as above, PKR Limited proceeded with further issue of RCPS on 20.08.2018 in order to fund the working capital requirements for its expansion project.
- Referring to the provisions of the Companies Act, 2013, examine the following:
- (i) Can the Tribunal restrict further issue of RCPS? If yes, then to what period?
- (ii) What are the penal provisions in case of contravention to the above Order? **(5 Marks)**
- (c) What are the powers of the Central Government under the Companies Act, 2013 regarding appeal against acquittal? **(2 Marks)**
- (d) An Association registered under the Foreign Contribution (Regulation) Act, 2010 (the Act) received donation from a club registered in Singapore. The Association proposes:
- (i) To transfer 10% of the donation to "Home for Aged Society", an unregistered person and 15% to "Welfare Club" a registered person under the Act,
- (ii) To invest portion of the donation in Chits promising high returns.
- In the light of provisions of the Foreign Contribution (Regulation) Act, 2010 decide whether the Association can carryout the above proposals and if so state the procedures to be followed under the said Act? **(6 Marks)**

Answer

- (a) (i) **Investigation in the opinion of Central Government [Section 210(1) of the Companies Act, 2013]:** Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company,—
- (a) on the receipt of a report of the Registrar or inspector under section 208;
- (b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or
- (c) in public interest,
- it may order an investigation into the affairs of the company.

Hence, the power of the Central Government to order an investigation is discretionary.

- (ii) As per section 212(6) of the Companies Act, 2013, offences covered under section 447 of this Act shall be cognizable as well as non-bailable. So, the person found guilty for commission of an offence under the said section, shall be liable to be arrested, by SFIO.

The Central Government by general or special order authorize the Director, Additional Director or Assistant Director of SFIO in this behalf, on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6) i.e. Section 447, to arrest such person and shall, as soon as may be, inform him of the grounds for such arrest. [Section 212(8)].

Immediately after arrest, they shall forward a copy of the order, along with the material in his possession, to the SFIO in a sealed envelope, in such manner as may be prescribed and the SFIO shall keep such order and material for such period as may be prescribed. [Sub section (9)] and present the person so arrested before the Judicial Magistrate or a Metropolitan Magistrate having jurisdiction within twenty-four hours. The period twenty four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's court. [Sub section (10)]. An Interim report is submitted, if so directed, to the Central Government, till the completion of the investigation. [Sub section (11)&(12)].

(b) Imposition of Restrictions upon Securities (Section 222 of the Companies Act, 2013)

- (i) **Tribunal may by order put restrictions upon securities [sub-section (1)]:** Where it appears to the Tribunal, in connection with any investigation under section 216 or on a complaint made by any person in this behalf, that there is good reason to find out the relevant facts about any securities issued or to be issued by a 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 three years as may be specified in the order.

In the instant case, the Tribunal can restrict the further issue of RCPS for such period not exceeding three years.

- (ii) **Punishment in case of contravention to an 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 be less than one 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 imprisonment for a term which may extend to six months or with fine which shall not

be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

(c) Power of the Central Government regarding Appeal against Acquittal [Section 444 of the Companies Act, 2013]

The Central Government may, in any case arising under this Act, direct -

- any company prosecutor or
- authorise any other person either by name or by virtue of his office,

to present an appeal from an order of acquittal passed by any court, other than a High Court, and an appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate court.

- (d) (i)** According to Section 7 of the Foreign Contribution (Regulation) Act, 2010, a person who is registered and granted a certificate and receives any foreign contribution, shall not transfer such foreign contribution to any other person unless such other person is also registered and had been granted the certificate or obtained the prior permission under this Act.

However, that such person may transfer, with the prior approval of the Central Government, a part of such foreign contribution to any other person who has not been granted a certificate or obtained permission to an extent not exceeding ten per cent of the total value thereof and for this purpose, make an application to the Central Government in prescribed Form. [Read with *Rule 24 of FCRR, 2011*]

In the instant case, the association can transfer 10% of the donation to “Home for Aged Society” an unregistered person after making an application to the Central Government in prescribed form and can also transfer 15% to “Welfare Club” a registered person under the Act.

