GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

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MODULE 3

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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(Under the jurisdiction of Ministry of Corporate Affairs)
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In answers to the questions based on case study, the students may write any other alternative answer with valid reasoning.

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

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

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MODULE 3

CORPORATE FUNDING AND LISTINGS IN STOCK EXCHANGES

Time allowed : 3 hours *Maximum marks : 100*

Total number of questions : 6

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

PART A

Question 1

(a) From the latest CMA data of Vancouver Ltd., the projected figures are as under:

— Sales : ₹ 10 crore

— Total current assets : ₹ 7 crore

— Current liabilities : ₹ 3 crore

You are required to calculate the working capital requirement under turnover method and maximum permissible banking finance method (method I).

(b) As per Regulations 16 and 115 of SEBI (ICDR) certain number of pre-issue securities of promoters is not transferrable for a certain period of time. By referring to the above regulations, state the minimum lock-in period in following cases :

(i) If the majority of the issue proceeds invested in purchase of plant and machinery.

(ii) Promoter's holding 40% of post-issue capital.

(c) Nischal Finance Ltd. floated IPO for 10 crore equity shares. Due to impending war like situation. Secondary market started falling due to weak market sentiment. As a result IPO was subscribed only to the extent of 80% on the closure date (i.e. 20/06/2023).

The Company has refunded the application money on 28.06.2023. Based on the SEBI regulation, is company action of refunding application money is justifiable ?

(5 marks each)

Answer 1(a)

i) **Working Capital requirement under the turnover method**

Under this method, bank credit for working capital purposes for borrowers requiring fund may be assessed at minimum of 25% of the projected annual turnover out of which 1/5^{h} should be provided by the borrower (i.e. minimum margin of 5% of the annual turnover to be provided by the borrower) and balance 4/5th (i.e. 20% of the annual turnover) can be extended by way of working capital finance.

The working capital requirement will be as under:

Projected sales	=	₹ 10 crore
Working capital requirement (25% of Projected Sales) **-A**	=	₹ 2.50 crore
Minimum margin (5% of Projected Sales) **- B**	=	₹ 0.50 crore
Working capital limit (A-B)	**=**	**₹2.00 crore**

ii) **Maximum Permissible Banking Finance (1st Method of Lending):** As per this method, 75% of the working capital gap (Working Capital Gap- Total current assets- Total current liabilities other than bank borrowings) is financed by the bank and the balance 25% of the Working Capital Gap considered as margin is to come out of long term source i.e. owned funds and term borrowings.

The working capital requirement will be as under:

Projected current assets	=	₹ 7 crore
Projected current liabilities	=	₹ 3 crore
Working capital gap (A)	=	₹ 4 crore
25% of (A) as margin (B)	=	₹ 1 crore

Maximum Permissible Banking Finance (A-B) = ₹ 3 crore

Answer 1(b)

(i) Regulation 16(1)(a) of the SEBI (ICDR) Regulations, 2018 provides that minimum promoters' contribution including contribution made by alternative investment funds or foreign venture capital investors or scheduled commercial banks or public financial institutions or insurance companies registered with Insurance Regulatory and Development Authority of India shall be locked-in for a period of **eighteen months** from the date of allotment in the initial public offer. However, if the majority of the issue proceeds excluding the portion of offer for sale is proposed to be utilized for capital expenditure, then the lock-in period shall be **three years** from the date of allotment in the initial public offer.

Hence, the lock-in period will be **three years** from the date of allotment in the given case as majority of the issue proceeds are invested in purchase of plant and machinery.

(ii) As per Regulation 14(1) of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018, the promoters of the issuer shall hold at least 20% of the post-issue capital.

Further, as per regulation 16 (1)(b) of the SEBI (ICDR) Regulations, 2018, promoters' holding in excess of minimum promoters' contribution shall be locked-in for a period of **six months** from the date of allotment in the initial public offer. However, in case the majority of the issue proceeds excluding the portion of offer for sale is proposed to be utilized for capital expenditure, then the lock-in period shall be **one year** from the date of allotment in the initial public offer.

Hence, the lock-in period will be as under:

Promoter's Holding	**Lock –in (ii)**	**Lock- in requirements in case the majority of the issue proceeds excluding the portion of offer for sale is proposed to be utilized for capital expenditure (i)**
20 %	18 months	3 years
In excess of minimum promoters' contribution 20% (i.e. 40%-20%)	6 months	1 year

Answer 1(c)

As per Regulation 45 of the SEBI (ICDR) Regulations, 2018, the minimum subscription to be received in the issue shall be at least 90% of the offer through the offer document, except in case of an offer for sale of specified securities. Further, in the event of non-receipt of minimum subscription referred above, all application monies received shall be refunded to the applicants forthwith, but not later than four days from the closure of the issue.

As the company have not been received the minimum subscription of 90%, hence it is obligatory to refund/unblock all subscription amount within four days from the date of closure of issue.

Under Regulation 50 of the SEBI (ICDR) Regulations, 2018, where the specified securities are not allotted and/or application monies are not refunded or unblocked within the period, the issuer shall undertake to pay interest at the rate of 15% per annum to the investors and within such time as disclosed in the offer document and the lead manager(s) shall ensure the same.

In the given situation, the Nischal Finance Ltd. has refunded the application money on 28.06.2023 which is later than four days. Hence, the action of company is not correct as per SEBI regulations and it has to pay interest to the investors for the delayed period.

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

Question 2

(a) *XYZ Factoring Ltd. has agreed to finance receivable of IFK Ltd. on a term of advances 80% of the receivables with 10% p.a. interest and 2% commission as factoring. Based on the below information, find the net amount to be remitted by XYZ Factoring Ltd.*

— *Annual credit sales = ₹ 1 crore*

— *Average collection period = 60 days*

— *Saving in administration cost = ₹ 1,00,000*

— *Bad debts = Nil.*

* ***Assume 365 days in a year for calculation purpose.***

(5 marks)

(b) *Harish is an Independent director of a listed company. In the Board Meeting, an agenda for formulation of policy for Sweat Equity Shares has been discussed. Harish objected on a clause, which made him ineligible for availing Sweat Equity Shares. Is Harish eligible for the sweat equity shares ?*

Will your answer be different, if it was for an Employee Stock Option Scheme?

(5 marks)

(c) *(i)* *Define Special Situation Fund.*

(1 mark)

(ii) *What are the conditions of an investment by special situation fund ?*

(4 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) Dollar LLC from Singapore wants to invest in an AIF fund in India and have approached you to understand how investment in AIF works in India ? Can they invest in an AIF in India ?

(5 marks)

(ii) Explain in brief about Strategic Investor and participation by the Strategic Investor in the public issues of REITs.

(5 marks)

(iii) (a) Explain Fund Based and Non-Fund Based Credit Facilities.

(2 marks)

(b) Calculate the amount of fund based and non-fund based credit facilities availed by Yamuna Ltd. from Bank from the following details :

(3 marks)

Sr. No	***Credit Facilities provided by***	***Rupees in Lakhs***
1.	*Standby Letter of Credit*	*2.50*
2.	*Clean Overdraft*	*9.80*
3.	*Bank Guarantee*	*12.50*
4.	*Car Loan*	*60.95*
5.	*Letter of Credit*	*22.50*
6.	*Key Cash Credit*	*35.50*
7.	*Post Shipment Packing Credit*	*80.40*
8.	*Suppliers Credit*	*30.50*
	Total Credit Facilities	***254.65***

Answer 2(a)

Calculation of net amount to be remitted by XYZ Factoring Ltd. to IFK Ltd.

Annual credit sales	₹ 1,00,00,000
Average collection period	60 days
Average receivable (₹1 crore * 60/365)	₹16,43,836
Advanced by factor (80%) of average receivable - A	₹ 13,15,068
Factoring commission 2% of ₹16,43,836 (average receivable) - B	₹ 32,877

Amount available for advance(A-B)	₹ 12,82,191
Factoring interest @ 10% (₹12,82,191 *10%*60/365) -C	₹ 21,077
Amount to be remitted to IFK Ltd. (A-B-C)	**₹ 12,61,114**

Amount rounded off to nearest rupee

Answer 2(b)

According to the Regulation 29 of the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations 2021, term 'employee' means,

(i) an employee of the company working in India or abroad; or

(ii) a director of the company whether a whole time director or not.

In the given question, Harish is an Independent director on the Board, he is eligible under scheme for Sweat Equity shares.

Further, according to the regulation 2(1)(i)(ii) of the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations 2021 'employee', except in relation to issue of sweat equity shares, means a director of the company, whether a whole time director or not, including a non-executive director who is not a promoter or member of the promoter group, but excluding an independent director.

In view of above, Harish will not be eligible under scheme for Employee Stock Option Scheme.

Answer 2(c)

Special Situation Fund

A Special Situation Fund means a Category I Alternative Investment Fund that invests in special situation assets in accordance with its investment objectives and may act as a resolution applicant under the Insolvency and Bankruptcy Code, 2016.

Condition of an Investment by Special Situation Funds

1) Special situation funds shall invest only in special situation assets and may act as a resolution applicant under the Insolvency and Bankruptcy Code, 2016. However, the special situation fund shall not invest in:

   i. its associates, or

   ii. the units of any other Alternative Investment Fund other than the units of a special situation fund: or

   iii. units of special situation funds managed or sponsored by its manager, sponsor or associates of its manager or sponsor.

2) Any investment by a special situation fund in the stressed loan acquired under clause 58 of the Master Direction Reserve Bank of India (Transfer of Loan Exposures) Directions. 2021 as amended from time to time shall be subject to lock-in period as may be specified by the SEBI.

Answer 2A(i)

Regulation 10 of SEBI (Alternative Investment Fund) Regulations, 2012 provides for the conditions of investment in Alternative Investment Fund (AIF). It provides that AIF may raise funds from any investor whether Indian, foreign or non-resident Indians by way of issue of units. Hence, Dollar LLC, Singapore can invest in an AIF in India.

Some other conditions for investing in AIF as prescribed in the Regulation covers the following:

- Each scheme of the alternative investment fund should have a corpus of at least ₹ 20 crores and the AIF shall not accept from an investor, an investment of a value less than ₹1 crore.
- In case the investors are employees or directors of the AIF Fund or employees or directors of the manager, the minimum value of investment shall be ₹ 25 Lakhs. However, this clause shall not apply to an accredited investor.
- The fund manager or sponsor shall have a continuing interest in the AIF Fund of not less than 2.5% of the corpus or ₹ 5 crores, whichever is lower, in the form of investment in AIF and this interest shall not be through the waiver of management fees. In case of category III AIF, the continuing interest shall be not less than 5% of the corpus or ₹10 crore, whichever is lower.
- The manager or sponsor shall disclose their investment in the AIF to the investors of the AIF.
- No scheme will have more than 1000 investors.
- The provisions of the Companies Act, 2013 shall apply to the AIF, if it is formed as a Company.
- The AIF shall collect funds only by way of private placement.

Answer 2A(ii)

As per Regulation 2(1)(ztb) of the SEBI (REITs) Regulations, 'Strategic investor' means

1. an infrastructure finance company registered with RBI as a NBFC;
2. a Scheduled Commercial Bank;
3. a multilateral and/or bilateral development financial institution;
4. a systemically important NBFC with RBI;
5. a foreign portfolio investor;
6. an insurance company registered with the Insurance Regulatory and Development Authority of India;
7. a mutual fund,

who invest either jointly or severally not less than 5% of the total offer size of the REIT or such amount as may be specified by SEBI with applicable provisions of the FEMA Act, 1999 and the rules or regulations or guidelines made there under.

Participation by Strategic Investor in the public issues of REITs

- The strategic investor(s) shall, either jointly or severally, invest not less than 5% and not more than 25% of the total offer size.
- The manager on behalf of the REIT, shall enter into a binding unit subscription agreement with the strategic investor(s), which propose(s) to invest in the public issue of REIT.
- Subscription price per unit, payable by the strategic investor(s) shall be set out in the unit subscription agreement and the entire subscription price shall be deposited in a special escrow account prior to opening of the public issue.

- The price at which units are offered to the strategic investors must not be less than the price determined in the public issue.
- The draft offer document or offer document, as applicable, shall disclose details of the unit subscription agreement. Such details shall include name of each strategic investor, the number of units proposed to be subscribed by it or the investment amount, proposed subscription price per unit, etc.
- The unit subscription agreement shall not be terminated except in the event the issue fails to collect minimum subscription.
- The unit subscribed by strategic investors, pursuant to the unit subscription agreement, will be locked in for a period of 180 days from the date of listing in the public issue.

Answer 2A(iii)

a) Fund based credit facilities are those in which an actual outflow of funds from the bank to the borrower takes place, typically involves cash transactions, whereas non-fund-based facilities are those, which do not involve such outflow of the bank's funds or does not deal with cash transactions or funds.

Examples of fund based facilities are term loans, cash credit and overdraft whereas non-fund based facilities are letters of credit, bank guarantees etc.

b) Calculation of Fund based and Non-fund based credit facilities availed by Yamuna Ltd.

Sr. No.	*Credit Facilities Provided by Bank*	*Amount (in ₹ Lakhs)*
I	**Fund Based Credit Facilities**	
	Clean Overdraft	9.80
	Key Cash Credit	35.50
	Car Loan	60.95
	Post Shipment Packing Credit	80.40
	Total Fund Based Credit Facilities	**186.65**
II	**Non Fund Based Credit Facilities**	
	Stand by Letter of Credit	2.50
	Bank Guarantee	12.50
	Letter of Credit	22.50
	Suppliers Credit	30.50
	Total Non Fund Based Credit Facilities	**68.00**

Hence, Yamuna Ltd. has availed ₹186.65 Lakhs fund based facilities and ₹ 68 Lakh Non-Fund-based facilities from Bank.

Question 3

(a) Securitization is a technique used to convert illiquid assets/claims into tradable securities. Explain the process along with examples of assets that can be securitized.

(5 marks)

(b) Your promoters want to issue Non-Convertible Redeemable Preference Shares (NCRPS) and wish to list the same on a Recognized Stock Exchange. With respect to the proposed issue explain the call option and put option available to them of the right to recall or redeem prior to maturity pursuant to the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021.

(5 marks)

(c) (i) A Real Estate Investment Trust (REIT) is having ₹ 600 crore assets in its portfolio. The asset mixes are as under :

(a) Completed project : ₹ 300 crore

(ii) Property on rent : ₹100 crore

(iii) Government securities : ₹ 150 crore

(iv) Money market instrument : ₹50 crore.

By referring the SEBI regulations, advise the company on the asset mix and suggest any changes, if required.

(3 marks)

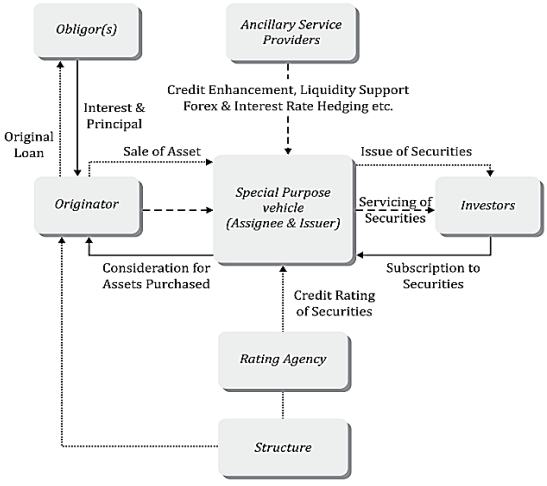
(ii) Give answer with reasons with reference to SEBI regulations on minimum application size for listing in SME and Innovators Growth Platform.

(2 marks)

Answer 3(a)

Securitization is the transformation of financial assets into securities. Securitization is used by financial entities to raise funding other than what is available via traditional methods of on-balance-sheet funding. Securitization as a structured finance mechanism has several commercial advantages, including balance sheet and risk management, increased liquidity, cost-efficient financing, marketability of the resulting securities and an opportunity for portfolio diversification, which has remained an attractive option for banks, NBFCs and financial institutions in India.

The Securitization Process



Steps in Securitisation

i. Special Purpose Distinct Entity (SPDE) is created to hold title to assets underlying securities;
ii. The originator or holder of assets sells the assets (existing or future) to the SPDE;
iii. The SPV, with the help of an investment banker, issues security receipts which are distributed to investors; and
iv. The SPV pays the originator for the financial assets purchased with the proceeds from the sale of securities.

Few examples of assets that can be securitized are:

1. Residential mortgage loans
2. Commercial mortgage loans
3. Bank loans to businesses
4. Commercial debt
5. Student loans (A Practice in USA)
6. Credit-card debt
7. Automobile loans etc.

Answer 3(b)

Regulation 15 of the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 provides the right to recall or redeem prior to maturity. As per the regulations,

(1) An issuer making issuance of non-convertible securities shall:
   (a) have the right to recall such securities prior to the maturity date (call option), or
   (b) have a right to provide such right of redemption of debt securities prior to the maturity date (put option) to all the investors or only to retail investors.
(2) Such right to recall non-convertible securities or redeem debt securities prior to the maturity date shall be exercised in accordance with the terms of issue and detailed disclosure in this regard shall be made in offer document including date from which such right is exercisable, period of exercise (which shall not be less than three working days) and redemption amount (including the premium or discount at which such redemption shall take place).
(3) The issuer or investor may exercise such right with respect to all the non-convertible securities issued or held by them respectively or with respect to a part of the non- convertible securities so issued or held.
(4) In case of partial exercise of such right in accordance with the terms of the issue by the issuer, it shall be done on proportionate basis only.
(5) No such right shall be exercisable before the expiry of one year from the date of issue of such non-convertible securities.
(6) The Issuer shall send notice to all the eligible holders of such non-convertible securities and debenture trustee at least twenty-one days before the date from which such right is exercisable and the notice to the eligible holders shall be sent in the following manner:
   i. soft copy of such notice shall be sent to the eligible holders who have registered their email address(es) either with the listed entity or with any depository; and

ii. hard copy of the notice shall be sent to the eligible holders who have not registered their email address(es) either with the listed entity or with any depository

(7) The Issuer shall also provide a copy of such notice to the stock exchange(s) where such non- convertible securities are listed for wider dissemination.

(8) Issuer shall pay interest at the rate of fifteen percent per annum for the period of delay, if any.

(9) After the completion of the exercise of such right, the issuer shall:

(a) submit a report to the stock exchange(s) where the non-convertible securities are listed for public dissemination regarding the details of non-convertible securities redeemed during the exercise period and details of redemption thereof;

(b) inform the debenture trustee regarding the debt securities redeemed during the exercise period and details of redemption thereof; and,

(c) inform the depositories for extinguishing the non-convertible securities that have been redeemed.