- (ii)** According to proviso to Section 8 of the FCRA, 2010 any foreign contribution shall not be used for speculative business.

Speculative activities have been defined in Rule 4 of FCRR, 2011 as under:-

- (a) any activity or investment that has an element of risk of appreciation or depreciation of the original investment, linked to market forces, including investment in mutual funds or in shares;
- (b) participation in any scheme that promises high returns like investment in chits or land or similar assets not directly linked to the declared aims and objectives of the organization or association.

In the instant case, the association cannot invest portion of the donation in Chits promising high returns.

Question 3

- (a) *MNC Private Ltd. is a Company in which there are six shareholders. Mr. Srinath, who is a director and also the legal representative of a deceased shareholder holding less than one tenth of the share capital the Company made a petition to the Tribunal for relief against oppression and mismanagement. Examine under the provisions of the Companies Act, 2013 whether the petition made by Mr. Srinath valid and maintainable?*

(3 Marks)

- (b) *In the light of the provisions of the Companies Act, 2013 explain whether the following Companies can be considered as a 'Foreign Company':*

- (i) *A Company which has no place of business established in India, yet, is doing online business through telemarketing in India.*
- (ii) *A Company which is incorporated outside India employs agents in India but has no place of business in India.*
- (iii) *A Company incorporated outside India having shareholders who are all Indian citizens.*

(8 Marks)

- (c) *Aggrieved by the Order of Securities Appellate Tribunal (SAT), MNO Ltd. decided to prefer an appeal with the Supreme Court. Identify the provisions governing further appeal on the Order by the Company under the provision of Securities Contracts (Regulation) Act, 1956. Also state whether any question of fact arising out of the Order of SAT can be challenged in the appeal?*

(3 Marks)

- (d) *Bharat Computer Hardware Ltd. received an advance -payment for export of high-tech hardware to a business concern in Singapore by entering into an export agreement to supply the hardware within six months from the date of receipt of advance payment. The shipment of hardware was made after 9 months and the documents covering the shipment were routed through an authorized dealer through whom the advance payment was received.*

Examine whether Bharat Computer Hardware Ltd. has discharged its obligation in accordance with the provisions of the Foreign Exchange Management Act, 1999?

Is it possible to receive advance payment where the export agreement provides for shipment of goods within 15 months from the date of receipt of advance payment? Also identify the maximum rate of interest payable on the advance payment under the said Act.

(6 Marks)**Answer**

- (a) 1. According to section 244 of the Companies Act, 2013, in the case of a company having share capital, the following member(s) have the right to apply to the Tribunal under section 241:

- (a) Not less than 100 members of the company or not less than one-tenth of the

total number of members, whichever is less; or

- (b) Any member or members holding not less than one-tenth of the issued share capital of the company provided the applicant(s) have paid all the calls and other sums due on the shares.
2. Legal heir of the deceased shareholder with minority status is entitled to file the petition.

In the given case, there are six shareholders. As per the condition (a) above, 10% of 6 i.e. 1 (round off 0.6) satisfies the condition. Therefore, in the light of the provisions of the Act, a single member (even the legal representative of a deceased shareholder) can present a petition to the Tribunal, regardless of the fact that he holds less than one-tenth of the company's share capital.

Thus, the petition made by Mr. Srinath is valid and maintainable.

(b) Foreign Company [Section 2(42) of the Companies Act, 2013]: "Foreign company" means any company or body corporate incorporated outside India which-

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) conducts any business activity in India in any other manner.