Explanation: "retail investor" shall mean the holder of non-convertible securities having the aggregate face value not more than rupees two lakh.

Answer 3(c)

(i) Pursuant to the Regulation 18(4) of the SEBI (REITs) Regulations, 2014, not less than 80% of the value of the REIT assets shall be invested in completed and rent and/or income generating properties.

In the given case, out of total investment of ₹ 600 crore in various assets, it has only invested ₹ 400 crore in the completed project and property on rent which is 66.67% of total investment (i.e less than 80%).

Therefore, the assets mix of REIT is not as per SEBI (REITs) Regulations, 2014 as it should invest at least ₹ 480 crore in the completed and rent and/or income generating properties.

(ii) **Minimum application size for listing in SME and Innovators Growth Platform is as under:**

SME Platform: ₹ 1 lakh

Innovators Growth Platform: ₹ 2 lakh.

This is kept higher than a regular non SME issue so that very small investors do not invest in the primary markets in these issues.

Question 4

(a) Anil is a retired from the Central Government Job in 2023. He is planning to invest ₹ 10 lakh in Fixed deposit and ₹ 25 lakh in mutual funds schemes. As these are the retirement fund, he is very cautious about the safety of investment. Is there any scheme of the Govt. for protection cover against losses in case of failure of bank/Asset Management Company ?

(3 marks)

(b) Jewel Ltd. needs funds for running its business operations. Mr. Sona one of the shareholders of Jewel Limited is ready to provide Loan to Jewel Ltd. The Board is skeptical on availing loan from a shareholder. One of the Directors of the Company is of the view that such loan will be treated as a deposit. What is

considered as deposit pursuant to the provisions of the Companies Act, 2013 and Rules made thereunder. Can the company accept deposit from its member ? Do you agree with the view of the Director ?

(3 marks)

(c) *A listed company has granted Employee Stock Options of 1000 shares under the scheme to Niraj. He is in need of funds. Therefore against the mortgage options, he took the loan from Quick Finance Ltd., a NBFC.*

Is the action of employee is legally valid as per Regulation 9 of SEBI Regulations 2021 ?

(3 marks)

(d) *Josh Ltd. a Listed Company in the process of implementing SEBI (Share Based Employee Benefits) (SBEB) for its employees :*

(i) Can Mr. Louis an employee working outside India avail the benefit of the scheme ?

(ii) Can Mr. Ayaan, CEO and a member of the Promoter Group apply for the benefit of the scheme ?

(iii) Can Mr. Sunder, a director in the Subsidiary Company of Josh Ltd. and holding 25% shares in Josh Limited apply for scheme ?

(3 marks)

(e) *What are the investment conditions for a Foreign Venture Capital Investors (FVCI) ?*

(3 marks)

Answer 4(a)

Deposits insured by Deposit Insurance and Credit Guarantee Corporation (DICGC)

The DICGC, a subsidiary of the RBI was set up under an Act of the Parliament for the purpose of insurance of deposits and guaranteeing of credit facilities in India. All types of deposits like savings deposits, term deposits and RDs are covered by DICGC.

The DICGC insures all forms of deposits such as savings, fixed, current, recurring, etc. except the following types of deposits:

- Deposits of foreign Governments;
- Deposits of Central/State Governments;
- Inter-bank deposits;
- Deposits of the State Land Development Banks with the State co-operative bank;
- Any amount due on account of and deposit received outside India;
- Any amount, which has been specifically exempted by the corporation with the previous approval of Reserve Bank of India.

Each depositor in a bank is insured up to a maximum of ₹5,00,000 (Rupees Five Lakhs) for both principal and interest amount.

In view of the above provisions, fixed deposits up to ₹ 5 lakh are insured and risk free.

The investments in mutual fund schemes are not insured, hence mutual fund schemes are subject to market risk.

Answer 4(b)

According to section 2(31) of the Companies Act, 2013, deposit includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.

Jewel Ltd. may, subject to the passing of a resolution in general meeting and subject to such rules prescribed by Reserve Bank of India (RBI), accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the fulfillment of the conditions, as mentioned in section 73(2) of the Companies Act, 2013.

Hence, the view of the Director is agreeable and the loan availed from the shareholder will be treated as deposit.

Answer 4(c)

According to the Regulation 9 (3) of the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations 2021, the option, Stock Appreciation Right (SAR), or any other benefit granted to the employee shall not be pledged, hypothecated, mortgaged or otherwise alienated in any other manner.

Therefore, action of Niraj is not legally valid as per the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021.

(Above answer is based on Regulation 9 of SEBI (Share Based Employee Benefits and Sweat Equity) Regulations 2021.)

Answer 4(d)

As per Regulation 2(1)(i) of the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021:

i) An employee who is exclusively working in India or outside India can avail the benefit of the share based employee benefit (SBEB) scheme.

   Hence, Mr. Louis who is an employee working outside India can avail the benefits of the scheme.

ii) An employee who is a promoter or a person belonging to the promoter group cannot avail the benefits of the share based employee benefit (SBEB) Scheme.

   Hence Mr. Ayaan, who is a CEO and a member of the Promoter Group, cannot apply for the benefit of SBEB scheme.

iii) A director who either himself or through his relative or through any body corporate directly or indirectly, holding more than 10 per cent of the outstanding equity shares of the Company cannot avail the share based employee benefit (SBEB) scheme.

   Hence Mr. Sunder, who is a director in the Subsidiary Company of Josh Ltd and holding 25% shares in Josh Limited cannot apply for the (SBEB) scheme.

Answer 4(e)

Regulation 11 of SEBI (Foreign Venture Capital Investors) Regulations, 2000 provides the Investment Criteria for a Foreign Venture Capital Investor. It states that all

investments to be made by a Foreign Venture capital Investor (FVCI) should be subject to the following conditions:

(a) It should disclose to SEBI its investment strategy.

(b) It can invest its total funds committed in one venture capital fund or alternative investment fund.

(c) It shall make investments as enumerated below:

  i. At least 66.67% of the investible funds should be invested in unlisted equity shares or equity linked instruments of venture capital undertaking or investee company.

  ii. Not more than 33.33% of the investible funds may be invested by way of:

    a. subscription to initial public offer of a venture capital undertaking or investee company whose shares are proposed to be listed;

    b. b) debt or debt instrument of a venture capital undertaking or investee company in which the Foreign venture capital investor has already made an investment by way of equity;

    c. preferential allotment of equity shares of a listed company subject to lock in period of one year;

    d. It shall disclose the duration of life cycle of the fund;

    e. Special Purpose Vehicles which are created for the purpose of facilitating or promoting investment in accordance with the SEBI (FVCI) Regulations, 2000.

The investment conditions and restrictions stipulated above shall be achieved by the Foreign Venture Capital Investor by the end of its life cycle.

PART B

Question 5

(a) In the amended (Amended vide its notification dated November 09, 2021) provisions of the SEBI (LODR) Regulations, 2015, some of the related party transactions (RPT) have been specifically excluded from the ambit of related party transactions subject to certain conditions.

State the transactions which shall not be related party transactions.

(b) Mr. Jihan an Independent Director in Gulab Limited wants to resign due to his advancing age and you being a Company Secretary requested to advice on disclosures that the Company should make to Stock Exchanges pursuant to Regulation 30 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

(c) Elaborate the Procedure and the estimated listing timelines for listing on NASDAQ.

(d) Prepare a checklist of documents required for a preferential allotment of shares.

(5 marks each)

Answer 5 (a)

As per Regulation 2 (1) (zc) of the SEBI (LODR) Regulations, 2015 (as amended vide notification dated November 09, 2021), following shall not be considered as Related Party Transaction (RPT):

a) the issue of specified securities on a preferential basis, subject to compliance of the requirements under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

b) the following corporate actions by the listed entity which are uniformly applicable/offered to all shareholders in proportion to their shareholding

   i. payment of dividend;

   ii. subdivision or consolidation of securities;

   iii. issuance of securities by way of a rights issue or a bonus issue; and

   iv. buy-back of securities.

c) acceptance of fixed deposits by banks/Non-Banking Finance Companies at the terms uniformly applicable/offered to all shareholders/public, subject to disclosure of the same along with the disclosure of related party transactions every six months to the stock exchange(s), in the format as specified by the SEBI.

However, this definition shall not be applicable for the units issued by mutual funds which are listed on a recognised stock exchange(s).

Answer 5(b)

Regulation 30(2) of the SEBI (LODR) Regulations, 2015 provides the events specified in Para A of Part A of Schedule III are deemed to be material events and listed entity shall make disclosure of such events as prescribed. Since the resignation of Independent Director is a material event, hence the disclosure will be made according to Part A of Schedule III of SEBI (LODR) Regulations, 2015.

Gulab Ltd. shall within seven days from the date of resignation, make the following disclosures to the stock exchanges upon resignation of Mr. Jihan:

a) The letter of resignation along with detailed reasons for the resignation as given by the said director.

b) Names of listed entities in which the Mr. Jihan holds directorships, indicating the category of directorship and membership of board committees, if any.

c) A confirmation from Mr. Jihan shall, along with the detailed reasons, that there are no other material reasons other than those provided in the letter of resignation.

d) The confirmation as provided by Mr. Jihan above shall also be disclosed by Gulab Ltd. to the stock exchanges along with the disclosure as specified above.

Answer 5(c)

Procedure and estimated listing timelines for listing on NASDAQ

On NASDAQ, it generally takes four to six weeks to process a listing application. This time frame is variable and may be shortened considerably, if the application raises no issues and the company responds quickly to comments made by Staff of NASDAQ.

- Week 1 - Company submits application for listing and NASDAQ Listing Qualifications Staff begins its review.
- Weeks 2-3 - NASDAQ Listing Qualifications Staff completes its preliminary review and prepares comment letter.
- Weeks 3-4 - Company addresses any issues raised by NASDAQ Listing Qualifications Staff.
- Weeks 5-6 - NASDAQ Listing Qualifications Staff completes their review and company is approved for listing.

Answer 5(d)

Checklist of documents required for a preferential allotment of shares

Pre-issue Formalities

1. Certified copy of the resolution passed by the Board of Directors of the company for the proposed preferential issue.
2. Printed copy of notice of AGM/EGM
3. Where the allotment is
   I. for consideration other than cash:
      a. Certified copy of valuation report
      b. Certified copy of Shareholders Agreements.
      c. Certified copy of approval letters from FIPB and RBI if applicable
   II. pursuant to a resolution plan approved by NCLT under Insolvency and Bankruptcy Code, 2016 (IBC)/ CDR Scheme/ Order of High Court/ BIFR
      a. Certified copy of resolution plan approved by NCLT under IBC (Extract of the relevant resolution) / relevant scheme/order
   III. pursuant to conversion of loan of financial institutions:
      a. Certified copy of the Loan Agreement executed by the company.
4. Brief particulars of the proposed preferential issue
5. In case if the prior holding of the allottee is under pledge with banks/ financial institution(s), company needs to provide an undertaking / confirmations from the banks/ financial institutions, company and allottee(s).
6. Confirmation by the Managing Director/ Company Secretary
7. Certificate from Statutory Auditors/ Practicing Chartered Accountant/ Practicing Company Secretary.
8. Pricing certificate by Statutory Auditor/ Practicing Chartered Accountant/ Practicing Company Secretary in case the securities of the company are infrequently traded pricing certificate as prescribed under the SEBI (ICDR) Regulation, 2018.
9. Non-refundable processing fees

Post Issue Formalities

Documents required for granting listing approvals, for the equity shares issued on a preferential basis:

1. Letter of Application (i.e. by Listed companies applying for listing of further issue) duly completed.
2. Brief particular of the new securities issued.
3. Certified copy of the resolution passed by board of directors for allotment of equity shares along with depository confirmation for the credit of securities in dematerialized form.
4. Certified copy of the resolution passed by board of directors for allotment of convertible instrument, applicable only where the allotment of equity shares is pursuant to conversion of convertible instrument.

5. Certified copy of the resolution passed by the shareholders of the Company approving the allotment on preferential basis and the resolution passed for increasing the authorized capital wherever applicable.
6. Shareholding Pattern as per the format prescribed under Regulation 31 of the SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015 giving details pre and post allotment.
7. Certified copy of the compliance certificate from the Statutory Auditor placed before the shareholders in the general meeting.
8. Certificate from Statutory Auditor of the company for receipt of funds.
9. Certificate from the Statutory Auditors/ Practicing Chartered Accountant/ Practicing Company Secretary for compliance.
10. Certificate from the Managing Director/Company Secretary of the company.
11. Confirmation for authentication on SEBI for SCORES.
12. Certified copy of the order passed by Hon'ble NCLT/ Hon'ble High Court/ BIFR/ Copy of NCLT approved resolution plan/Scheme approved by CDR, if applicable.
13. Details of Processing fee/ Additional listing fee, if applicable, to be paid on the enhanced capital.

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

Question 6

(a) *Mihir, a shareholder of Blue Chip Company lost the physical share certificates. Due to the substantial increase of price of shares, he wanted to sell the shares. As only dematerialized shares are allowed to transact in the secondary market, you being a practicing company secretary, Mihir approach you to advise on the revised procedure for issue of duplicate share certificate.*

Explain briefly the procedure for issue of Duplicate Share Certificates.

(5 marks)

(b) *Maxwell Ltd. has floated IPO for equity shares. It received more than 90% of subscription. You being a company secretary of the company asked by the management for the list of documents to be submitted for determination of basis of allotment. Prepare a list documents to be submitted to SEBI/ROC.*

(5 marks)

(c) *ABC Ltd. has 10 directors, 3 Executive Directors and promoters of the Company and one of the executive directors Mr. Prahlad is also the Chairman of the Company, 2 Non-Executive Women Directors related to Executive Directors and 5 Independent Directors. Mr. Ajay an Independent Director wants to resign from the Company due to personal reasons.*

(i) *In the given case is it mandatory for the Company to appoint another Independent Director ?*

(3 marks)

(ii) *Since Mr. Ajay was also a member of Nomination and Remuneration Committee, can the Company appoint Mr. Prahlad in place of Mr. Ajay in the Committee ?*

(2 marks)

(d) *Nyaay Ltd. (listed entity) appointed Rishi as Independent director of the*

company by way of resolution passed in the meeting of the Board of Directors on 01.04.2023. The last AGM of the company was held on 30.09.2022. Whether such appointment requires approval of shareholders (give your answer with reason) ?

(5 marks)

OR (Alternate question to Q. No. 6)

Question 6A

(i) *A listed company has achieved turnover of ₹ 250 crore as per latest audited financial statement. The Board of Directors of the company is viewing that as per Regulation 17(1) (a) of the SEBI (LODR) Regulations, 2015 there is no requirement to appoint one woman director on the Board. Do you agree ? What would be your opinion ?*

Will your opinion would differ, if it is an unlisted company with turnover of ₹ 350 crore ?

(ii) *Every listed company are required to disclose certain information in public domain by way of disclosing the information on the Website of the company. State the disclosure requirement of financial information and management policies by the listed company.*

(iii) *Prepare a checklist for basis of allotment of SME IPO.*

(iv) *What are the steps taken by SEBI to strengthen the credit rating process and how does Credit rating agencies play a vital role in the process ?*

(5 marks each)

Answer 6(a)

Simplification of procedure and standardization of formats of documents for issuance of duplicate securities certificates

(Circular No. SEBI/HO/MIRSD/MIRSD_RTAMB/P/CIR/2022/70 dated May 25, 2022)

With a view to make issuance of duplicate securities more efficient and investor friendly, SEBI has simplified the procedure and documentation requirements for issuance of duplicate securities as under:

1. Submission by the security holder of copy of FIR including e-FIR/Police complaint/Court injunction order/copy of plaint, necessarily having details of the securities, folio number, distinctive number range and certificate numbers.
2. Issuance of advertisement regarding loss of securities in a widely circulated newspaper.

   However, there shall be no requirement to comply with point 1 and 2 above, if the value of securities as on the date of submission of application, along with complete documentation as prescribed by the SEBI does not exceed Rs.5 Lakhs.
3. Submission of Affidavit and Indemnity bond as per the format prescribed by the SEBI There shall be no requirement of submission of surety for issuance of duplicate securities
4. In case of non-availability of Certificate Nos./Distinctive Nos./Folio nos., the RTA (upon written request by the security holder) shall provide the same, to the security holder only where the signature and the address of the security holder matches with the RTA/ listed company's records. In case the signature and/or the address do not match, the security holder shall first comply with the KYC

procedure and then only the details of the securities shall be provided to the security holder by the RTA/listed company.

Further, as mandated vide SEBI Circular dated January 25, 2022, duplicate securities shall be issued in dematerialized mode only.

Answer 6(b)

List of documents to be submitted to stock exchange for determination of basis of allotment:

1. One soft Copy of final prospectus filed with ROC along with its acknowledgement copy.
2. Proceeding details / minutes of basis of allotment, verified and signed by R&T Agent, BRLM (Responsible for post issue) and the Issuer along with the reasons for exception to rejection cases.
3. Category wise, summary of list of "technical rejection cases Specifying - Application No. Category, and Name & Add, Pan #, DP ID, CL ID, Quantity, price Amount and reason for rejection.
4. Copy of the statutory advertisement released in respect of the public issue / offer for sale, opening and closing of the issue, price revision, if any etc. up to the stage of basis of allotment.
5. Auditor's certificate for the following
    a. Receipt of the minimum promoter's contribution, if applicable with date and amount
    b. If minimum promoter's contribution is being brought in by alternative investment funds or foreign venture capital investors or scheduled commercial banks or public financial institutions or insurance companies registered with Insurance Regulatory and Development Authority of India, as specified under Regulation 14(1) of SEBI (ICDR) Regulation, 2018, bifurcation of the same shall be provided with date of receipt of the same from each of the party with percentage to the post issue capital Further, a confirmation that the same is in compliance with the requirement of SEBI (ICDR) Regulations, 2018.
6. Declaration from the Managing Director/Company Secretary that there is no injunction/ prohibition order of a competent court of law on the issue or on a part of any particular category of the issue.
7. Confirmation that:
    i. Only QIBs as mentioned under the definition in Regulation 2 (zd) of SEBI ICDR regulation 2009 are proposed to be allotted equity shares under QIB category
    ii. No QIB has Bid and is proposed to be allotted equity shares under non-QIB or retail category.
8. The Basis of allotment has been prepared in compliance with SEBI (ICDR) Regulations, 2018 and for its issue the company has complied with said regulation and all other statutory requirement.
9. Verification of all the final certificates issued by the controlling branch of the banker to the issue and the same has been found in order.
10. The validation of the electronic bid details with the depository's records for DP ID, client ID and PAN.

11. If approval from Stock Exchanges is sought for relaxation in PAN mismatch applications, then copy of Stock Exchange approval letter as well as the true copy of request letter to such Stock Exchange, should be submitted.

(The above list of document is to be submitted to Stock Exchange and not to Regulators i.e. SEBI/ROC. There is no list of documents to be submitted for determination of basis of allotment to SEBI/ROC except draft offer document and due diligence certificate.)

Answer 6(c)

As per SEBI (LODR) Regulations 2015, the Board of Directors is required to have an optimum combination of executive and non-executive directors with at least one-woman director and not less than fifty per cent of the Board of Directors shall comprise of non-executive directors. Further in case the Chairman is related to any promoter or person occupying management positions at the level of Board of director or at one level below the Board of directors at least half of the Board of Directors shall be independent directors.

Hence, in the given question, upon resignation of Mr. Ajay, the constitution of the Board's will have less than half of Independent Directors hence the company will have to appoint another Independent Director.

Regulation 19 of SEBI (LODR) Regulations, 2015 provides that all directors of the Committees shall be non-executive directors. Therefore, Mr. Prahlad cannot be appointed as a member of Nomination and Remuneration Committee since all the directors in the Nomination and Remuneration Committee shall be non-executive directors.

(The above answer is based on the assumption that ABC Ltd. is a listed entity.)

Answer 6(d)

As per Regulation 17(1C) of the SEBI (LODR) Regulations, 2015, a listed entity shall ensure that approval of shareholders for appointment of a person on the Board of Directors is taken at the next general meeting or within a time period of three months from the date of appointment by the Board, whichever is earlier.

Further, as per Regulation 25(2A) of the SEBI (LODR) Regulations, 2015, the appointment, or removal of an independent director of a listed entity, shall be subject to the approval of shareholders by way of a special resolution.

Thus, as per these provisions, the appointment of Rishi requires approval of shareholders by way of a special resolution in the next general meeting. This general meeting should be conducted by Nyaay Ltd. within a time period of three months from the date of appointment by its Board.

Answer 6A(i)

Regulation 17(1) (a) of the SEBI (LODR) Regulations, 2015, which is applicable to listed companies, while specifying the composition of board of directors of the listed company says that the board of directors of the company shall have an optimum combination of executive and non-executive directors with at least one woman director and not less than 50% of the board of directors shall comprise of non-executive directors.

However, the second proviso to sub-section (1) of section 149 of the Companies Act 2013 read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 is the governing provision for the appointment of a woman director. As per this provision –

(i) Every listed company shall appoint at least one woman director; and

(ii) Every other public company having a paid-up share capital of ₹ 100 crore or more or turnover of ₹ 300 crore or more as on the last date of the latest audited financial statements, shall also appoint at least one woman director.

In the given case, the listed company is required to appoint one woman director irrespective of the turnover of the company in the latest audited financial statement.

Further, if it is an unlisted company and turnover is ₹ 350 crore then the company is required to appoint one woman director on its Board.

Answer 6A(ii)

Regulation 46 of the SEBI (LODR) Regulations, 2015, a listed entity shall disclose the following information on its website, which has to be functional:

The listed entity shall disseminate the following information under a separate section on its website:

a) details of its business;

b) terms and conditions of appointment of independent directors;

c) composition of various committees of board of directors;

d) code of conduct of board of directors and senior management personnel;

e) details of establishment of vigil mechanism/ Whistle Blower policy;

f) criteria of making payments to non-executive directors , if the same has not been disclosed in annual report;

g) policy on dealing with related party transactions;

h) policy for determining 'material' subsidiaries;

i) details of familiarization programmes imparted to independent directors including the following details:-

    i. number of programmes attended by independent directors (during the year and on a cumulative basis till date),

    ii. number of hours spent by independent directors in such programmes (during the year and on cumulative basis till date), and

    iii. other relevant details

j) the email address for grievance redressal and other relevant details;

k) contact information of the designated officials of the listed entity who are responsible for assisting and handling investor grievances;

l) financial information including:

    i. notice of meeting of the board of directors where financial results shall be discussed;

    ii. financial results, on conclusion of the meeting of the board of directors where the financial results were approved;

    iii. complete copy of the annual report including balance sheet, profit and loss account, directors report, corporate governance report etc;

m) shareholding pattern;

n) details of agreements entered into with the media companies and/or their associates, etc;

o) schedule of analyst or institutional investor meet and presentations made by the listed entity to analysts or institutional investors simultaneously with submission to stock exchange;

p) new name and the old name of the listed entity for a continuous period of one year, from the date of the last name change;

q) items in sub-regulation (1) of regulation 47.

r) all credit ratings obtained by the entity for all its outstanding instruments, updated immediately as and when there is any revision in any of the ratings.

s) separate audited financial statements of each subsidiary of the listed entity in respect of a relevant financial year, uploaded at least 21 days prior to the date of the annual general meeting which has been called to inter alia consider accounts of that financial year.

t) secretarial compliance report as per sub-regulation (2) of regulation 24A of SEBI LODR Regulations;

u) disclosure of the policy for determination of materiality of events or information required under regulation 30 (4) of SEBI LODR Regulations;

v) disclosure of contact details of key managerial personnel who are authorized for the purpose of determining materiality of an event or information and for the purpose of making disclosures to stock exchange(s) as required under regulation 30 (5) of SEBI LODR Regulations;

w) disclosures under regulation 30 (8) of SEBI LODR Regulations;

x) statements of deviation(s) or variation(s) as specified in regulation 32 of SEBI LODR Regulations;

y) dividend distribution policy by listed entities based on market capitalization as specified in regulation 43A (1) of SEBI LODR Regulations;

z) annual return as provided under section 92 of the Companies Act, 2013 and the rules made thereunder.

Answer 6A(iii)

Checklist for basis of allotment on SME platform

The following documents / certifications have to be submitted to stock exchanges where the shares are proposed to be listed:

1. One Copy of final prospectus filed with ROC along with ROC filing acknowledgement copy.
2. Authenticated proceeding details / minutes of basis of allotment, verified and signed by R&T Agent, BRLM (Responsible for post issue) and the Issuer along with the reasons for exception to rejection cases.
3. Confirmation from registrar regarding withdrawal of applications received, considered in the basis, indicating date and time (should not be more than 12 hours from time of submission of basis.
4. Category wise, summary of list of "technical rejection" cases Specifying - Application No., Category, and Name & Add., Pan #, DP ID CL ID, Quantity, price Amount and reason for rejection along with photo- copies of Application forms.
5. Verification of all the final certificates issued by the controlling branch of the banker to the issue.

6. The validation of the electronic bid details with the depository's records for DP ID, client ID and PAN.
7. Auditors' certificate for the following:
    a. Receipt of the minimum promoter's contribution, if applicable with date and amount.
    b. If minimum promoter's has been brought in by alternative investment funds or foreign venture capital investors or scheduled commercial banks or public financial institutions or insurance companies registered with Insurance Regulatory and Development Authority of India, as specified under Regulation 14(1) of SEBI (ICDR) Regulation, 2018, bifurcation of the same shall be provided with date of receipt of the same from each of the party with percentage to the post issue capital. Further, a confirmation that the same is in compliance with the requirement of SEBI (ICDR) Regulations, 2018.
8. Declaration from the Managing Director/Company Secretary that there is no injunction/ prohibition order of a competent court of law on the issue or on a part of any particular category of the issue.
9. Confirmation from RTA and Merchant Bankers that:
    i. Only QIBs as mentioned under the SEBI (ICDR), Regulations, 2018 are proposed to be allotted equity shares under the QIB category.
    ii. No QIB has Bid and proposed to be allotted equity shares under non-QIB or retail category.
    iii. The basis of allotment has been prepared in compliance with SEBI (ICDR) Regulations 2018 and for its issue the Company has complied with said regulation and all other statutory requirement.
10. PAN, Demat account details etc. (in soft copy CD)
11. If Approval from Stock Exchanges is sought for relaxation in PAN mismatch applications, then copy of Stock Exchange approval letter as well as the true copy of request letter to such Stock Exchange, should be submitted.

Answer 6A(iv)

In a move to further strengthen the credit rating process, SEBI has directed credit rating agencies (CRAs) to downgrade an instrument to 'non-investment grade with Issuer Not Cooperating (INC) status', if all outstanding ratings of the issuer remain non-cooperative for more than six months. Failure on the part of the listed entity to furnish any information, material and clarifications as required by the credit rating agency from time to time so as to enable it to carry out continuous monitoring of the Rated Debt is construed as non-cooperation. Failure to pay the Fee as and when due is also construed as non-co-operation on part of the issuer.

No CRA should assign any new ratings to an issuer categorized as non-cooperative with all the CRAs for a continuous period of preceding 12 months, until the issuer resumes cooperation or the rating is withdrawn.

SEBI has also relaxed the norms for CRAs to withdraw from an issue, which has multiple ratings. The rating agency is allowed to withdraw if it has rated an instrument for three years continuously or for 50% of the tenure of the instrument, whichever is longer. Additionally, the CRA must have received a no-objection certificate from 75% of the bondholders of the outstanding debt by value for withdrawal of rating. The CRA must also have received an undertaking from the issuer that another rating is available on that instrument.

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

Earlier, SEBI had more stringent norms for CRAs to exit from the issue based on lack of information provided by the issuer. If the company stopped cooperating with the CRA and does not provide information, the CRA was required to continue to publish a rating accompanied with the statement, *"issuer did not cooperate, based on best available information".*

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MULTIDISCIPLINARY CASE STUDIES

Time allowed : 3 hours *Maximum marks : 100*

Total number of question : 6

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

Question 1

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

Gaba Group was founded by J. N. Gaba in 1870s. He successfully set up cotton manufacturing mills at Nagpur and Bombay. He was also the first businessman, to introduce hydroelectric power plants in India, which later on became part of Gaba Power.

In 1901, his vision gave India its first large scale iron works — Gaba Iron and Steel Company. The Gabas were equally involved in service industries such as hotels, telecommunications, broadband and financial services. In 1998, Gaba Motors launched the first fully indigenous India Passenger Car and in 2008, it launched Gaba Mano, the world's cheapest car. Gaba Consultancy Services (GCS) was founded by J.N. Gaba in 1968. It is one of the largest IT service providers in the world. GCS, with a market capitalization of more than ₹ 5,000 billion almost contributes to 60% of Gaba Group's total market value.

Gaba Sons, as the promoter of the major operating Gaba companies, owns significant shareholdings in these companies. Gaba companies together are commonly referred to as Gaba Group. The Chairperson of Gaba Sons is the de facto Chairperson of the Gaba companies. The companies are further networked through cross holdings, directors and even trustees. About 66% of the equity capital of Gaba Sons is held by philanthropic trusts endowedby members of the Gaba family. The income of Gaba Sons is primarily dividends and brand royalties received from the Gaba Group companies. The Gaba Group is reputed to be an ethical organisation with highest standards of corporate governance.

Sreno Mozak, a civil engineer and management graduate from London Business School with experience of managing a big conglomerate, was chosen as Nutan Gaba's successor in November 2011. On Nutan Gaba's retirement in December 2012, Sreno Mozak was appointed as the sixth chairperson of Gaba Sons to head the Gaba Group. He was selected by a panel comprising inter alia Nutan Gaba and Kumar S (a close friend of Nutan Gaba). Mozak was the grandson of S.P. Mozak, whose family holds 18.4% equity in Gaba Sons.

Traditionally, once appointed, a Chairperson would remain at the helm of affairs until retirement. J.N. Gaba was chairperson for more than 50 years and Nutan Gaba for 20 plus years, until his retirement at the age of 75 years. Mozak, who was 48 years old, should have continued for a long time. However, in a departure from traditional practice, he was removed on October 21, 2016. Mozak was neither served any show cause notice for removal, nor was given a chance to defend himself. No reasons were provided at that time by Gaba Sons for his sudden removal. The decision was taken as per the collective wisdom of Gaba Sons and on the recommendation of key shareholders. Before Mozak, every Chairperson of Gaba Group was a member of Gaba family. As the head of the two Gaba Trusts, Nutan Gaba controlled 66% of Gaba Sons and hence wielded significant control as the promoter shareholder.

Before Mozak was made chairperson, the post of head of Trusts and the Chairperson of Gaba Sons, was always held by the same person.

The Gaba Group maintained that Mozak was asked to step down, at least on four occasions, but he insisted on a Board vote. Kumar S, in his praise of Mozak in September 2016, just a month before his removal had said that, Mozak is building firm foundations to ensure that Gaba's expansions lasts for not a quarter or two, but a decade and more.

The rift and mystery unfolded when, soon after taking charge as chairperson, Mozak replaced Nutan Gaba's selected CEO's of Gaba Hotels, Gaba Motors and Gaba Steel with younger persons of his choice. Perhaps, Mozak's bigger mistake was his wanting to get rid of Mano (operating at 15% capacity), which was the dream project of Nutan Gaba.

A new airline, under the brand name of Vimaan was launched in January 2015, along with Minto Airlines where the Gabas held a majority stake. Mozak was reluctant to pump more money into the aviation business.

Dissatisfaction with how Mozak handled the Kocomo negotiation with the Japanese party, business partners in the telecom business and the divestment in Korus, the UK based company, was the final nail in the coffin.

Mozak, in a letter to Gaba Sons Board, after his removal, commented :

"Prior to my appointment, I was assured that I would be given a free hand. The previous Chairman was to step back and be available for advice and guidance as and when needed. After my appointment, the Articles of Association were modified, changing the rules of engagement between the Trusts, the Board of Gaba Sons, the Chairman and the operating companies."

Mozak alleged that he was reduced to being a 'lame duck chairman', while Nutan Gaba remained a towering figure influencing decisions even during the board meetings, which forced him to circulate a corporate governance note in order to clarify the distinct roles of Gaba Sons, Gaba Sons Board and the Boards of operating companies.

Nutan Gaba argued that Mozak made it his personal fiefdom, took unilateral decisions and did not keep the Board appraised of major decisions, even though he had been specifically asked to do so, particularly for large scale capital investments and appointment and pay packages of senior management. There was a corporate Mahabharat and war of many battles.

The family run businesses have governance pitfalls. There are governance intricacies in large family run businesses struggling to balance the interest of the promoters with the interest of all the other stakeholders in the network of companies of the group. Family dynamics strongly influence the governance of family businesses and family feuds and can lead to splits in a company. Traditionally, family businesses have always been run by a member of the family. In the instant case, clearly, in Nutan Gaba's mind, his legacy was slowly vanishing before his eyes.

One of the strengths of the Gaba companies is the use of brand name 'Gaba', but for using it, each company has to pay royalty to Gaba Sons. This is notwithstanding, that the brand has been built because of the older operating companies in the group.

The Gaba team had threatened withdrawing rights to use of brand name and loan guarantees, if Mozak remained at the helm. This would have been detrimental to the business of the companies. Group companies are dependent on the group for resources including financial, legal and technical know-how; and often shared common brands and infrastructure such as software platforms or business processing units, inter-company transactions are also prevalent.

All decisions in a family run business are taken with a view of long term benefits of the family. They are not only interested in tomorrow or even next year, but in the growth, success and survival for generations to come. Professional managers need to prove their performance through quarterly and annual results. Their appointments and remuneration are usually linked to performance. Thus, they tend to hold short-term view. The difference in strategy between Nutan Gaba and Sreno Mozak could stem from this. Nutan Gaba did not have to prove his mettle or justify his appointment in the short-run. Unclear roles and a split in power between the chief trustee, a family representative and the Chairperson and an outsider had proved detrimental.

Family managers tend to make decisions that balance the interest of the family and the company. Emotions and sentiments seep into the decision making process. Appointments to key managerial posts, are kept in the family or outdated ancestral factories are held on to because a great grandfather built them, or because they have been in the family for generations. Professional directors, as agents and trustees, are expected to protect the interests of all the shareholders. This can lead to family interests being hurt and thus the promoters being unhappy with the chosen non-family chairperson or chief executive officer. Business families such as Gabas or Tirkas start grooming their children from a young age in a manner that instils in them a business acumen enabling them to take charge of the business empire. Mozak was broughtin just one year prior to Nutan Gaba's retirement. No long-term succession planning was put in place. As Nutan Gaba chose not to have a family, he should have mentored someone to become his successor, who would then share his values and management style.

Independent directors do not owe allegiance to major shareholders. Their fiduciary duty is to promote the interest of all shareholders. However, in a family controlled business, the whole purpose of independent directors is to protect the interest of the family (read minority). If, in their wisdom, they wanted to support Mozak, then so be it. But if the Gabas withdrew their support, the companies would suffer, and as a consequence, minority shareholders would see their investment value fall. The EGM notices of GCS and other Gaba companies expressed their Board's support of the principle shareholder's desire to remove Mozak as a director. Gaba Group Board (GGB) in its statement removing Mozak as chairperson, stated it was done keeping in view the long-term interest and alignment of all stakeholders and stability of the company.

The lack of active participation by institutional investors and small shareholders gives promoters' unchallenged power. Almost half of institutional shareholders including IIC of India, the largest institutional investor in Gaba Companies and more than 80% of the public shareholders did not even vote in the EGM held by GCS to oust Mozak. Hardly anyone of them questioned about the reasons for his removal. Only one shareholder challenged the actions of the Gabas and the role of independent directors.

Generally, in family-run business, board processes are very loosely structured; deliberations and decision making processes can tend to take on an informal turn. The dominant member generally the promoter, is able to control and steer discussions. The agenda of Gaba Sons did not include the removal or replacement of the Chairperson of the Board. Mozak was removed without show cause notice or a chance to defend himself. In fact, Gaba Sons allowing Nutan Gaba, post retirement, to participate in the board meeting was itself said to be questionable.

Also at GCS, Gaba Sons used their powers under the Articles of Association to remove Mozak without passing any board resolution. The Board processes at GGB were also questioned as they failed to provide the video recording of the meeting in which Mozak was removed. GGB later passed a circular resolution confirming the removal to prevent any legal action. If removing a Chairperson is unusual, doing it by circular resolution was unprecedented.

Usually, one or two people exercise full control in the family firms, the culture and values of the organisation depend on the ethical behaviour of these individuals. Unethical removal of Mozak, by Nutan Gaba and the refusal of Mozak to step down from the Gaba Group companies reflected their ethical standards. The blatant disregard and mutual mud-slinging left much to be desired in terms of behavioral standards benchmarks set by the captains of Indian industry.

The Gaba Trusts are registered as philanthropic entities, which entitles them to tax exemptions, raising questions of their direct involvement in corporate matters. The public feud caught attention of the income-tax authorities, which was reassessing the status of the Trusts. The whole episode impacted the 148 year old conglomerate's image in the eyes of the stakeholders and its reputation as a good corporate citizen. Gaba Trust's partnership with the Department of Science and Technology of India to fund social entrepreneurship was felt to be a move to rebuild its tarnished image.