According to Rule 2 (c) of the *Companies (Registration of Foreign Companies) Rules, 2014*, "**electronic mode**" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to -

- (a) business to business and business to consumer transactions, data interchange and other digital supply transactions;
- (b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;
- (c) financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;
- (d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and
- (e) all related data communication services,

whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

In the light of the said provisions of the Companies Act, 2013, as enumerated above:

- (i) *A company which has no place of business in India but is doing online business through telemarketing in India, will be considered as a 'Foreign Company'.
- (ii) A company incorporated outside India which has a place of business in India whether by itself or through an agent, physically or through electronic mode, will be

considered as foreign company. Thus, a company incorporated outside India which does not have a place of business in India, will not be considered a 'Foreign Company'

- (iii) A company incorporated outside India having shareholders who are all Indian citizens shall be a 'Foreign Company'

(*It is presumed that the company in question is incorporated outside India, so that provisions of section 2(42) of the Companies Act, 2013 can be applied on it.)

- (c) According to section 22F of the Securities Contracts (Regulation) Act, 1956, any person aggrieved by any decision or order of the Securities Appellate Tribunal (SAT) may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order. However, the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days.

From the perusal of the section, it is evident that any question of fact arising out of the Order of SAT cannot be challenged in the appeal.

- (d) According to the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015,

Advance payment against exports:

- (1) Where an exporter receives advance payment (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 an 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 the 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, no remittance towards refund of unutilized portion 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.

- (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.

In the light of the provisions as enumerated above,

- (i) Since Bharat Computer Hardware Ltd. has exported the hardware within 9 months of the date of receipt of advance payment, it has discharged its obligations within the provisions of the Foreign Exchange Management Act, 1999.
- (ii) Yes, it is possible to receive advance payment where the export agreement provides for shipment of goods extending beyond the period of one year (here in question 15 months) from the date of receipt of advance payment.
- (iii) The maximum rate of interest, if any, payable on the advance payment should not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points.

Question 4

- (a) *Mr. Gopi is the Managing Director of LGB Limited. The Company wants to vacate the post of Managing Director on March 31, 2018 and appoint Mr. Lakshmikant in place of Mr. Gopi due to hands on experience and better track records. The tenure of appointment of Mr. Gopi is upto 30th June, 2022 with the condition that he will get compensation in case of early vacation of his office due to the Company's requirements. Mr. Gopi was drawing following remuneration during the last five financial years:*

Financial Year	Remuneration (₹ in Lakhs)
2013-14	30
2014-15	35
2015-16	40
2016-17	45
2017-18	50

Mr. Gopi approaches you to know the amount of compensation he will be eligible to get from LGB Limited, as per the provisions' of the Companies Act, 2013. Advise.

What will be your answer if a person is only an ordinary director but neither the Managing Director nor a whole time director nor a manager of the Company? (8 Marks)

- (b) *Mr. Ravi failed to pay the penalty imposed by the Adjudicating Officer for an offence committed under Securities and Exchange Board of India Act, 1992. After the penalty has become due, Mr. Ravi, otherwise than for adequate consideration, transferred his residential property to his sister and the fixed deposits with Banks in favour of his minor son. The minor son has become major and deposits continue to be held by his son.*

With reference to the provisions of SEBI Act, 1992 discuss,

- (i) Whether the residential property and fixed deposits with Banks can be attached by the Recovery Officer for the purpose of recovering the penalty?
- (ii) Whether the Recovery Officer can seek assistance of local district administration for attaching the property? **(6 Marks)**
- (c) A Bank issued a notice pursuant to Section 13 of the SARFAESI Act, 2002 to a Company to discharge its loan which has already become time barred under the Limitation Act, 1963. The Company did not settle the loan beyond the prescribed notice period. The Bank took recourse under Section 13(4) of the SARFAESI Act, 2002 to take possession of the building to enforce its security interest. Discuss whether the Bank will succeed in its attempt. State whether the provision of SARFAESI Act, 2002 can over ride any other law? **(2 Marks)**
- (d) As on March 31, 2018, the audited balance sheet of M/s. Sharp Industries Limited, revealed total assets of ₹1 crore. M/s. Sharp Industries Limited, in the capacity of a Corporate Debtor, filed an application on July 1, 2018 with the Adjudicating Authority for initiating a fast track corporate insolvency resolution process. Explain under the provisions of Insolvency and Bankruptcy Code, 2016 the following:
- (i) Whether the application made by M/s. Sharp Industries Ltd. for initiating a fast track corporate insolvency resolution process is admissible?
- (ii) The time period including the extension of time period, if any, within which the fast track corporate insolvency resolution process shall be completed? **(4 Marks)**