The removal of Mozak was viewed in corporate circles and among the enlightened public as mystifying. When Mozak was removed, Nutan Gaba informed the Prime Minister and he even later on met up with the Finance Minister.

The governance framework between the three powerhouses — Gaba Trusts, Gaba Sons and the listed Gaba companies probably craved to be addressed to determine succession planning, as the boardroom battles witnessed in India's biggest conglomerate portrayed the weakness in governance systems of modern corporations.

The National Company Law Appellate Tribunal (NCLAT) in its December 2019 Order reinstated, Mozak as the executive Chairperson of the Gaba Group. The Order, while upholding Mozak's charges that he was ousted without due process, said the action taken by Nutan Gaba against the former Gaba Sons Chairperson was oppressive and illegal. It set aside the conversion of Gaba Sons into a Private Limited company. In March 2020, the Supreme Court stayed the NCLAT order until it reaches a decision. Unfortunately, Sreno Mozak died in a fatal car accident

Questions :

(a) "Corporate governance processes are over-run in family run businesses by those in power for serving their self-interests". Comment.

(10 marks)

(b) Evaluate the role of family dynamics in choosing the leaders in family run business, in absence of a defined process. Also, suggest how succession planning can be done in such organisations.

(10 marks)

(c) Analyse the interest of Gaba group versus subsidiary companies in the context of conflict of interest between the two.

(10 marks)

(d) Discuss the role of independent directors, non-promoter shareholders in a family-run business, in context of corporate ethics.

(10 marks)

Answer 1(a)

Family Businesses form the pillars of most economies across the globe. These businesses are a major contributor to wealth creation and employment creation which at the same time have ensured that quality products and services reach to the consumer. Most successful multinational business has commenced their operations

as Family Businesses and has successfully grown to be multinational brands. These businesses they have their own set of strong points as well as weaknesses. Like any other business, corporate governance is as much of concern here. Since being family owned and family run, the issue of corporate governance is usually neglected.

Academic research and experience from many companies and investors all show that a certain degree of family ownership/control provides positive benefits to the family business and its shareholders. However, many failures of family-owned companies indicate that such firms also face a multitude of challenges which risk destroying shareholder value or even the business itself.

From an investor perspective, the key is to establish the right corporate governance conditions so that the positive aspects of family ownership are coupled with assurances that investor interests will be recognized and addressed.

The Family Business due to involvement of the family in governance of the business becomes a far more complex situation vis-à-vis their counterparts. Adding the family emotions and issues to the business increases the complexity of issues that these businesses have to deal with. With different family members playing different roles within the business can sometimes lead to a mismatch of incentives among all family members.

The Gaba case amply highlights that usually in family run businesses, the self-interest, beliefs and style of management of those in power outweigh the principles of corporate governance.

Some of the points in support of the above view are given below from the facts of the case presented –

1. Abrupt removal of Mozak from his position as Chairman without service of any show cause notice for removal or a chance to defend himself and without assigning any reasons for the removal which seems to be against the dictum of principles of corporate governance as enshrined in the legislations.
2. It appears from the case study that since there was no heir groomed to succeed as the Chairman, an outsider was brought in (first off case in the family business) but when outside chairman did not act according to the wishes of the earlier chairpersons (such as not supporting their dream projects and changing KMP which were appointed by them), a one-sided decision was taken to oust him
3. Nutan Gaba was allowed to participate in board meetings even after his retirement, which is highly questionable in law
4. Lack of agenda item for removal of chairperson, no resolution passed at meeting for removal – removal was done through circular resolution, video recording of board meeting was not available – all these actions are against the law.

Further, the very fact that NCLAT ordered reinstatement of Mozak as the Chairperson of the Company upholding that he was ousted without following proper procedure of law and that actions of Mr. Nutan Gaba were oppressive and illegal cements the fact that in the given case legal provisions as well as principles of corporate governance were blatantly disregarded by people in power to further their interests. Supreme Court also stayed this order of NCLAT.

Thus, it is rightly observed that corporate governance processes are usually over-run-in family run businesses by those in power for serving their self-interests as is evident in the given case and also many studies conducted over the years.

Answer 1(b)

The role of family dynamics to choose the future leaders irrespective of their capabilities or absence of defined process to choose the leaders in the family run business is crucial.

The Family Business due to involvement of the family in governance of the business becomes a far more complex situation vis-à-vis their counterparts. Adding the family emotions and issues to the business increases the complexity of issues that these businesses increases the complexity of issues that these businesses different roles within the business can sometimes lead to a mismatch of incentives among all family members.

In Family Business there is a tendency to expect family members of the subsequent generations to run the Business. The ability to ensure competent family leadership across generations makes this task very complex. The situation gets worse when all the siblings aspire for the top slot, and can even be disastrous when the siblings remaining within a single fold pull in different directions. The next generation even if not capable of running the business is expected to do so. Preparing the next generation for taking over the business becomes one of the biggest challenges of a family business.

The given case highlights how much centralised the decision-making power remains in the family run business. It is contrasting with the progressive business ideas of having decentralized decision-making capacity for the overall growth of the business and incorporating/allowing the young minds with the decision-making process.

The question of putting the family's survival over the group's survival has been debated for a long time in the interest of a family run business where the promoter always puts the family in priority and is often impacted by the sentiments.

The family matters affecting decision making also impacts the succession planning. The promoter wants that the power should be within the family to secure the future of the family, rather than future of the group.

Smooth succession in an important aspect for family business governance and can save many businesses. Within a family business there is need to have a fair and transparent process for succession selection. The succession process need to be such that it is candid and transparent to the person (successor) as to why he/she was chosen, to the contemporaries so that it can deal with the their disappointments and above all to the various stakeholders that the successor has been chosen in such a way that he/she is capable of ensuring the growth as well as day to day functioning of the business. The succession plan needs to be formal and is recommended to be prepared well in time so as to avoid potential disputes over as to who is entitled to take over. This plan also needs to be communicated to all concerned well in advance. Communication is essential in succession process especially between predecessors and potent successor alongwith utilization of professional management especially legal advisors. Family businesses need to make themselves future ready by investing in leadership development and succession planning processes and adapting succession planning best practices of similar family-owned businesses.

Answer 1(c)

The interest of the group versus subsidiary companies in a family run business is always troublesome. This is a long-drawn issue of conflict whether the group's interest should impose on the subsidiary companies even if they are at a loss or to hold the subsidiary companies' interest to each one of them, growing at their own capabilities.

In this case, quite a few examples have been quoted, which shows that the decision of Gabas has impacted their subsidiaries in a negative way, and many people in the

shareholders and the public at large were unhappy about their investments and their costs.

On the other hand, association with the large group provides a cushion to those subsidiaries for having brand value and interdependence of resources, which is beneficial to them.

The repeated and blatant impact of self interest in most parts of the Gabas raised the question of corporate ethics of the leaders.

The entire episode was seen as a sore in the eyes of the large corporate community. It also raised questions on the governance structure and its appropriateness in the family run businesses in the long run.

One of the most critical questions facing family businesses is how to treat the next generation. They are clearly different from other employees, as current or potential owners of the company, whose wealth and reputation are on the line. On the flip side, most parents rightfully worry that providing too many unearned advantages undermines not only the next generation's work ethic, but the soul of the company. In answering this question, families often default to one extreme or another: giving the next generation special treatment that doesn't hold them accountable to the same standards as other employees.

The given case does not throw much light on the matter of conflict of interest between the Gaba group and its subsidiaries. However, it does indicate that the group was run as a whole rather than looking at interest of each entity. The Companies were networked through cross holdings, directors and even trustees such that decision making is centralized. The group companies paid royalities for use of brand name 'Gaba'.

Answer 1(d)

Role of independent directors, non-promoter shareholders is very crucial, as well as limited and controversial in a family run business.

The regulatory guidelines give freedom to the independent directors to decide to protect the minority (Mozak in the instant case), they get impacted by their self-interest.

As the case highlighted, Gaba could have pulledback their support which would have impacted the business and thereby impacting the investment values of the other shareholders. Further, the independent directors would want to be on good terms with business leaders like Gabas, and thereby may not openly speak out objectively, but agree with the majority wishes.

The independent directors shall be independent in letter and spirit and objective enough, to support the decision which is beneficial for the Company.

The role of inactive shareholders in the given case is dubious. Though they get to vote, still they do not voice their opinions. They have assumed that their voices will not be heard. And there could as well be an element of self interest in this too.

Mozak was removed without any show cause notice or without an opportunity of being heard or defending himself. This indicates lack of proper processes at family run businesses to upload the principles of corporate governance.

Question 2

(a) Halo Private Ltd, had four shareholders, each holding, 25,000 equity shares of ₹ 10. These shareholders were also the directors on the Board. The Company was initially doing well operationally and financially. However, after four years of operations, differences arose between the directors managing the Company's business and the regulatory filings of the Company were impacted

and not made within time. It was mutually agreed that the Company should be wound up. Accordingly, a voluntary application was filed as per the Companies Act, 2013 in January 2019 and the matter was pending before NCLT. However, one of the directors wanted to revive the Company and had filed an appeal under Section 252 of the Companies Act, 2013, for revival of the Company, which was pending adjudication before the NCLT. Meanwhile the Registrar of Companies (RoC) struck off the name of the Company from Register of Companies with effect from September 1, 2019.

In the background of judicial pronouncements, comment whether NCLT can proceed with the winding up petition ?

(6 marks)

(b) *Auro Auto Ltd (AAL) is a leading global automobile manufacturer listed on a Bombay Stock Exchange (BSE). AAL has wide range of products including fancy cars and sports cars and has a market share of 12% in India. The Company heavily invests in research and technology and aims to bring higher sophistication in its products, while providing best in class experience to its customers. AAL is planning for expansion in India and overseas. It is also evaluating to invest in start-ups with great ideas and has also founded incubation centres which give impetus to budding entrepreneurs. During evaluation process, the Mergers and Acquisitions team has identified few entities namely, Drive Mauritius LLP, registered under the LLP Act of Mauritius, and Pluto LLP, an Indian LLP which have developed technology, that can help AAL. After the initial evaluation, the M & A team, reached out to you, the Company Secretary of AAL, with the following questions :*

(i) Can Pluto LLP be merged with AAL assuming that Pluto LLP is not registered as a Company ?

(ii) Can Drive Mauritius LLP amalgamate with AAL ? Advise the M & A team, with reference to applicable legal and regulatory provisions.

(6 marks)

Answer 2(a)

The case presented is similar to case of, *Late Mona Aggarwal through her Legal heir Mr. Vijay Kumar Aggarwal & Anr. (Appellants) vs. Ghaziabad Engg. Company Ltd. &Ors. (Respondent)*, on 19.9.2017, NCLT issued notice on the petitioner for winding up of the Respondent No. 1 to the Respondents therein. During the pendency of the petition, ROC vide order dated 30.6.2017 exercising powers under sub-section (5) of Section 248 of the Companies Act 2013 struck off the name of the Company from register of companies with effect from 7.6.2017.

The Respondent No.2 filed an appeal before NCLT Delhi under Section 252 of the Companies Act, 2013 for revival of the Company which was pending before the NCLT.

However, on 7.8.2019 NCLT rejected the petition for winding up with liberty to the petitioner (Appellants) to file a fresh one as and when the Respondent Company is revived. Being aggrieved with theorder the Appellants filed an appeal.

Appellant submitted that during the pendency of the petition before NCLT, the name of the company was struck off by the ROC under Section 248 of the Companies Act, 2013 for which an appeal under Section 252 of the Companies Act, 2013 for revival of the company was pending. However, NCLT rejected the company petition on the ground that the company's name has been struck off by the ROC and after revival the appellants herein are at liberty to file the petition. This order is erroneously passed. Even if the name of the company has been struck off the power of NCLT to wind up

the company shall not be affected as per the provisions under Section 248 (8) of the Companies Act, 2013.

For this purpose, the appellant placed reliance on the judgement of tribunal in the case of *Hemang Phophalia vs The Greater Bombay Cooperative Bank Ltd., Company Appeal (AT) No. 765/2019 decided on 5.9.2019.* It was submitted that the impugned order be set aside and the matter be remitted back to NCLT for deciding the petition afresh on merit.

Respondents submits that the appeal is not maintainable as the Appellants have sought the same relief on the same ground and cause of action as they have filed this appeal as well as filed the application before NCLT for review of the impugned order. Appellant cannot be permitted to exercise concurrent jurisdiction over the same dispute over the same parties for the same relief and on same ground and same cause of action. In such circumstances the possibility of conflicting decisions cannot be ruled out.

The NCLAT observed that under sub-section (8) of Section 248, it is clear that Section 248 in no manner will affect the powers of the Tribunal to wind up the company, the name of which has been struck off from the register of companies. Therefore, even after removal of the name of the company from the register of companies the NCLT can proceed with the petition for winding up under Section 271 of the Companies Act, 2013.

Hence, impugned order was not found to be sustainable in law and was set aside and the matter was remitted to NCLT, New Delhi for deciding the winding up petition on merit as per law.

Answer 2(b)

(i) As per Section 232 of the Companies Act, 2013, a company or companies can be merged or amalgamated into another company or companies. The Companies Act, 2013 has taken care of merger of LLP into company. In this regard Section 366 of the Companies Act, 2013 provides that for the purpose of Part I of Chapter XXI, the word company includes any partnership firm, limited liability partnership, cooperative society, society or any other business entity which can apply for registration under this part. It means that under this part LLP will be treated as a company and it can apply for registration and once the LLP is registered as company then the company can be merged in another company as per section 232 of the Companies Act, 2013.

The facts of the present case are similar to the case of *Regional Director, Southern Region and Ors. (Appellants) Vs. Real Image LLP and Ors. (Respondents)* **.**

Thus, Pluto LLP can merge with AAL, if Pluto LLP converts itself into a company as per the provisions of section 366 of the Companies Act, 2013 and not otherwise.

(ii) As per Rule 25A of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016-

"A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of the Reserve Bank of India and after complying with the provisions of section 230 to 232 of the Act and these rules."

Further as per Explanation to Section 234(2) of the Companies Act, 2013, the expression "Foreign Company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

Thus, from the above discussion it is clear that Drive Mauritius LLP can amalgamate with AAL by following the provisions and procedures prescribed in the Companies Act, 2013 and if approved by the NCLT.

Question 3

(a) *Rana, Mahim and Guru were close friends, who had great interest in the stock market. Gradually, they started trading in stocks and options using various platforms. Whilst they were trying to invest safely, with smaller quantum of money, they were unable to make large gains. During one of the conversations about markets, Guru suggested Rana and Mahim, that they should avail some professional advisory services which would give them inputs about trading in stocks. One of Guru's cousins, had made good money by investing based on the tips he got on whatsapp and telegram apps. Guru, Rana and Mahim also became part of that whatsapp group, and were getting regular updates about stocks. The updates they got were mostly forwarded messages and they made good amount of money using those tips. Gradually, over couple of years, they accumulated funds and were investing higher amount of money. In February 2023, SEBI vide its order imposed a penalty of ₹ 20 Lakhs each on Guru, Rana and Mahim for violating Section 12 A(d) & 12 A (e) of the SEBI Act 1992 and Regulation 3(1) of SEBI (Prohibition of Insider Trading) Regulations, 2015. An appeal was filed by Guru, Rana and Mahim before SAT, stating that they had not violated any provisions, as they just received information by way of forwarded messages on whatsapp. Comment in the background of relevant case law.*

(6 marks)

(b) *Apna Dhan Ltd., is a Public Sector Undertaking, manufacturing various beverages. The management of the Company was evaluating to expand its footprint globally, it was planning to spend USD 7,500 for advertisement in foreign print media. The Company also plans to donate USD 2,00,000 to a technical institution established in Chicago at USA for conducting advanced research in the field of beverages. The foreign earnings of the Company for the last four financial years is as follows :*

Financial Year	*Amount in USD*
2019-2020	*3,250,000*
2020-2021	*3,500,000*
2021-2022	*3,750,000*
2022-2023	*4,000,000*

The company has reached out to you, to advise them on the following :

(i) Can it spend USD 7,500 for advertisement in foreign media ?

(ii) Assuming that Apna Dhan Ltd., is not a Public Sector Undertaking, can it donate USD 2,00,000 ?

Advise in the background of relevant legal provisions.

(6 marks)

Answer 3(a)

The given case is similar as in case of *Shruti Vora, Neeraj Kumar Agarwal, Parthiv Dalal and Aditya Omprakash Gaggar (Appellants) vs. Securities and Exchange Board of India (SEBI) (Respondent)*. In this matter SEBI had observed that these appellants

had circulated a number of messages on watsapp to various other people containing financial results of many listed companies which were found to be quite similar to the results which were published subsequent to circulation of these messages. '.

The SEBI in its orders reasoned that though the appellants were involved as employees or otherwise in the securities market, their duties did not involve sending any such messages to any of the clients and some of the entities to whom the messages were forwarded were not even clients.

Further the proximity of the circulation of the WhatsApp messages with publication of financial results, striking resemblances between the figures circulated via messages and actual results declared by the respective companies, also weighed with the learned Adjudicating Officer (AO) in each of the case to come to the conclusion that the message was nothing but circulation of unpublished price sensitive information in violation of PIT Regulations

SEBI imposed penalty of INR 15 lakhs on each of the appellants as mentioned above for alleged violation of SEBI (PIT) Regulations i.e., for circulation of unpublished price sensitive information (UPSI).

An appeal was filed to the Securities Appellate Tribunal (SAT). The SAT set aside the penalty imposed by the SEBI for forwarding allegedly UPSI of six companies on WhatsApp.

Further, the SAT said that AO of the SEBI failed -

- to appreciate that the appellants were pleading that the WhatsApp messages might have been originated from the brokerage houses, or from the estimates found on the platform of Bloomberg which were floated and were in the public domain.
- to take into consideration that there were numerous other messages of similar nature received and forwarded by the appellant which did not at all match with the published financial results.
  Appellant Shruti Vora in the case of Wipro has specifically pointed out that along with the said message, a similar message regarding Axis Bank had also reached her which she had also forwarded. The published results, in that case, however, were widely different. The AO did not give any weightage to the same, SAT said.
- to prove any preponderance of probabilities that the impugned messages were unpublished price sensitive information, that the appellants knew that it was unpublished price sensitive information and with the said knowledge they or any of them had passed the said information to other parties.

Answer 3(b)

i. As per Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000, advertisement in Foreign Print Media for the purposes other than promotion of tourism, foreign investments and international bidding exceeding USD 10,000 by a State Government and its Public Sector Undertaking requires permission of Ministry of Finance, Department of Economic Affairs.

   In the given case, Apna Dhan Ltd., wants to spend USD 7,500 for advertisement in foreign print media so that it may promote its beverages business globally. Apna Dhan Ltd., can spend such an amount without taking any permission from the Ministry of Finance, Department of Economic Affairs as the amount to be spent is below the threshold limit of USD 10,000.

ii. As per Schedule III read with Rule 5 of Foreign Exchange Management (Current Account Transactions) Rules, 2000, remittances by persons other than individuals shall require prior approval of the Reserve Bank of India in case of-

Donations exceeding one percent of their foreign exchange earnings during the previous three financial year or USD 5,000,000 whichever is less, for

- Creation of Chairs in reputed educational institutes
- Contribution to funds (not being an investment fund) promoted by educational institutes; and
- Contributions to a technical institution or body or association in the field of activity of the donor company.

Since, the donation amount by Apna Dhan Ltd., does not fall under the exemption limit, Apna Dhan Ltd., may donate USD 2,00,000 but only with the prior approval of the RBI.

Question 4

(a) The Dazed Inn, is a 40-unit, no frills resort operating in the less scenic part of a major Maharashtra town. Its owner Rane, firmly believes that there is a need for his style of low-cost family accommodation amid the luxury and beauty of the area. His rooms are large, family style rooms, without television. Although there is plenty of space for future expansion, the grounds are fairly bare, with a bit of landscaping Rane can serve breakfast to the rooms and provide tea making facilities. There are now a lot of good restaurants and take-aways in the area. Rane's prices are less than half of what similar resort charges and, really, it isn't all that far away from the waterfalls and other attractions.

The problem is occupancy. He has some regulars who come every holiday period. Overall, occupancy is about 50% year around, however, as per data available the average occupancy in similar resorts is 68%. Cars pull-in, drive around the parking areas and then drive away. Currently, Rane does very little advertising in local district guides and the, holiday papers, mainly because he really thinks word of mouth is the best form of advertising. He is a member of the local tourist committee, but too busy to go to the meetings. However, he does receive local statistics. He is not desperate yet, but he is getting worried about the future. Rane has requested you to do a SWOT analysis for Dazed Inn.

(6 marks)

(b) Fun & Feast Ltd (FFL) was a well to do Company with its resorts operating in two locations near Chennai. However, after COVID the Company was unable to recover financially and was referred to insolvency proceedings by its creditors. Roop, an Insolvency Professional, was appointed to sell the property of Fun and Feast Ltd. (FFL). He finds that an undervalued transaction was made by the FFL with Tummarsi (a related party of director), in six months preceding the insolvency commencement date.

Examine the validity of such transaction by FFL with Tummarsi.

(6 marks)

Answer 4(a)

SWOT analysis of the Dazed Inn:

(A) **Strengths**:

- Located in a popular tourist region.

- Big rooms.
- Large grounds and open areas.
- Breakfast service in rooms.
- Good restaurants and take-aways nearby.
- Low prices.
- Regular customers.
- Membership in the local tourist group.
- Access to information about the industry.

(B) **Weaknesses**:

- No television.
- Bare and unappealing grounds.
- Initial interest by people who drive in and look but then leave.
- No separate restaurant service.
- Low occupancy compared to other resorts.
- Very little advertising.
- Only local advertising.
- Uninspiring resort name.
- Low rates being charged could be perceived as unappealing.

(C) **Opportunities**:

- Install televisions immediately.
- Landscape the grounds.
- Add more facilities - a pool, restaurant, BBQ, etc.
- Increase level of advertising.
- Attend touring group meeting.
- Need to do more networking.
- Investigate other markets.
- Increase the rates being charged.
- Add own restaurant.

(D) **Threats**:

- Potential failure if occupancy doesn't improve.
- Potential failure if other properties begin cutting rates.
- Potential problems if other properties begin big promotional camping.
- Potential problems if more budget resorts are built.

Mr. Rane's most important action is to raise rates immediately. At less than half the price of other motels / resorts, the price of his resort is too low, which conveys a poor image. This combined with the bare ground may be driving potential customers away. His rates can still be low but should be comparable to the rates of competitive properties.

Answer 4(b)

As per Section 45 of Insolvency and Bankruptcy Code, 2016:

(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor-

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,

and such transaction has not taken place in the ordinary course of business of the corporate debtor.

In the given case, Roop the Insolvency Professional, on examination of the transactions of FFL, determines that certain transactions were made by FFL with a related party Tummarsi within a period of six months, which were undervalued. Roop shall make an application to the NCLT to declare such transaction as void and reverse the effects of such undervalued transaction and requiring the person who benefits from such transaction to pay back any gains, he/she may have made as a result of such transaction.

Question 5

(a) Kirmo Rubber Tubes and Tyres Ltd ('Kirmo') manufactures tyres with a peculiar tread pattern over which it has claimed proprietary rights. Sumo Tubes Private Ltd ('SUMO') also manufactures truck tyres with similar tread pattern like that of Kirmo. During one of the market survey by Kirmo marketing professionals, it was observed that the shopkeepers were selling SUMO tyres saying the design and make is similar to those of Kirmo, thereby causing damage to Kirmo. Kirmo filed a suit against SUMO for infringement of its proprietary rights and an interim injunction was granted in favour of Kirmo. SUMO moved an application to vacate the stay and contended that the tread pattern of truck tyre is not covered under copyright. In the background of judicial pronouncements, comment whether SUMO will succeed.

(6 marks)

(b) Zarana Ltd, a company providing IT & ITES services entered into an agreement with Valcon Ltd, a Company registered in Hong Kong, to provide software services relating to implementation and maintenance of new ERP module. The agreement was for a period of one year, however, due to cost overrun and other administrative issues, there was a dispute between the parties. Valcon Ltd, referred the matter to sole arbitrator based in Singapore and an award was given by the arbitrator in favour of Valcon Ltd. Zarana Ltd filed an application under Arbitration and Conciliation Act, 1996 inter alia praying that the enforcement of impugned award be declined. In the background of judicial pronouncement, comment whether Zarana Ltd's contention is justified ?

(6 marks)

Answer 5(a)

The facts of the given situation are similar to case *Apollo Tyres Ltd. vs. Pioneer Trading decided by Delhi High Court on 17th August, 2017*, which is discussed hereunder.

The facts of the case

The Plaintiff manufactures truck tyre Endurance LD 10.00 R20, with a peculiar tread pattern over which it had claimed proprietary rights. The defendant also manufactures truck tyre HI FLY with similar tread pattern of the Plaintiff.

Plaintiff filed a suit against the Defendant for infringement of its proprietary rights and an interim injunction was granted in favour of the Plaintiff. Defendant moved an application to vacate the stay.

Decision: Interim stay confirmed.

Reason

It was held that the tread patterns are utilized by the manufacturers including by the plaintiff, in respect of its tyre in question, as a source identifier, i.e. as a trademark.

No doubt, the tread pattern adopted by the plaintiff in respect of its tyre also serves the purpose which the treads on any tyre serve. However, if the same function can be achieved through numerous different forms of tread patterns, then the defence of functionality must fail. It was essential for the defendant to, at least, *prima facie*, establish that the tread pattern of the plaintiff was the only mode/ option, or one of the only few options, which was possible to achieve the functional requirements of the tyre. The position which emerges on a perusal of the documents placed on record by the plaintiff is that there are innumerable different and unique tread patterns in existence, adopted by different manufacturers of tyres, which achieve the same objective.

It cannot be said that the unique tread pattern adopted by the plaintiff is attributable only to the technical result, namely, of providing grip and stability to the vehicle on which the tyre of the plaintiff is used. The same function can be performed by any other tyre with a different tread pattern.

The manner in which the tyres of different manufacturers are advertised and marketed leaves no manner of doubt that the tread pattern on the tyre of the manufacturer is prominently displayed, apart from the brand name of the manufacturer. It is also not uncommon to see the customer - interested in buying a tyre, being shown the tyres by the vendor with the tread pattern in a vertical position i.e. by showing the “face” of the tyre, such that the tread pattern is the first thing that strikes and appeals to the eye of the customer. It is also not uncommon to see that even when tyres are wrapped in covering, the vendor removes the covering while displaying his tyres to the customers. Pertinently, the defendant does not display its tyres in question under the brand “HI FLY” in a wrapped condition in its advertisements. The defendant is displaying its tyre in question under the brand “HI FLY” in an unwrapped condition, and prominently showing the tread pattern on the tyre. This itself shows that the wrapping of the tyre does not inhibit the display and marketing of the tyre, by prominently displaying the tread pattern on the tyres.

Thus, the submission that the tread pattern adopted by the plaintiff is functional and, therefore, not capable of protection, cannot be accepted. This submission is rejected.

The tread pattern on a tyre, in court’s view, is such a prominent feature - and is so prominently displayed and advertised, that the added matter, namely the brand name on the sides of the tyre, is not sufficient to distinguish the goods of the defendant from those of the plaintiff. Similarly, the inclusion of the tyre-tube and flap in the plaintiff’s tyre, and only the flap along with the tyre in the defendant’s tyre - minus the tube, is not sufficient to distinguish the plaintiff’s tyre from that of the defendants. It is not in dispute that both tyres of the plaintiff and the defendant in question are tyres meant for trucks. Therefore, some change of specifications between the two is of no consequence, when it comes to the aspect of confusion in the mind of the customer. Hon’ble Court also observed that the customers of the truck tyres, by and large, are semi-literate middle class truck owners, operators and drivers, from whom it is difficult to expect a detailed examination, threadbare, of all the differences in the tyres of the plaintiff and that of the defendant before the purchase of the tyre is made.

In view of the aforesaid, the Hon’ble Court was inclined to confirm the injunction granted in favour of the plaintiff till the disposal of the suit. Accordingly, the plaintiff’s

application, i.e. I.A. No. 19350/2015 is allowed and the *ex- parte ad interim* order of injunction dated 15.09.2015 is confirmed till the disposal of the suit.

In view of the above case, it can be said that SUMO will not succeed.

Answer 5(b)

In case of, *Falcon Progress Ltd (Decree Holder) Vs. Sara International Ltd. (Judgment Debtor),* petition was filed by Falcon Progress Limited (hereafter 'FPL'), a company registered under the laws of Hong Kong, for enforcement of the foreign award dated 22.11.2012 (hereafter 'the impugned award'). The impugned award was rendered by the sole arbitrator pursuant to arbitration proceedings conducted under the rules of Singapore International Arbitration Centre (SIAC) in respect of disputes between FPL and Sara International Ltd. (hereafter 'Sara'), the Judgment Debtor. Sara filed an application under Section 48 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') inter alia praying that enforcement of the impugned award be declined. The application was dismissed and the major grounds observed are given below:

The contention advanced on behalf of FPL that the question as to the existence of a contract cannot be agitated in these proceedings as the same had been considered by the Arbitral Tribunal, is unmerited. The existence of an arbitration agreement is sine qua non to constitute a foreign award.

Section 44 of the Act defines a foreign award to mean an arbitral award rendered on differences between the parties arising out of legal relationships, considered as commercial under the law in force in India, in pursuance of an agreement in writing for arbitration to which the New York Convention applies. Thus, the question of existence of a foreign award does not arise if there is no agreement in writing between the parties. It is also necessary to understand that the Arbitral Tribunal has the jurisdiction to rule on the existence and validity of the agreement and, consequently to rule on its own jurisdiction, however, the said decision is not final and binding and is amenable to challenge. In case of arbitration to which Part I of the Act applies, the decision of the Arbitral Tribunal to assume jurisdiction is subject to challenge under Section 34 of the Act. In case of an award, which is sought to be enforced under Part II of the Act, the court has to be satisfied at the threshold that the award is a foreign award. Plainly, the Arbitral Tribunal's decision regarding existence of an agreement - which clothes the Arbitral Tribunal with the jurisdiction to decide the disputes - would not be immune to judicial review because if the party challenging the existence of the agreement is correct then the Arbitral Tribunal's decision on its own jurisdiction would be without jurisdiction. The Arbitral Tribunal owes its existence to the agreement between the parties. And, although the Arbitral Tribunal can rule on the same in the first instance, the same would be amenable to judicial review. There is no substance in the contention that if the Arbitral Tribunal has considered and decided that the agreement is in existence, this court should accept the same; because, if there is no agreement between the parties, the decision of the Arbitral Tribunal is of no value at all. The rule of Kompetenz - Kompetenz, which is now accepted in the UNCITRAL model of law and also embodied in Section 16 of the Act, does not in any manner preclude or curtail challenge to the Arbitral Tribunal's jurisdiction, once the award is made. The rule only clothes the Arbitral Tribunal to decide the existence of the agreement and its jurisdiction in the first instance without the parties seeking recourse to courts.

It is also necessary to observe that the question whether the enforcement of a foreign award would be declined under Section 48 of the Act has to be considered only on the grounds as set out in Section 48 of the Act, notwithstanding the decision of the Arbitral Tribunal. If the grounds as indicated in Section 48 of the Act are established, the recognition and enforcement of the award is to be declined.

Having stated the above, the principal question to be considered is whether there was a concluded contract between the parties. A plain reading of the agreement indicates

that all essential terms had been agreed to between the parties. Article II(2) of the New York Convention expressly provides "The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". In the present case, it is not disputed that the agreement attached with the emails referred hereinabove contained an arbitration clause and, therefore, the contention that there is no arbitration agreement between the parties is also devoid of any merits.

Thus, in the given case, based on above settled matter, Zarana's contention is not justified.

Question 6

(a) In modern businesses, Corporate Secretaries are key managerial personnel occupying pivotal positions in their companies. They have a central role in fostering good governance practices and supporting the development of highly functioning Boards. As sustainability has become a business imperative, it is essential that boards provide stewardship and oversight over a company's sustainability performance. The role of the Corporate Secretary in Sustainability Governance provides an overview of how governance professionals can support the board's emerging "environmental, social and governance" (ESG) mandate. Company Secretaries also play a vital role in forming the Board's Corporate Social Responsibility policy. It's the Company Secretaries responsibility to consider the best interest of both the organization and its stakeholders. One of the key roles of the Company Secretary is "to ensure that the CEO and the management communicate effectively and frequently with the Board to establish corporate governance, CSR and internal controls required to enable the organization to effectively execute the Business Strategy, and to facilitate a clear mandate being given to the various departments of the organizations." As a Company Secretary, explain the difference between ESG and Corporate Social Responsibility.

(6 marks)

(b) Atherno Ltd, was a start-up Company founded by four IIT graduates, for identifying solutions through technology for water contamination and to provide water filters at a lower cost. The Company had already received funding from big angel investors and was planning to expand its operations. As part of their IPO readiness, the Company appointed Srimo, a Practising Company Secretary to review compliance with applicable laws and regulations and also to suggest improvements to the existing processes. After a detailed review, Srimo identified and informed the Directors and Management, various finer points on compliance and how it can be improved further. He emphasised that, the Company should have a robust risk management policy in place, for which the Board of Directors may voluntarily form a risk management committee. In the background of the above, explain :

(i) Legal provisions relating to role and functions of risk management committee.

(ii) Outline of risk management policy for the Company.

(6 marks)

Answer 6(a)

The difference between Corporate Social Responsibility (CSR) and Environmental, Social and Governance (ESG) can be highlighted as under:

- Corporate Social Responsibility (CSR) refers to sustainability strategies companies employ to ensure that the business is carried out ethically. In

contrast, Environmental, Social and Governance (ESG) are criteria used to measure a company's overall sustainability.

- CSR is a sustainability framework employed by organisations, while ESG measures the organisation's level of sustainability- increasingly demanded by investors and other stakeholders.
- CSR practices are usually self-regulated and can have a lot of variations. It is a more qualitative measure and can be challenging to define. ESG, on the other hand, provides investors with a measure they can use to decide which companies to invest in.
- CSR takes into account the legal and ethical implications of a company's actions, while ESG focuses on how corporate practices can have an impact on wider social issues such as climate change, resource depletion and income inequality. CSR considers how a company treats its employees, customers and suppliers, whereas ESG broadens this scope to consider how a company monitors and reduces its environmental footprint in addition to workforce treatment and governance transparency.
- Establishing and controlling fiscally-relevant environmental, social and governance risks and opportunities is an essential component of ESG strategy. This process separates ESG from CSR by focusing the disclosed data on its significance concerning a company's operations or business model. In comparison, CSR may reflect values held within the company itself, but ESG reporting focuses solely on materiality to identify potential areas for improvement.

Answer 6(b)

(i) Regulation 21(4) of the SEBI (LODR) 2015 states that the board of directors shall define the role and responsibility of the Risk Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit such function shall specifically cover cyber security.

Provided that the role and responsibilities of the Risk Management Committee shall mandatorily include the performance of functions specified in Part D of Schedule II.

Part D of Schedule II of the SEBI (LODR) 2015 provides that:

a. To formulate a detailed risk management policy which shall include:
   - A framework for identification of internal and external risks specifically faced by the listed entity, in particular including financial, operational, sectoral, sustainability (particularly, ESG related risks), information, cyber security risks or any other risk as may be determined by the Committee.
   - Measures for risk mitigation including systems and processes for internal control of identified risks.
   - Business continuity plan.

b. To ensure that appropriate methodology, processes and systems are in place to monitor and evaluate risks associated with the business of the Company;

c. To monitor and oversee implementation of the risk management policy, including evaluating the adequacy of risk management systems;

d. To periodically review the risk management policy, at least once in two years, including by considering the changing industry dynamics and evolving complexity;

e. To keep the board of directors informed about the nature and content of its discussions, recommendations and actions to be taken;

f. The appointment, removal and terms of remuneration of the Chief Risk Officer (if any) shall be subject to review by the Risk Management Committee.

The Risk Management Committee shall coordinate its activities with other committees, in instances where there is any overlap with activities of such committees, as per the framework laid down by the board of directors.