Answer

- (a) Section 202 of the Companies Act, 2013 provides the provisions for compensation for loss of office of managing or whole-time director or manager as under:
- (i) A company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.
- (ii) The compensation payable to such managing director or whole-time director or manager shall not exceed the remuneration he would have earned if he would have been in office for the remainder of his term or three years, whichever is shorter, calculated on the basis of the average remuneration earned by him during a period of three years immediately preceding the date on which he ceased to hold such office, or where he held the office of less than three years, then for such shorter period.

In the light of the provisions as stated above, the following will be taken into consideration while calculating the amount of compensation to be paid to Mr. Gopi:

1. Average remuneration earned by Mr. Gopi during a period of 3 years (i.e. 2015-16, 2016-17 and 2017-18) immediately preceding the date on which he

ceased to hold office: $[(40+45+50)/3] = \text{Rs. } 45 \text{ Lakhs.}$

2. Remainder time period left to be served in office has Mr. Gopi not been removed, 1st April, 2018 to 30th June, 2022, 4 years.

Thus, Mr. Gopi will be paid compensation for Maximum 3 years.

Amount of Compensation: The maximum amount of compensation that Mr. Gopi will be eligible to get from LGB Limited is Rs.45 lakhs for 3 years = Rs. 135 lakhs.

In case of an ordinary director: Further, if a person is only an ordinary director but neither the Managing Director nor a whole time director nor a manager of the company, he shall not be eligible to get compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

- (b) As per requirement of section 28A of the Securities and Exchange Board of India Act, 1992, if a person fails to pay the penalty imposed by the adjudicating officer, the Recovery Officer may draw up under his signature a statement in the specified form specifying the amount due from the person and shall proceed to recover from such person the amount specified in the certificate by modes specified in the said section.

As per the explanation, the person's movable or immovable property or monies held in bank accounts shall include any property or monies held in bank accounts which has been transferred directly or indirectly on or after the date when the amount specified in certificate had become due, by the person to his spouse or minor child or son's wife or son's minor child, otherwise than for adequate consideration, and which is held by, or stands in the name of, any of the persons aforesaid; and so far as the movable or immovable property or monies held in bank accounts so transferred to his minor child or his son's minor child is concerned, it shall, even after the date of attainment of majority by such minor child or son's minor child, as the case may be, continue to be included in the person's movable or immovable property or monies held in bank accounts for recovering any amount due from the person under this Act.

Further, Section 28A states that the Recovery Officer shall be empowered to seek the assistance of the local district administration while exercising his powers.

In the light of the provisions enumerated above and facts of the question,

- (i) The residential property shall not be attached by the Recovery Officer for the purpose of recovering the penalty, as it has been transferred by Mr. Ravi to his sister and said transfer has not been covered in the section.

The Fixed deposits with Bank that have transferred by Mr. Ravi in favour his minor son can be attached by the Recovery Officer for the purpose of recovering the penalty. Further, these Fixed deposits can even after the date of attainment of majority by such minor son, continue to be included in Mr. Ravi's monies held in bank accounts for recovering any amount due from him under this Act.