(ii) A risk management policy serves two main purposes: to identify, reduce and prevent undesirable incidents or outcomes and to review past incidents and implement changes to prevent or reduce future incidents. A risk management policy should include the following sections:

- Risk management and internal control objectives (governance)
- Statement of the attitude of the organisation to risk (risk strategy)
- Description of the risk aware culture or control environment
- Level and nature of risk that is acceptable (risk appetite)
- Risk management organisation and arrangements (risk architecture)
- Details of procedures for risk recognition and ranking (risk assessment)
- List of documentation for analysing and reporting risk (risk protocols)
- Risk mitigation requirements and control mechanisms (risk response)
- Allocation of risk management roles and responsibilities
- Risk management training topics and priorities
- Criteria for monitoring and benchmarking of risks
- Allocation of appropriate resources to risk management
- Risk activities and risk priorities for the coming year

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BANKING – LAW & PRACTICE

(Elective Paper 9.1)

Time allowed : 3 hours *Maximum marks : 100*

Total number of questions : 6

NOTE : *Answer ALL Questions.*

Question 1

Integrated Ombudsman Scheme:

Banks are service organizations. Customer satisfaction and loyalty is prime focus of any bank. Customer complaints are the part and parcel of day-to-day functioning of banks in India. To address this Reserve Bank of India (RBI) has taken various initiatives over the years for improving customer service and Grievance Redress Mechanism (GRM) in banks which are as follows :

- *The Banking Ombudsman Scheme was introduced in 1995 to serve as an alternate GRM for customer complaints against banks;*
- *In 2019, RBI introduced the Complaint Management System ('CMS'), a fully automated process-flow based platform, available 24×7 for customers to lodge their complaints with the Banking Ombudsman ('BO');*
- *As a part of the disclosure initiative, banks were advised to disclose in their annual reports, summary information regarding the complaints handled by them and certain disclosures were also being made in the annual report of the Ombudsman Schemes published by the RBI;*
- *Banks were mandated to appoint an Internal Ombudsman ('IO') to function as an independent and objective authority at the apex of their GRM;*

It is evident from the increasing number of complaints received in the Offices of Banking Ombudsman ('OBOs'), that greater attention by banks to this area is warranted. More focused attention to customer service and grievance redress was required to ensure satisfactory customer outcomes and greater customer confidence.

Hence, with a view to strengthen and improve the efficacy of the internal GRM of the banks and to provide better customer service RBI vide its press release dated 4th December, 2020 w.r.t. Statement on Developmental and Regulatory Policies decided:

- *To put in place a comprehensive framework comprising inter alia of enhanced disclosures on customer complaints by the banks;*
- *A monetary disincentive in the form of recovery of cost of redress of complaints from banks when maintainable complaints are comparatively high; and*
- *Undertaking intensive review of GRM and supervisory action against banks that fail to improve their redress mechanism in a time bound manner.*

The aforesaid framework was introduced by RBI on 27th January, 2021 vide its notification w.r.t strengthening of GRM in Banks. The same shall be effective from 27th January, 2021 and applicable to all scheduled commercial banks (excluding regional rural banks).

In order to ensure speedy resolution of Customer Grievances against Regulated Entities (REs), Reserve Bank of India brought about Reserve Bank-Integrated Ombudsman Scheme (RB-IOS)-2021 as single point resolution mechanism. Since it is steered by Reserve Bank of India, all Regulated Entities are conscious about compliance standards. With greater connect of the formal banking system with masses under financial inclusion scheme and increased digitalization of financial system, it is necessary to institutionalize a progressively effective grievances redressal mechanism to infuse greater confidence among users and to protect them from procedural delays, digital hindrances and lack of knowledge of operating people. With the increase in customer base, robust systems have to be developed for development of efficient financial system.

Internal Ombudsman (IO) is already institutionalized in Regulated Entities, where majority of grievances are resolved at entity level. Normally, Regulated Entities do not allow escalation of complaints to Reserve Bank-Integrated Ombudsman Scheme (RB-IOS). Only those that are not satisfactorily closed by Regulated Entities get escalated to the Integrated Ombudsman by customers. This has improved the speed of disposal of complaints.

Any customer aggrieved by an act or omission of a Regulated Entities resulting in deficiency in service can file a complaint under the Integrated Ombudsman Scheme (IOS) personally or through an authorized representative as defined under Clause 3(1)(c) of Reserve BankIntegrated Ombudsman Scheme, 2021 Such customer should have initially lodged the same complaint to Regulated Entities and if the complainant is not satisfied with its decision or if the complaint has remained un-responded by Regulated Entities for 30 days, then only it can be escalated to Reserve Bank-Integrated Ombudsman Scheme (RB-IOS).

Reserve Bank-Integrated Ombudsman Scheme (RB-IOS) will consider the complaints of customers of Regulated Entities without any limit on the amount but it should relate to deficiency in service. There is no cut off of amount to refer a complaint for redressal. Ombudsman can pass an Award for any direct perceived loss / consequential loss suffered by the complainant. A compensation up to Rupees 20 lakhs, in addition to, up to Rupees One lakh for the loss of the complainant's time, expenses incurred and for harassment/mental anguish suffered by the complainant can be awarded by the ombudsman depending upon the proven deficiency of service.

"Deficiency in Service" means a shortcoming or an inadequacy in any financial service or such other services related thereto, which the Regulated Entities (REs) are required to provide statutorily or otherwise, which may or may not result in financial loss or damage to the customer.

RBI brought Credit Information Companies (CICs) within the ambit of RB-IOS much to the relief of large number of small and big borrowers experiencing the difficulties to get corrections done in the rating information. Neither the banks are prompt in informing the correct status of servicing of loans nor CICs are meticulous in reflecting correct status of credit information. Large number of credit cards which have outlived and expired with small debit balances are often reflected in the records of borrowers impacting the credit rating. Many people have to go back and forth with CICs to correct the information to get correct rating.

It is the larger vision of RBI that CICs are brought within the range of RB-IOS. Not only that, RBI mandated that they too need to have an internal ombudsman framework like any other REs to settle most of the grievances before they are escalated to integrated ombudsman.

Looking to the improved efficiency and fine-tuned turnaround time of grievance redressal of REs, the scope of RB-IOS has been further broad based. It henceforth will handle all grievances related to CICs. With increased role of CICs in providing inputs for credit decisions, bringing them under the ambit of RBI is a far-reaching reform. It will provide much needed costfree alternative redressal mechanism for grievances against CICs.

At the same time, CICs will also be made to establish their own Internal Ombudsman (IO) framework like other REs. The proposed move shall provide immense relief to millions who experience downgrades without understanding reasons thus increasing the cost of borrowings from REs.

Based on the above information, answer the following questions:

(a) Why have the Three Ombudsman Schemes been integrated ? What are the major changes ?

(5 marks)

(b) Which Regulated Entities are covered under the Reserve Bank-Integrated Ombudsman Scheme (RB-IOS), 2021 ?

(6 marks)

(c) What is the position of those entities not covered under Reserve Bank-Integrated Ombudsman Scheme (RB-IOS), as regards grievances redressal ?

(3 marks)

(d) What are the benefits of the Reserve Bank-Integrated Ombudsman Scheme (RB-IOS) 2021/Alternate Grievance Redress (AGR) Framework ?

(8 marks)

(e) What happens after a complaint is received by the RBI Ombudsman ? What are the different ways, in which complaints are resolved by the Ombudsman Office?

(5 marks)

(f) How will the integration of Ombudsman Schemes help complainants ?

(5 marks)

(g) Why has the receipt of complaints under Reserve Bank-Integrated Ombudsman Scheme (RB-IOS) been centralized ?

(5 marks)

(h) Can one participate in the conciliation meeting in the Ombudsman's office from anywhere ?

(3 marks)

Answer 1(a)

The three ombudsman schemes, having evolved over different periods, had different grounds for complaints, leading to uneven redress across customers of different entities,

and had different compensation structures, resulting in unequal treatment of aggrieved customers.

There was a perceived need to integrate the three ombudsman schemes into one, simplify the procedure by covering all complaints involving deficiency in service, and centralise the receipt and initial processing of complaints to impart process efficiency.

In addition, under the Reserve Bank-Integrated Ombudsman Scheme (RB-IOS), 2021, the exclusive jurisdiction of each Ombudsman's office has been done away with under the concept of 'One Nation, One Ombudsman'. A Deputy Ombudsman too would be appointed to address certain categories of complaints to allow the Ombudsman's Office a greater adjudication role. A Centralised Receipt and Processing Centre (CRPC) has been set up at the Reserve Bank of India, Chandigarh, along with a contact center with a toll-free number to assist complainants in filing complaints and seeking information related to their complaints / other aspects of the redress mechanism.

Answer 1(b)

The following Regulated Entities of RBI are covered under the Reserve Bank-Integrated Ombudsman Scheme (RB-IOS), 2021:

(i) *Banks*: All commercial banks, including Public Sector Banks, Private Sector Banks, Foreign Banks, Local Area Banks, Small Finance Banks, Payment Banks, Regional Rural Banks, Scheduled Primary (Urban) Co-operative Banks and Non-scheduled Primary (Urban) Co-operative Banks with deposit size of Rs.50 crore and above, as on the date of the audited balance sheet of the previous financial year;

(ii) *NBFCs registered with RBI* : All Non-Banking Financial Companies (NBFCs) (excluding Housing Finance Companies) which (a) are authorized to accept deposits; or (b) have customer interface, with an assets size of Rs.100 crore and above as on the date of the audited balance sheet of the previous financial year;

Note: Core Investment Companies, Infrastructure Debt Fund-Non-banking Financial Companies, Non-Banking Financial Companies-Infrastructure Finance Companies, companies in resolution or winding up / liquidation, or any other NBFC specified by RBI are excluded from the ambit of the RB-IOS, 2021.

(iii) *System Participants* : All Payment System Participants-banks as well as non-banks regulated by RBI are covered under the RB-IOS, 2021. These entities issue Prepaid Payment Instruments (PPIs) and facilitate transactions over National Electronic Funds Transfer (NEFT) / Real Time Gross Settlement (RTGS) / Immediate Payment Service (IMPS) / Unified Parents Interface (UPJ) / Bharat Bill Payment System (BBPS) / Bharat QR Code / Unstructured Supplementary Service Data (USSD) / Aadhaar Enabled Payment System (AePS), etc.

(iv) *Credit Information Companies* : All Credit Information Companies as defined in the Companies Act, 2013 and granted a Certificate of Registration under sub-section (2) of section 5 of the Credit Information Companies (Regulation) Act, 2005.

Answer 1(c)

Customer complaints regarding entities not yet covered under the Reserve Bank-Integrated Ombudsman Scheme (RB-IOS) are UCBs with deposits of less than Rs.50 crore, NBFCs with assets of less than Rs.100 Crore, Housing Finance Companies, CICs (Core Investment Companies) are handled by the Consumer Education and Protection Cells (CEPCs) operating from the RBI's Regional Offices. The process of filing complaints with Consumer Education and Protection Cells (CEPCs) is the same as under the Reserve Bank- Integrated Ombudsman Scheme (RB-IOS).

Answer 1(d)

Reserve Bank-Integrated Ombudsman Scheme (RB-IOS), 2021 has simplified the processes, centralized the receipt of physical and email complaints, brought more Regulated Entities (REs) under its ambit, done away with limited grounds of complaints and different jurisdictions of Ombudsmen and now all complaints involving deficiency in service are covered under Reserve Bank-Integrated Ombudsman Scheme (RB-IOS). Complainants can lodge their complaints against Regulated Entities (RE) on the 24x7 online Complaint Management System (CMS) portal or send their complaint in email / physical form to the Centralised Receipt and Processing Centre (CRPC). Salient benefits for the complainant arising from the Reserve Bank-Integrated Ombudsman Scheme (RB-IOS) with upgraded Complaint Management System (CMS) portal are as under:

i. Simplification in the process of filing the Complaint-on-Complaint Management System (CMS) portal;

ii. A complaint can be filed on the Complaint Management System (CMS) portal / Centralised Receipt and Processing Centre (CRPC) from anywhere in the country irrespective of the address of the complainant, Regulated Entities (RE) or branch involved;

iii. One address and one email for lodging physical / email complaints from anywhere in the country;

iv. Automatic acknowledgement to the complainant on registration of online complaint;

v. Facility for real-time tracking of the status of complaints;

vi. Convenience from the 'One Nation One Ombudsman' approach;

vii. Facility for online submission of additional documents on the Complaint Management System (CMS) itself;

viii. Detailed letter intimating decision/closure of complaint;

ix. Facility for online and voluntary feedback submission by the complainant regarding redress provided by the Reserve Bank of India.

Answer 1(e)

On receipt of a complaint, it is scrutinized to assess whether it is a maintainable or a non-maintainable complaint. If found non-maintainable, the complaint is closed, and a suitable communication is issued to the complainant.

For a maintainable complaint, the RBI Ombudsman endeavours to promote resolution by agreement between the complainant and the Regulated Entities (REs). If an amicable settlement of the complaint is arrived at between the parties, the same is recorded and signed by both parties. As the parties have agreed to the settlement by affixing their signature on it, it becomes binding on both parties and no formal Award is issued by the Ombudsman.

If the matter is not resolved through settlement (facilitation or conciliation or mediation) the Ombudsman, after allowing the parties a reasonable opportunity (and based on records placed before him, principles of banking law and practice, directions, instructions and guidelines issued by Reserve Bank of India from time to time and such other factors which in his opinion are relevant for deciding the complaint), may pass an Award (directing the Regulated Entity for specific performance) or reject the complaint (if the Regulated Entity is found to have adhered to the extant norms and practices in vogue). The outcome of the complaint is communicated to both the complainant and the Regulated Entity.

Answer 1(f)

Under the earlier schemes, customers were required to file their complaints under the correct scheme and with the correct Ombudsman's Office, based on the territorial jurisdiction concerning the branch of the entity being complained against, failing which the complaint would be rejected. This has now been taken care of by having one scheme with a single point of reference for all complaints.

Under the earlier dispensation, the customer had also to ensure that the complaint fell under the specified and limited grounds of complaints under the respective schemes, failing which the complaint would get rejected as non-maintainable. Now, all complaints involving deficiency in service will be admitted under the Reserve Bank-Integrated Ombudsman Scheme (RB-IOS).

The limit for compensation, if any, would also be the same for all complainants, unlike earlier where it varied.

Answer 1(g)

The basic idea behind the centralization of receipts was to have one address, one email, one portal and one contact number for lodging complaints, submitting documents and getting relevant information, and to create process efficiency through the initial processing of complaints in the system and centralizing non-adjudication processes in the centralised receipt and processing centre CRPC to free up Ombudsman staff for the adjudication process. This also facilitates a faceless interface and a one-point reference for complainants as well as the regulated entities.

An important benefit is that there is now a single point of reference. The complaint management system and Centralised Receipt and Processing Centre (CRPC) at Reserve Bank of India, Chandigarh, enable a one-point interface for customers to file complaints, submit documents, track status and get relevant information. The Reserve Bank- Integrated Ombudsman Scheme (RB-IOS) allows for greater coverage as well. While 11,352 entities will eventually come under the scheme in a phased manner, to begin with, the number of entities covered will increase from 1091 under the current three ombudsman bodies to approximately 1975.

Answer 1(h)

Yes. The conciliation meeting can be held virtually either through the videoconferencing facility of the Reserve Bank of India, for which one may have to visit the nearest Reserve Bank of India Office, or from any nearby branch of the bank concerned in consultation with the Ombudsman's Office, or through platforms like Webex, MS Teams, etc., subject to mutual convenience. Audio conference calls are also possible.

Question 2

Factoring Services made an entry into the Indian Market back in 1987, with the recommendations of the 'Vaghul Committee'. Later, in 1988, the Kalyanasundaram Committee laid emphasis on setting up independent agencies to provide factoring services. Eventually, the Factoring Regulation Act, 2011 ('Principal Act') was enacted to provide for "Regulating" the assignment of receivables to factors, making provisions for registration for carrying out factoring business, and the rights and obligations of the parties to the factoring contract. On 14th January, 2022, the Reserve Bank of India ('RBI') Notified the Registration of Factors (Reserve Bank) Regulations, 2022 ('Registration Regulations') laying down the manner of granting Certificate of Registration ('CoR') to Companies which propose to do factoring business. Based on the above information, answer the following questions :

(a) (i) What are the entry point norms for NBFC-Factor ?

(ii) What would happen with the existing companies registered with RBI as NBFCs and conducting factoring business that constitute less than 75 percent of total assets/income ?

(b) (i) Is it necessary for NBFC-Factors to register every factoring transaction with the Central Registry ?

(ii) Can NBFC-Factors undertake Import and Export Factoring ?

(6 marks each)

Answer 2(a)

(i) NBFC - Factor means a Non-banking Financial Company fulfilling the Principal Business criteria i.e., whose financial assets in the factoring business constitute at least 75% of its total assets and whose income derived from factoring business is not less than 75% of its gross income, has Net Owned Funds of Rs.5 crores and has been granted a Certificate of Registration (CoR) by RBI under Section 3 of the Factoring Regulation Act, 2011.

(ii) In case of RBI registered NBFC conducting factoring business that constitutes less than 75% of total assets/income, such a Company shall have to submit to RBI, a letter of its intention either to become a Factor or to close the business totally, and a road map to this effect. The Company would be granted CoR as an NBFC-Factor only after it complies with the Twin Criteria of Financial Assets and Income. If the Company does not comply within the period specified by the Reserve Bank of India, it will have to close the factoring business.

Answer 2(b)

(i) Under Section 19 of the Factoring Act, 2011 every Factor is under obligation to

file the particulars of every transaction of Assignment of Receivables in his favour with the Central Registry (CERSAI) set up under Section 20 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), within a period of "thirty days" from the date of such assignment or from the date of establishment of such registry, as the case may be.

(ii) Yes. An NBFC factor can undertake import and export factoring. However, such NBFC-Factors will need to obtain the necessary authorization from the Foreign Exchange Department of the Reserve Bank of India under Foreign Exchange Management Act, 1999 (FEMA) as amended from time to time and adhere to all the Regulations made under FEMA in this regard.

Question 3

(a) "In exercise of the powers conferred by Sections 12, 12B, and 35A of the Banking Regulation Act, 1949, the Reserve Bank of India issued Guidelines on Acquisition and Holding of Shares or Voting Rights in Banking Companies". These directions are issued with the intent of ensuring that the ultimate ownership and control of Banking Companies are well diversified and the major shareholders of Banking Companies are 'Fit and Proper' on a continuing basis.

Explain the above statement and also RBI Guidelines to get an approval of voting rights in a Banking Company by any person.

(6 marks)

(b) "In order to ensure a financially sound and stable Co-operative Sector, selected Urban Co-operative Banks (UCBs) are termed as Financially Sound and Well Managed (FSWM)". In this connection, explain the revised criteria, for determining the FSWM Status to Urban Co-operative Banks by Reserve Bank of India.

(6 marks)

Answer 3(a)

In terms of Sub-section (1) of Section 12B of the Banking Regulation Act, 1949, every person, who intends to acquire shares or voting rights and intends to be a major shareholder of a banking company, is required to obtain previous approval of the Reserve Bank of India.

Under Section 12(2) of the Banking Regulation Act, 1949, a person holding any share/s in a banking company may exercise voting rights on the poll, not exceeding 10% of the total voting rights of all the shareholders of the banking company.

With effect from 18th January 2013, RBI has the power to increase the same gradually from 10% to 26%. Further under section 12(1) (ii) (b) preference shareholders cannot exercise voting rights in respect of shares held by them in a banking company as specified under the Companies Act.

Under section 12(3), no suit can be filed against a registered shareholder except by a genuine transferee of such shares or on behalf of minors or lunatics for whom such shares are held by a registered shareholder.

Any person who intends to acquire shares or voting rights in a Banking Company

beyond the limit for which approval was obtained from the Reserve Bank, is required to apply to the Reserve Bank for prior approval to increase their aggregate holding in the banking company.

Answer 3(b)

The process of deciding the eligibility for being classified as a Financially Sound and Well Managed (FSWM) UCB may be carried out by Urban Co-operative Banks (UCBs) themselves as per the revised criteria based on the assessed financials and findings of RBI inspection report or audited financial statements, whichever is the latest. The Boards of the Banks shall examine the compliance to the Financially Sound and Well Managed (FWSM) criteria and pass the necessary resolution approving the same and inform the concerned Regional Office of the Department of Supervision, Reserve Bank of India immediately, and in any case, not later than 15 calendar days from the date of passing the resolution. Urban Co-operative Banks (UCBs) may review the compliance with FSWM criteria every year at the Board level as indicated above immediately after the audit of the financial statements and RBI inspection report as and when received. This process will be subject to supervisory review.

The revised criteria, for determining the Financially Sound and Well Managed (FSWM) status have been given as under:

a. The CRAR shall be at least I percentage point above the minimum Capital to Risk Weighted Assets Ratio (CRAR) applicable to a UCB as on the reference date;

b. Net NPA of not more than 3%;

c. Net profit for at least three out of the preceding four years subject to it not having incurred a net loss in the immediately preceding year;

d. No default in the maintenance of CRR / SLR during the preceding financial year;

e. Sound Internal Control System with at least two professional directors on the Board;

f. Core Banking Solution (CBS) fully implemented; and

g. No monetary penalty should have been imposed on the bank on account of violation of RBI directives / guidelines during the last two financial years.

Question 4

(a) What is Clayton's Rule and how will it apply to Bank for closure of customer's account ?

(b) Commercial Paper (CP) is an unsecured and discounted promissory note issued to finance the short-term credit needs of large institutional buyers. CPs are currently traded in OTC market settled through clearing corporations. Further, SEBI has issued a Circular on 22nd October, 2019 providing for the framework for listing of CPs for trading in Stock Exchanges in order to enhance the investor participation which will in turn help the issuers to cope up with their short-term fund requirements. In this connection, explain the various applicable laws governing Issue of Commercial Papers by NBFCs/Corporates in India.

(c) There are some statutory restrictions on lending by banks under Banking Regulation Act 1949. What are those restrictions ?

(4 marks each)

Answer 4(a)

Application of Clayton's Rule to Bank

If a firm stands dissolved- On receipt of information about a partner's death, the banker will close the firm's account immediately. This is necessary to decide the liability of the deceased partner. If this is not done Clayton's Rule will apply, which is as follows:

In the absence of specific direction by a customer, the banker enjoys the right to appropriate the money paid by the customer into his account to any of the loans including a time-barred debt. But however, if there is a specific direction from the customer regarding appropriation, the banker has to follow the same and does not have the power to alter it. In the absence of any direction from the customer, the banker can appropriate the money paid by the customer at his discretion but should keep the customer informed of his action.

In case both the customer and the bank fail to act as per their powers, the rule given in Clayton's Rule of 1816 will apply. Accordingly, if no specific appropriation is made by the debtor or the creditor, the law allows appropriating the money paid by the customer to his account by reducing the first item on the debit side of the current account by the first item on its credit side in its chronological order. In short, this rule sets off the sum first paid in with the sum that is first paid out. This rule applies to current accounts especially when it is overdrawn. To nullify the applicability of this rule, the operation in the overdrawn current account are stopped especially when there is a death of a partner in a firm and under specific circumstances.

Answer 4(b)

Commercial Papers (CPs) are governed by the following laws:

1. *Companies Act, 2013* : The Companies Act does not specifically provide for CPs. Further, no definition for CPs exists under Company law. Thus, they would be treated like any other borrowings and would consequently trigger Sections 179 and 180 for borrowing through CPs. Also, since CPs are not Securities, provisions relating to the Private placement of securities (Section 42 of the Companies Act, 2013) would not apply to the issuance of CPs.

2. *RBI Directions* : The Reserve Bank of India (RBI) introduced the Commercial Paper Directions, 2017 (Directions) on 10th August 2017. The primary purpose of the Directions was to regulate CPs accepted as deposits by Non-banking Companies. The Directions supersede the previous directions such as the Non-Banking Companies (Acceptance of deposits through Commercial Paper) Directions 1989, which had been amended in 1996, 1998, 2000 and further in 2012 (2012 Guidelines). The Directions also repealed Section II of the extant directions on Commercial Paper in the Master Directions on Money Market.

3. *Fixed Income Money Market and Derivatives Association of India (FIMMDA) Operative Guidelines* : FIMMDA has issued Operating Guidelines that prescribe

procedures and documentation required to be followed by issuers, investors and IPAs of CPs. These guidelines are issued with the aim of investor protection.

4. *Indian Stamp Act,1899* : Since CPs are instruments that create a liability for the issuer and a right for the investor, provisions relating to stamp duty will be attracted. Stamp duty implications will be governed by the Indian Stamp Act, of 1899.

5. *Foreign Exchange Management Act (FEMA)* : FEMA (Debt Instruments) Regulations, 2019 lay down provisions relating to investment by non-residents in CPs.

6. *Securities and Exchange Board of India (SEBI) and Stock Exchanges (SE) Circulars for Listing* : Issuers may choose to list their CPs. Listing of CPs is voluntary and compliances with SEBI and Stock exchange Circulars issued on this behalf from time to time.

Answer 4(c)

Statutory restrictions on lending by Banks under the Banking Regulation Act, 1949:

i. In terms of Section 20(l) of the Banking Regulation Act, 1949, a bank cannot sanction loans/advances on the security of its own shares.

ii. Under Section 20(1) of the Banking Regulation Act, 1949, a bank cannot sanction loans/ advances to directors and the firms in which they are substantially interested.

iii. As per the provision of Companies Act, 2013, companies are permitted to buy back their own shares out of their free reserves/ securities premium account or from the proceeds of any shares/securities subject to compliance of statutory provisions. Banks should not provide any loans for buyback of securities.

iv. Without prior approval of the board, banks should not grant any loans/advances to the directors/ their relatives of the bank/other banks including cooperative banks or of their subsidiaries/ trusts/mutual funds/venture capital funds set up by them. .

v. Banks should not grant any loans/advances to industries producing/ consuming any ozone depleting substances.

vi. There are also restrictions on advances against sensitive commodities under Selective Credit Control, as per RBI directives from time to time.

vii. Financing of Badla transactions by banks/its subsidiaries are strictly prohibited.

viii. Finance should not be extended to any person by way of bridge loans against subsidies/refunds/reimbursements, capital contributions etc. receivable from Central Government/State Government, subject to certain exemptions like financing against receivables from Government by exporters (i.e. duty drawback & IPRS).

Question 5

(a) Is bouncing of cheques a criminal offence under NI Act ? What are the applicable provisions ?

(b) What are the components that form Tier 1 and Tier 2 capital of banks ?
(6 marks each)

Answer 5(a)

Under Section 138 of the Negotiable Instruments Act, 1881 (NI Act), dishonour of a cheque is a criminal offence punishable with 2 years' imprisonment. The following are required to be satisfied to make the dishonour an offence under the provisions of the NI Act.

i. Existence of a legally enforceable debt or other liability by the drawer of the cheque towards another person (will be payee or holder of the cheque) and the cheque is drawn to discharge the debt/liability.

ii. The cheque is returned due to insufficient funds or it has exceeded the arrangement with the bank.

iii. The cheque was not a stale one (i.e. presented within 3 months of issue).

iv. Notice in writing is sent to the drawer within 30 days along with information received from the bank.

v. The payee or the holder does not receive the payment within 15 days of notice to the drawer.

Cheques issued towards payment of debt will only attract the provisions of Section 138. Cheques given for donation post-dated cheques issued for security purposes or undated cheques are not covered under this section.

Answer 5(b)

Tier 1 Capital items of a Bank

1. Paid up capital, statutory reserves, disclosed free reserves
2. Capital reserve (e.g. Surplus from sale of assets)
3. Eligible Innovative Perpetual Debt Instruments (IPDI) up to 15% of Tier 1 capital
4. Perpetual non-cumulative preference shares (PNPS)- 3 & 4 can be a maximum of 40% of Tier 1.

Tier 2 Capital item of a Bank

1. Revaluation Reserve at a discount of 55%
2. General Provision & Loss Reserves
3. Hybrid debt capital instruments. (e.g. Perpetual cumulative preference shares, Redeemable Non-Cumulative Preference Shares, and Redeemable Cumulative Preference shares.)
4. Subordinate debt; fully paid up, unsecured, subordinated to other creditors, free of restrictive clauses.
5. Remaining IPDI & PNPS from Tier 1 capital (i.e. surplus)

Question 6

(a) Cash Credit/Overdraft (CC/OD) is to be classified as NPA if it is 'Out of Order'. Explain the guidelines issued by the Reserve Bank of India in respect of "Out of Order" Loan Accounts by the Commercial Banks.

(4 marks)

(b) "दक्ष (DAKSH) means 'efficient' & 'competent', reflecting the underlying capabilities of the application. RBI Migrated Payments Fraud Reporting Module to DAKSH from Jan 1, 2023." Explain the importance of RBI's Central Payments Fraud Information Registry (CPFIR) System and its Migration of Reporting to DAKSH.

(8 marks)

Answer 6(a)

The following are the guidelines of RBI in respect of "Out of Order" Loan Accounts:

i. The definition of 'out of order', as clarified in the RBI Circular, shall apply to all loan products being offered as an overdraft facility, including those not meant for business purposes and/or which entail interest repayments as the only credits.

ii. The 'previous 90 days period' for determination of the 'out of order' status of a CC/OD account shall be inclusive of the day for which the day-end process is being run.

iii. In the case of borrowers having more than one credit facility from a lending institution, loan accounts shall be upgraded from NPA to standard asset category only upon repayment of entire arrears of interest and principal of all the credit facilities.

iv. The RBI Circular does not make any changes to the requirements related to reporting information to the Central Repository of Information on Large Credits (CRILC), which will continue to be governed in terms of extant instructions for respective entities.

v. These instructions do not, in any way, interfere with the extant guidelines on the implementation of Ind-AS by Non-banking Financial Companies (NBFCs).

vi. Loan accounts classified as NPAs by banks/NBFCs may be upgraded as 'Standard' assets only if entire arrears of interest and principal are paid by the borrower.

Answer 6(b)

''दक्ष (DAKSH)" is a web-based end-to-end workflow application through which RBI shall monitor compliance requirements in a more focused manner to further improve the compliance culture in Supervised Entities (SEs) like Banks, NBFCs, etc.

The application will also enable seamless communication, inspection planning and execution, cyber incident reporting and analysis, provision of various MIS reports etc., through a Platform which enables anytime-anywhere secure access.

Central Payments Fraud Information Registry (CPFIR) is reporting payment frauds by scheduled commercial banks and non-bank Prepaid Payment Instrument (PPI) issuers.

To streamline reporting, enhance efficiency and automate the payments fraud management process, the fraud reporting module is being migrated to DAKSH-Reserve Bank's Advanced Supervisory Monitoring System. The migration will be effective from 1st January 2023, i.e., entities shall commence reporting payment frauds in DAKSH from this date. In addition to the existing bulk upload facility to report payment frauds, DAKSH provides additional functionalities, viz. maker-checker facility, online screen-based reporting, option for requesting additional information, facility to issue alerts/ advisories, generation of dashboards and reports, etc.

The CPFIR reporting guidelines are:

(i) All RBI-authorised Payment System Operators (PSOs) / providers and payment system participants operating in India are required to report all payment frauds, including attempted incidents, irrespective of value, either reported by their customers or detected by the entities themselves. This reporting was earlier facilitated through the Electronic Data Submission Portal (EDSP) and is being migrated to DAKSH.

(ii) The responsibility to submit the reported payment fraud transactions shall be of the issuer bank / Prepaid Payment Instrument (PPI) issuer/credit card issuing NBFCs, whose issued payment instrument has been used in the fraud.

(iii) Entities are required to validate the payment fraud information reported by the customer in their systems to ensure authenticity and completeness, before reporting the same to RBI on an individual transaction basis.

(iv) Entities are required to report payment frauds (domestic and international) to the Central Payments Fraud Information Registry (CPFIR) as per the specified timelines (currently within 7 calendar days from the date of reporting by the customer/date of detection by the entity).

(v) Entities may continue to report payment frauds as per the extant reporting format using the bulk upload facility in DAKSH or report individual payment frauds online using the screen-based facility under the Incident Module of the DAKSH platform.

(vi) After the life of payment fraud reporting in DAKSH effective from 1st January 2023, entities shall not be able to report any payment frauds in the Electronic Data Submission Portal (EDSP). Entities may, however, continue to update and close payment frauds reported in the Electronic Data Submission Portal (EDSP) until 31st December 2022. Reserve Bank shall subsequently migrate the historical data from the Electronic Data Submission Portal (EDSP) to DAKSH.

(vii) Though some elements/fields of the Reporting Format are indicated as 'Optional', entities shall strive to include them as part of initial reporting and only in exceptional cases be reported as updates.

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INSURANCE - LAW AND PRACTICE

Time allowed : 3 hours *Maximum marks : 100*

Total number of questions : 6

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

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

Question 1

Late Mr. NKG, husband of Smt. AG, was an employee of M/s DW Woollen Mills Ltd. at Jamnagar as a Labour Officer. He submitted a proposal for a life insurance policy at Meerut in the State of U.P. on 29th May, 1979 which was accepted and the policy for a sum of Rs.1,00,000 (Rs. One lakh) was issued by the Company in his favour. The insured passed away on 12th December, 1980 at the age of 46 leaving behind his wife, a daughter and a son. The cause of death was certified as acute Myocardial Infarction and Cardiac arrest. Smt. AG, being nominee of the deceased under the policy informed the Divisional Manager, Meerut City, about the death of her husband, and submitted the claim along with other papers as instructed by the Divisional Manager and requested for consideration of her claim and for making payment. The Divisional Manager by his letter dated 8th June, 1981 repudiated any liability under the policy and refused to make any payment on the ground that the deceased had withheld correct information regarding his health at the time of effecting the insurance with the Company. The Divisional Manager drew the attention of the claimant that at the time of submitting the proposal for insurance on May 29, 1979, the deceased had stated his usual state of health as good, that he had not consulted a medical practitioner within the last five years for any ailment requiring treatment for more than a week, and had answered the question if remained absent from place of your work on ground of health during the last five years in the negative. According to the Divisional Manager, the answers given by the deceased as aforementioned were false. Since, Smt. AG failed to get any relief from the authorities of the Company despite best efforts she filed the writ petition seeking a writ of mandamus directing the Company and its officers to pay the sum assured and other accruing benefits with interest. The writ petition was opposed by the Corporation, on the ground of maintainability as noted earlier. Alternatively, the contention was raised that in case the High Court is inclined to entertain the writ petition then opportunity should be given to the Corporation to lead evidence in support of its plea of repudiation of the claim.

The learned single Judge after examining the question of maintainability of the writ petition from different angles, held that in view of the provisions of the Life Insurance Corporation Act, 1956 and the relevant provisions of the Insurance Act, 1928 which are applicable to the Company's liability under a policy of life insurance is a statutory liability and hence a writ petition can lie under Article 226 of the Constitution. The learned Judge also considering the question on the assumption that the liability of the Company under the policy is not a statutory liability but a contractual liability, held that even then a writ petition under Article 226 of the Constitution can lie against the Company for enforcement of such liability. On these findings the learned single Judge rejected the objection of the Company against maintainability of the writ petition. Then the learned judge further considered the objection raised on behalf of the Company that the case involves disputed questions of fact for determination of which it will be necessary to record evidence and writ jurisdiction of the High Court under Article 226 of the Constitution should not be exercised in such a case. He was not inclined to hold that the matter involves disputed questions of fact just because the Company produced

a document which is inconsistent with those produced by the writ petitioner. The learned Judge did not feel satisfied that this is a fit case in which the Company should be granted liberty to lead evidence before the High Court. Examining the matter on merits the learned single Judge referred to the provisions of section 45 of the Insurance Act, 1938 which imposes certain restrictions on the scope of repudiation of a claim by the insurer and held that the Company has not brought on record satisfactory evidence to establish any of the conditions envisaged in the second part of section 45. The learned Judge refused to draw a conclusion that the deceased was having heart ailment in 1976 for which he had taken 13 days sick leave and held that much importance cannot be attached to the leave records in the matter. On such findings, the learned Single Judge rejected the case of the Company on merit. Hence, as a result, the Life Insurance Company was directed to pay to the petitioner an amount of Rs.1,00,000/- (One lakh) arising out of Life Insurance Policy of her deceased husband NKG, together with all the benefits accruing therefrom with interest at the rate of 15% from the date of the death of the petitioners husband within a month. The Company is also directed to pay cost of Rs. 2,000/- to the petitioner. On the basis of above facts, answer the following questions :

(a) Discuss the merits of the arguments raised by Life Insurance company in repudiating the claim.

(8 marks)

(b) What are the avenues for consumers to get redressal through consumer courts?

(8 marks)

(c) What are the provisions of Section 45 and what is the impact of this section on the tenability of the claim in the present case ?

(8 marks.)

(d) Do you agree that there is a breach of trust and violation of the principle of Utmost good faith in this case ? Is the present case a justifiable claim ?

(8 marks)

(e) What are the circumstances, where insurer has ascertained that the death claim is payable but is unable to settle the claim ? In this regard, discuss the provisions of Section 47 of the Insurance Act, 1938.

(8 marks)

Answer 1(a)

Insurers may refuse to pay claims for a variety of reasons. As all insurance is an agreement (contract) between the insured and the insurer, the insurer will always rely on the insurance agreement, which is contained in:

i. The Schedule of insurance, read together with

ii. The Policy

The Schedule details the specific items and amounts insured; and exclusions and preconditions, it may also include the statements insured has made (proposal) as a basis on which the insurer has entered into the agreement. The Policy details the general conditions items insured under most contracts, procedures and all of the other relevant terms of the agreement. Collectively they form the evidence of the contract of insurance.