- (ii) Yes, the Recovery Officer can seek assistance of local district administration for attaching the property.
- (c) According to section 36 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, no secured creditor shall be entitled to take all or any of the measures under section 13(4), unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963.
- Thus, the Bank will not succeed in its attempt to take possession of the building to enforce its security interest, as the loan has already become time barred under the Limitation Act, 1963.
- According to section 35, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Thus, provision of SARFAESI Act, 2002 can override any other law.
- (d) **Application by corporate debtor:** An application for fast track insolvency resolution can be made by any corporate debtor falling under any of the below mentioned category:-
- a corporate debtor with assets and income below a level as may be notified by the Central Government; or
 - a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or
 - such other category of corporate persons as may be notified by the Central Government.

Time period for completion of fast track corporate insolvency resolution process

The fast track corporate insolvency resolution process shall be completed within a period of 90 days from the insolvency commencement date.

Extension: The aggrieved may make an application to the Adjudicating Authority if it is satisfied that the fast track corporate insolvency resolution process cannot be completed within a period of 90 days, it may, by order, extend the duration of such process to a further period which shall not be exceeding 45 days.

In the light of the provisions above and the fact of the question:

- The application made by M/s Sharp Industries for initiating fast track corporate insolvency resolution process is admissible if it falls within the purview of the mentioned categories of corporate debtor.
- The fast track corporate insolvency resolution process shall be completed within 135 days (90+45) from the insolvency commencement date.

[Note: Students can also write their answer on the basis of the press release dated 16th June, 2017. Its states the categories of corporate debtors that can apply for fast track corporate insolvency resolution process specifying class of an unlisted company with

total assets as reported in the financial statement of immediately preceding financial year not exceeding one crore may apply for Fast Track Insolvency Process.

Question 5

(a) VGP Ltd. is a listed public Company with a paid up capital of ₹ 100 crores as on 31st March, 2018. Mrs. Jasmine, who was one of the promoters of PDS Ltd. (a Joint Venture Company of VGP Ltd.), was appointed as Woman Director on the Board of VGP Ltd. VGP Ltd. has the following proposals :

- (1) To remove Mr. Z, an Independent Director who was re-appointed for a second term.
- (2) To appoint Mr. N, a nominee Director in the Board as an Independent Director.
- (3) To appoint Mrs. Jasmine as 'an Independent-cum-Woman Director.

With reference to the relevant provisions of the Companies Act, 2013, examine:

- (i) The validity the above proposals and the appointment of Woman Director already made.
- (ii) Whether Mr. N, can be appointed as an Independent Director of PDS Ltd.?
- (iii) Is an Independent Director entitled for stock option? **(8 Marks)**

(b) Rajshree Producer Co. Ltd. was incorporated on 1st April, 2010. Its paid up capital ₹ 10 Lakhs consists of 1 Lakh equity shares of ₹ 10 each held by 100 individuals. There are 6 directors on its Board. Referring to the provisions of the Companies Act, 1956, answer the following:

- (i) What is the quorum for the Annual General Meeting?
- (ii) What is the quorum for the Board Meeting?
- (iii) The Board of Directors wants to co-opt one expert in the field of agronomics, as Director on its Board. Whether it is permissible?
- (iv) Is it obligatory for this Company to conduct internal audit of its accounts for Financial Year 2017 -18? **(6 Marks)**

(c) XY Ltd. filed a petition under Insolvency and Bankruptcy Code, 2016 with NCLT against DF Ltd. (Corporate Debtor) and the petition was admitted. There were only three financial creditors including XY Ltd. During the Corporate Insolvency Resolution process, the Corporate Debtor settled the claims of all the 3 financial creditors. Whether such settlement agreement could be termed as a valid resolution plan? Also discuss whether a financial creditor in respect of whom there is no default can file an application before Adjudicating Authority (NCLT) for initiating corporate insolvency resolution process. Discuss. **(6 Marks)**

Answer

(a) As per the stated facts, VGP Ltd., a listed public company with a paid up capital of 100 crore appointed Mrs. Jasmine (Promoter of PDS Ltd., a joint venture of VGP Ltd.) as woman director on the Board of VGP Ltd. VGP Ltd. made the following proposals:

- (1) Removal of Mr. Z, an Independent Director(ID) who was re-appointed for a second term.
- (2) Appointment of Mr. N, a nominee director in the Board as an Independent Director.
- (3) Appointment of Mrs. Jasmine as an Independent- cum-woman Director

Following are the answers in the light of the above given facts under the Companies Act, 2013-

- (i) With respect to this part of the question, **Proposal no. (1)** will be valid only on the compliance of the proviso given under section 169(1). According to the said proviso an independent director re-appointed for second term under section 149(10) shall be removed by the company only by passing a special resolution and after giving him a reasonable opportunity of being heard.

W.r.t. **proposal nos. (2)**, it will be invalid as per section 149(6). As per the stated section, in relation to a company, an independent director means a director other than a managing director or a whole-time director or a nominee director.

W.r.t. **proposal nos. (3)**, it will be valid as per requirement of section 149(6) read with Rule 3 of the *Companies (Appointment and Qualification of Directors) Rules, 2014*. Person so appointed as ID, is or was not a promoter of the company or its holding, subsidiary or associate company. Since here, Mrs. Jasmine is a promoter of PDS Ltd. which is joint venture co. of VGP Ltd. So, out of the purview of the above disqualification and is in compliance with Rule 3, so she is eligible to be appointed as Independent –cum- Woman director in VGP Ltd.

Alternate Answer:

As per Section 2 (6) of the Act, associate company includes a joint venture company, therefore Mrs. Jasmine, a promoter of an associate company cannot be appointed as independent director.

- (ii) As per Notification G.S.R. 839(E) dated 5th July, 2017, an unlisted public company which is a joint venture, a wholly owned subsidiary or a dormant company will not be required to appoint Independent Directors. So, Mr. N cannot be appointed as an Independent Director of PDS Ltd.
- (iii) As per section 149(9), notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option.

(b) (i) Quorum for Annual general meetings [Section 581ZA]

Quorum: Unless the articles of association of the producer company provide for a larger number, $\frac{1}{4}$ th of the total number of members of the producer company shall be the quorum for its annual general meeting. In this case the company has got 100 members. Hence, the quorum is 25.

(ii) Meetings of Board and quorum [Section 581V]

The quorum for a meeting of the Board shall be one-third of the total strength of directors, subject to a minimum of three. Here there are 6 directors on its Board. Therefore quorum will be $\frac{1}{3}$ rd of 6 directors which comes to 2, but minimum required is 3 and therefore the quorum will be 3 directors for a Board meeting.

(iii) Appointment of Co-opted or expert directors or additional director [Section 581P]

The section empowers the Board of Directors of the Producer Company to co-opt one or more expert as a director, but not exceeding one fifth of the total number of directors. As there are six directors in the given case, co-opting one expert on the Board will be in order.

(iv) Internal audit [Section 581ZF]

Yes, as per above provision, every producer company shall have internal audit of its accounts carried out, at such interval and in such manner as may be specified in articles, by a chartered accountant as defined in clause (b) of sub-section (1) of Section 2 of the Institute of Chartered Accountants Act, 1949. Therefore its obligatory for Rajshree Producer Co. Ltd. to conduct internal audit of its accounts for financial year 2017-18 as per above stated provision.

(c) As per section 7 of the Insolvency and Bankruptcy Code, 2016, a financial creditor either by itself or jointly with other financial creditors, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

As per the facts given, the Adjudicating Authority admitted the petition. During the Corporate Insolvency Resolution Process (CIRP), the DF (Corporate debtor) settled the claims of all the 3 financial creditors.

However, as per the Code, during the insolvency resolution process, the IRP/RP was appointed to collate the claims in a collective mechanism to propose a time bound solution to resolve the situation of insolvency and prepare the resolution plan as agreed to by the debtors and creditors and submit the same to Committee of Creditors for its approval.

Since in the give case, debtor itself settled the claims without following the said procedure. Therefore, such a settlement agreement cannot be termed as valid resolution plan.

As per requirement of the Code, the process of insolvency is triggered by occurrence of default. Default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be. [Section 3(12)]. So a financial creditor in respect of whom there is no default, cannot file an application for initiating insolvency resolution process.

Question 6

- (a) *The Articles of Association of a listed company provides for fixed payment of sitting fee for each meeting of Directors subject to maximum of ₹ 30,000. In view of the increased responsibilities of Independent Directors of listed Companies, the Company proposes to increase the sitting fee to ₹ 45,000 per meeting. Advise the Company about the requirement under the Companies Act, 2013 to give effect to the proposal.*

OR

ABC Limited is an unlisted public Company having a paid up equity share capital of ₹ 20 Crores and a turnover of ₹ 150 Crores as on 31st March, 2018. The total number of Directors on the Board is 13.

Referring to the provisions of the Companies Act, 2013 answer the following:

- (i) *The minimum number of Independent Directors that the Company should appoint.*
- (ii) *How many Independent Directors are to be appointed in case ABC Limited is a listed Company? **(4 Marks)***
- (b) *Ronnie Coleman Ltd., a foreign Company failed to deliver some documents to the Registrar of Companies as required under Section 380 of the Companies Act, 2013. State the provisions of penalty prescribed under the Act, which can be levied on Ronnie Coleman Ltd. for its failure to deliver the documents.*
- (c) *Aggrieved by an Order of NCLT dated 05.05.2018, passed without the consent of the parties, Madhruk Ltd. decided to file an appeal before NCLAT. Meanwhile, the employees and officers of the Company went on a strike from 10.05.2018 demanding higher pay and allowances and as a result of which, the operational and management activities were badly affected. The strike was called-off on 15.06.2018. Thereafter, the appeal was filed on 25.06.2018 before NCLAT with a prayer for condoning the delay in filing the appeal. A single judicial member of NCLT started the hearing. With reference to the provisions of the Companies Act, 2013, examine the following:*
- (i) *Whether the appeal is admissible?*
- (ii) *Maximum period allowed for condonation*
- (iii) *Is the appeal transferable to a Bench consisting of two members? **(8 Marks)***
- (d) *The Management of Gangotri Ltd. was taken by LBV Bank Ltd. (secured creditor) complying the provisions of SARFAESI Act, 2002 and appointed two Directors. The*

Board of Directors of Gangotri Ltd., duly authorized by its Articles, appointed two Alternate Directors and the majority of the Directors made a declaration required for voluntary liquidation proceedings. A special resolution requiring the Company to be liquidated voluntarily by appointing an insolvency professional to act as the Liquidator was passed at the general meeting of the Company. The Board of Directors and the Shareholders passed the resolutions without the approval/consent of Directors appointed by LBV Bank Ltd. Discuss the validity of the above resolutions under SARFAESI Act, 2002. Does an unsecured Creditor have recourse to this Act?

(e) Examine the validity of the following statements with reference to The Arbitration and Conciliation Act, 1996:

(i) Every Court would be a Judicial Authority but every Judicial Authority would not be a Court.

(ii) The disputes submitted to arbitration must be arbitrable. **(3 Marks)**

Answer

(a) Section 197(5) of the Companies Act, 2013 provides that a director may receive remuneration by way of fee for attending the Board/Committee meetings or for any other purpose as may be decided by the Board, provided that the amount of such fees shall not exceed the amount as may be prescribed. The Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014 prescribes that the amount of sitting fees payable to a director for attending meetings of the Board or committees thereof may be such as may be decided by the Board of directors or the Remuneration Committee thereof which shall not exceed the sum of rupees 1 lakh per meeting of the Board or committee thereof. Further, the Board may decide different sitting fee payable to independent and non-independent directors other than whole-time directors.

From the above, it is clear that fee to independent directors can be increased from Rs. 30,000 to Rs. 45,000 per meeting by passing a resolution in the Board Meeting and altering the Articles of Association by passing Special Resolution.

Or

According to Section 149(4) of the Companies Act, 2013, every listed public company shall have at least one-third of the total number of directors as independent directors.

Any fraction contained in such one-third numbers shall be rounded off as one

According to the Rule 4 of the *Companies (Appointment and Qualification of Directors) Rules, 2014*, the following class or classes of companies shall have at least 2 directors as independent directors:

(1)	the Public Companies having paid up share capital of 10 crore rupees or more; or
(2)	the Public Companies having turnover of 100 crore rupees or more; or

(3)	the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.
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- (i) As the paid up share capital of ABC Limited is Rs. 20 Crore and turnover is Rs. 150 crore, the company shall have at least 2 directors as independent directors.
- (ii) In case ABC Limited is a listed company, it shall have at least 5 directors as independent director ($1/3^{\text{rd}}$ of the total number of directors: $1/3^{\text{rd}}$ of 13 is 4.33 rounded off as 5).
- (b) The Companies Act, 2013 lays down the governing provisions for foreign companies in Chapter XXII which is comprised of sections 379 to 393. The penalties for non filing or for contravention of any provision for this chapter including for non filing of documents with the Registrar as required by section 380 and other sections in this chapter are laid down in section 392 of the Act which provides that if a foreign company contravenes the provisions of this Chapter, the foreign company shall be punishable with a fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 3,00,000 and in the case of a continuing offence, with an additional fine which may extend to ₹ 50,000 for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 5,00,000, or with both.

(c) Appeal from Orders of Tribunal [Section 421 of the Companies Act, 2013]

- (1) **Appeal to AT:** Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal (AT).
- (2) **When order made by consent of parties:** No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.
- (3) **Period for filing of appeal:** Every appeal under sub-section (1) (i.e. appeal to AT against order of Tribunal) shall be filed within a period of 45 days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed.

However, the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding 45, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

In the instant case,

- (i) The appeal is admissible as the order of NCLT was passed without the consent of the parties.
- (ii) The maximum period allowed for condonation is 45 days if the AT is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that

period. In the instant case, the appeal filed on 25.06.2018 before NCLAT is tenable.

(iii) As per second proviso to section 419(3) if at any stage of the hearing of any such case or matter, it appears to the Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President, or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

(d) **Management of borrower taken by the secured creditor (Section 15 of the SARFAESI Act, 2002):** Where the management of the business of a borrower, being a company is taken over by the secured creditor then, notwithstanding anything contained in the said Act or in the memorandum or articles of association of such borrower -

- (a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;
- (b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the secured creditor;

Accordingly, in the given situation in the question, appointment of alternate directors by the BoD of Gangotri Ltd. though authorised by its Articles, is not valid, and the special resolution so passed by majority for voluntary liquidation passed at general meeting shall not be given effect due to lack of consent of LBV Bank Ltd.

An unsecured creditor doesn't have recourse to this Act.

(e) (i) **Judicial authority** - The term judicial authority is not defined in Act. The Supreme Court in *SBP v. Patel Engineering* observed "A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, include other courts and may even include a special tribunal like the Consumer Forum." Therefore, it is a concept wider than courts as ordinarily understood and would include special tribunals and quasi-judicial authorities. The functions performed would include reference to arbitration. Every court would be a judicial authority, but every judicial authority would not be a court.

(ii) **Arbitrability:** The disputes submitted/ proposed to be submitted to arbitration must be arbitrable. In other words the law must permit arbitration in that matter. There are certain disputes that the law retains exclusively for the court, and the same cannot be submitted for arbitration. The rationale is that given the nature of disputes, the courts are the only appropriate forum for adjudicating the matter.

For example, criminal offences, matrimonial disputes, guardianship matters, testamentary matters, mortgage suit for sale of a mortgaged property, etc. cannot be arbitrated.