In the present case, the claimant Smt. AG, wife of the deceased policyholder submitted a death claim, for Rs. l,00,000 as the death was caused due to acute Myocardial Infarction and Cardiac arrest, in the capacity of a nominee. However, the Divisional Manager by his letter dated 8th June, 1981 repudiated any liability under the policy and

refused to make any payment on the ground that the deceased had withheld correct information regarding his health at the time of effecting the insurance with the Company. The Divisional Manager argued that the claimant at the time of submitting the proposal for insurance on May 29, 1979, the deceased had stated his usual state of health as good, that he had not consulted a medical practitioner within the last five years for any ailment requiring treatment for more than a week, and had answered the question if remained absent from place of your work on ground of health during the last five years in the negative. Hence, the insurance company was of the opinion that the policyholder Mr. NKG did not disclose vital information with regards to his heart condition as it is a pre-existing disease. Hence, the company contented that, it is not liable for any compensation under the policy, as there is non-disclosure of material fact, with respect to the pre-existing condition of the policyholder. Hence the company was of the opinion that the repudiation of the claim was justified.

Answer 1(b)

The Consumer Protection Act is an act of Parliament enacted in 1986, revised in 2019, aims to protect interests of consumers in India. It makes provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for mattes connected therewith. Consumer Protection Councils are established at the national, state and district level to increase consumer awareness. The Central Consumer Protection Council is established by the Central Government which consists of the Minister of Consumer Affairs as the chairman and such number of other official or non-official members representing such interests as may be prescribed. The State Consumer Protection Council consists of the Minister in charge of consumer affairs in the State Government as the Chairman and such other officials appointed by the Central and State Government.

As regards the options available to consumers for their redressal and complaints, the following avenues are available:

- District Consumer Disputes Redressal Forum established by the State Government in each district of the State. The State Government may establish more than one District Forum in a district. It is a district level court that deals with cases valuing upto Rs. 50 lakhs.
- State Consumer Disputes Redressal Forum established by the State Government takes up cases valuing between Rs. 50 lakh and Rs. 2 crore.
- National Consumer Disputes Redressal Commission established by the Central Government, which works as a national level Court and deals with amounts more than Rs.2 Crore.

None of the above fora can entertain a complaint unless it is filed within two years from the date on which the cause of action had arisen. Notwithstanding the above, a complaint may be entertained after the period of two years, if the complainant satisfies the concerned forum that he had sufficient cause for not filing the complaint within such period and the reason for condonation of the delay is recorded by the concerned forum.

Answer 1(c)

The provisions of section 45 deal with restrictions with respect to repudiation of claims. The section provides, inter alia, that no policy of life insurance effected after the coming into force of this Act shall, after the expiry of three years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made

by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that is suppressed facts which it was material to disclose.

A policy of life insurance may be called in question at any time within three years from the date of issuance of the policy or the date of commencement of risk or the date of revival of the policy or the date of the rider to the policy, whichever is later, on the ground of fraud:

A policy of life insurance may be called in question at any time within three years from the date of issuance of the policy or the date of commencement of risk or the date of revival of the policy or the date of the rider to the policy, whichever is later, on the ground that any statement of or suppression of a fact material to the expectancy of the life of the insured was incorrectly made in the proposal or other document on the basis of which the policy was issued or revived or rider issued:

It lays down three conditions for applicability of the section namely:

i. the statement must be on a material matter or must suppress facts which it was material to disclose.

ii. the suppression must be fraudulently made by the policy holder, and

iii. the policy holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose. Mere inaccuracy of falsity in respect of some recitals or items in the proposal is not sufficient. The burden of proof is on the insurer to establish these circumstances and unless the insurer is able to do so there is no question of the policy being avoided on ground of misstatement of facts.

Answer 1(d)

The contracts of insurance including the contract of life assurance are contracts uberrima fides and every facet of material must be disclosed, otherwise, there is good ground for rescission of the contract. The duty to disclose material facts continues right up to the conclusion of the contract and also implies any material alteration in the character of the risk which may take place between the proposal and its acceptance. If there are any misstatements or suppression of material facts, the policy can be called in question. For determination of the question whether there has been suppression of any material facts it may be necessary to also examine whether the suppression relates to a fact which is in the exclusive knowledge of the person intending to take the policy and it could not be ascertained by reasonable enquiry by a prudent person.

Where the policy holder, who had been treated, a few months before he submitted a proposal for the insurance of his life with the insurance company by a physician of repute for certain serious ailments as anaemia, shortness of breath and asthma, not only failed to disclose in his answers to the questions put to him by the insurance company that he suffered from those ailments but he made a false statement to the effect that he had not been treated by any doctor for any such serious ailment, in the present case, however, the policyholder also did not disclose the fact of his medical treatment in the proposal form. To that extent he has violated the principle of utmost good faith. However, it can be also be observed that the non-disclosure of material fact was not done with the intention of cheating or defrauding the insurance company. Hence, the learned court has directed the company to make payment of the sum insured, as there was no malafide intention on the part of the policyholder in not disclosing his health condition. Hence, the court directed the company to make payment with interest also to spouse of the deceased policyholder.

In the present case the claim is justified and has to be paid as directed by the court. The court rejected the case of the Company on merit. The court has also given the instructions to pay the interest rate of 15% from the date of due payment.

Answer 1(e)

A claim under a life insurance contract is triggered by the happening of one or more of the events covered under the insurance contract. Claims can be survival claims and death claim. While a death claim arises only upon the death of the life assured, survival claims can be caused by one or more events. For payment of a survival claim, the insurer has to ascertain that the event has occurred as per the conditions stipulated in the policy. Maturity claims, money-back instalment claims and surrender claims are easier to be established as they are based on dates and positive action by the policyholder. Critical illness claims are ascertained based on the medical and other records provided by the policyholder in support of his claim. The complexity arises in case of a policy that has a critical illness claim rider and such policy is assigned. It is intended that a critical illness benefit should be paid to the policyholder so as to enable him defray his expenses. However, where the policy is assigned, all benefits are payable to the assignee which, although legally correct, may not meet the intended purpose. The triggering of a maturity or death claim leads to termination of the insurance cover under the contract and no further insurance cover is available. While in most cases, a claim is disputed by the Insurer on the basis of such claim not meeting the policy conditions, there are times where the insurer has ascertained that the death claim is payable but is unable to settle the same due to conflicting claims or insufficiency of proof of title of the rightful claimant. This happens under the following circumstances

- Absence of nomination by the policyholder,
- Registration of an assignment,
- multiple claimants with conflicting claims with insufficient proof of title,

Where the claimant has approached the Court for settlement of property disputes including insurance claims, Circumstances where for the Insurer to obtain a satisfactory discharge from the claimant. Under these circumstances, Section 47 of the Insurance Act, 1938 provides the provision as follows:

- Where in respect of any policy of life insurance maturing for payment an insurer is of opinion that by reason of conflicting claims to or insufficiency of proof of title to the amount secured thereby or for any other adequate reason it is impossible otherwise for the insurer to obtain a satisfactory discharge for the payment of such amount, the insurer may, apply to pay the amount into the Court within the jurisdiction of which is situated the place at which such amount is payable under the terms of the policy or otherwise.
- A receipt granted by the Court for any such payment shall be a satisfactory discharge to the insurer for the payment of such amount.
- An application for permission to make a payment into Court under this section, shall be made by a petition verified by an affidavit signed by a principal officer of the insurer setting forth the following particulars, namely:
    a) the name of the insured person and his address,
    b) if the insured person is deceased, the date and place of his death,
    c) the nature of the policy and the amount secured by it,
    d) the name and address of each claimant so far as is known to the insurer with details of every notice of claim received,
    e) the reasons why in the opinion of the insurer satisfactory discharge cannot be obtained for the payment of the amount; and

f) the address at which the insurer may be served with notice of any proceeding relating to disposal of the amount paid into Court.

- An application under this section shall not be entertained by the Court if the application is made before the expiry of six months [from the maturing of the policy by survival, or from the date of receipt of notice by the insurer of the death of the insured, as the case may be].
- If it appears to the Court that a satisfactory discharge for the payment of the amount cannot otherwise be obtained by the insurer it shall allow the amount to be paid into Court and shall invest the amount in Government securities pending its disposal.
- The insurer shall transmit to the Court every notice of claim received after the making of the application under sub-section (3), and any payment required by the Court as costs of the proceedings or otherwise in connection with the disposal of the amount paid into Court shall as to the cost of the application under sub-section (3) be borne by the insurer and as to any other costs be in the discretion of the Court.
- The Court shall cause notice to be given to every ascertained claimant of the fact that the amount has been paid into Court, and shall cause notice at the cost of any claimant applying to withdraw the amount to be given to every other ascertained claimant.
- The Court shall decide all questions relating to the disposal of claims to the amount paid into Court.

A careful analysis of the above reproduced provision would reveal that an insurer can approach the competent civil Court if the following contingencies arise, i.e., whether due to conflicting claims or insufficiency of proof of title to the amount secured thereby, or for any other adequate reason, it is not impossible otherwise for the insurer to obtain a satisfactory discharge for the payment of such amount. In such events, insurer can seek permission of the Court to make payment into the Court and obtain a receipt, which will constitute satisfactory discharge to the insurer for the payment of the amount. In other words, the occasion for the insurer to approach the civil Court u/s 47 of the Act would arise when there is no dispute as to the payment of the insured amount but the dispute as to the persons to whom the amount has to be paid or if there is insufficiency of proof of title to the amount secured or any other adequate reason which render it impossible for the insurer to obtain a satisfactory discharge for the payment of such amount.

Question 2

Mr. KP had purchased a bus by taking a loan from M/s. S Financers. The bus was being used as a private service vehicle, and not as a public transport. It was insured under a comprehensive insurance policy issued by M/s. SI Insurance Co. Ltd. The bus met with an accident, for which insurance was claimed. The insurance company appointed its surveyor, who assessed the loss at Rs 1,26,500. However, the company deducted Rs. 33,125 from the assessed amount, on the ground that the driver did not have an endorsement on his licence to drive a transport vehicle. Also the amount was not paid to Mr. KP, but was directly paid to the financer. Aggrieved, Mr. KP filed a consumer complaint that ultimately reached the National Commission.

Questions :

(i) Should an insurance claim be paid to insured or financer ? Justify the stand taken by the company.

(ii) Mention the exclusions under the comprehensive motor insurance policy.

(iii) What are the Innovative trends in auto insurance ?

(4 marks each)

Answer 2(i)

No, the action taken by the company is not justified for the following reasons:

- Firstly, if a person has a licence to drive a heavy goods carriage vehicle, it also means that he/she was entitled to drive a transport vehicle, including a public service vehicle, hence repudiation of the claim on this ground or reason is not tenable.
- Secondly, the company is also not right in making a part payment of the amount of loss. The commission should direct the insurance company to pay the balance amount, along with 12 percent interest and costs.
- Thirdly, the practice adopted by insurance companies of directly paying to the financer, without informing the insured or without his consent, cannot be justified. If the insurance policy is taken in the name of the vehicle purchaser, there is no question of paying the amount straightaway to the financier.

Answer 2(ii)

The common exclusions or limitations in a motor insurance policy are as follows:

- Consequential loss depreciation, wear and tear, mechanical and electrical breakdown, failures or breakages.
- Damage to tyres and tubes (50% in case of mishap).
- Accidental loss or damage under the influence of intoxicating liquor or drugs.
- Method of valuation - claim amount is also limited by the valuation method, for example at retail value (the price at which a dealer will sell a vehicle to a consumer), trade value (the price a dealer pays on purchase of car), or market value (generally the mid-point between trade and retail). These values affect the premiums and what the insurer will pay out when on claim.
- “No water damage” exclusion damage to an engine.
- Excesses or sometimes multiple excesses exclusion. Sometimes, in addition to standard excess, extra excesses may be imposed like others may apply. For example, young or new drivers who haven't had a license for a certain number of years, can be liable for an additional excess.
- If the policyholder has had an accident within six months of obtaining cover, or between midnight and 6am - the most dangerous time on the road - an extra excess may apply.
- And some insurers levy an additional excess on drivers older than a certain age.
- Damages incurred while using the car for illegal purposes.
- Damages caused to the car due to its usage beyond limits.
- Loss or damage as a result of war, terror attacks, hostilities or nuclear accidents.
- Consequential losses due to certain actions from the car owner or a third-party, and not due to an uncertain event. For instance, the engine damage of a car following hydrostatic loss during the monsoons is due to the negligence of the

car-owner, as he had cranked it up in a flooded area. This will not be covered by the insurer.

- Contractual liabilities that the policyholder has towards the car. For example, if the car-owner had pledged his car to another person for a certain duration, and the car is damaged while it was used by the person to whom it was pledged, the damages incurred by the car are not covered by the policy. However, if the pledged car was driven by the car-owner himself, the damages to the car will be covered by the insurance, as per the comprehensive coverage of the policy.

Answer 2(iii)

Innovative Trends in Auto Insurance includes

Trend 1: Transition to telematics rates

The introduction of telematics rates allows insurers to better understand individual driving behavior and offer personalized insurance rates. However, data protection and acceptance are still obstacles that need to be overcome to realize the full potential of this technology.

Trend 2: Environmental awareness and insurance premiums

Increasing demand for environmentally friendly vehicles is leading to incentives from insurers offering lower premiums for low-emission vehicles. This premium structure not only factors in the individual environmental impact, but also reflects the lower risk and safety of these vehicles.

Trend 3: Rise of micro cars as an environmentally friendly alternative

Micro cars such as electric vehicles are becoming increasingly popular because they produce no harmful emissions. The insurance industry is responding to this development with specialized rates, factoring in the lower accident risks and repair costs of these vehicles. In addition, the trend opens up the possibility for innovative insurance products that cover specific micro car risks and highlights the influences of technological innovation on the insurance landscape.

Trend 4: Personalization and customer experience through AI

The use of artificial intelligence allows for more in-depth personalization of insurance rates and an improved customer experience. By analyzing driving data, individual offers can be created and potential damage can be better predicted. However, data protection remains an ongoing and major challenge.

Trend 5: Cost awareness and innovative solutions

The insurance industry is striving for efficiency and innovation by embracing automation, digital platforms and AI. This means both cost reductions and better adaptation to individual customer needs.

Question 3

(a) Describe the unique features of an insurance contract. How is it different from other commercial contracts ?

(b) "Insurance distribution channels have undergone a paradigm shift from the traditional agency mode". Discuss the categories, role and function of an insurance Broker.

(6 marks each)

Answer 3(a)

Though all contracts share fundamental concepts and basic elements, insurance contracts typically possess a number of characteristics not widely found in other types of contractual agreements. The most common of these features are listed here:

- **Aleatory:** If one party to a contract might receive considerably more in value than he or she gives up under the terms of the agreement, the contract is said to be aleatory. Insurance contracts are of this type because, depending upon chance or any number of uncertain outcomes, the insured (or his or her beneficiaries) may receive substantially more in claim proceeds than was paid to the insurance company in premium.
- **Adhesion:** In a contract of adhesion, one party draws up the contract in its entirety and presents it to the other party on a 'take it or leave it' basis; the receiving party does not have the option of negotiating, revising, or deleting any part or provision of the document. Insurance contracts are of this type, because the insurer writes the contract and the insured either 'adheres' to it or is denied coverage.
- **Executory:** An executory contract is one in which the covenants of one or more parties to the contract remain partially or completely unfulfilled. Insurance contracts necessarily fall under this strict definition; of course, it's stated in the insurance and agreement that the insurer will only perform its obligation after certain events take place.
- **Unilateral:** A contract may either be bilateral or unilateral. In a bilateral contract, each party exchanges a promise for a promise. However, in a unilateral contract, the promise of one party is exchanged for a specific act of the other party. Insurance contracts are unilateral; the insured performs the act of paying the policy premium, and the insurer promises to reimburse the insured for any covered losses that may occur.
- **Conditional:** A condition is a provision of a contract which limits the rights provided by the contract. In addition to being executory, aleatory, adhesive, and of the utmost good faith, insurance contracts are also conditional. Even when a loss is suffered, certain conditions must be met before the contract can be legally enforced.
- **Personal contract:** Insurance contracts are usually personal agreements between the insurance company and the insured individual, and are not transferable to another person without the insurer's consent.
- **Valued or Indemnity Contract:** An insurance contract is either a valued contract or an indemnity contract. A valued contract pays a stated sum regardless of the actual loss incurred. Life insurance contracts are valued contracts. If an individual acquires a life insurance policy insuring her life for Rs 500,000, that is the amount payable at death. There is no attempt to value actual financial loss upon a person’s death.
- **Utmost Good Faith:** Insurance is a contract of utmost good faith. This means both the policy owner and the insurer must know all material facts and relevant information. There can be no attempt by either party to conceal, disguise, or deceive. A consumer purchases a policy based largely on the insurer and agent’s explanation of the policy’s features, benefits, and advantages. Insurance applicants are required to make a full, fair and honest disclosure of the risk to the agent and insurer.

Answer 3(b)

Insurance Broker is an intermediary and has become prominent in the recent times. Every Insurance Broker shall possess a valid and subsisting licence to act as an Insurance Broker issued by IRDAI. The framework for licensing of an Insurance Broker is similar to that of a Corporate Agent. However, a Broker differs from an Agent in the sense that a Broker represents customer's interests and is required to select the best product amongst all insurance companies, while an agent represents an insurer at any point in time (one in life and one in general insurance) and will present the product of only such insurer(s) with whom the agent is attached with.

The various categories of Brokers include:

(a) Direct Broker (Life)

(b) Direct Broker (General),

(c) Direct Broker (Life & General),

(d) Reinsurance Broker (Reinsurance Life or General) and

(e) Composite Broker (Life and/or General + Reinsurance).

A Direct Broker is authorised to recommend the products of any of the life insurance companies or general insurance companies to their clients, as the case may be. A Reinsurance broker arranges for reinsurance contracts between direct insurers and reinsurance companies. Reinsurance is a contract under which insurance companies can pass on the risk they assume under the policies issued by them, to yet another insurance company (called reinsurer). Therefore, the insurance company which issues the policy becomes the Policyholder under the reinsurance contract entered into with a reinsurer. A broker can be an intermediary who can arrange reinsurance contracts with reinsurance companies. The role of reinsurance brokers in getting a best deal for insurance companies cannot be undermined. A Composite Broker is one who arranges for both insurance contracts both for retail and institutional clients as a Direct Broker as well as for insurance companies as a reinsurance broker. The role of an Insurance Broker, as per the Regulation 3 of the IRDAI (Insurance Brokers) Regulations, 2002 summarises the functions of a Direct Broker as follows:

- Since a Broker represents a client, he is expected to obtain detailed information on client's business and risk management philosophy and familiarise himself with the client's business.
- Render proper advice to the client in selecting the appropriate insurance as well as terms of insurance.
- Possessing a detailed knowledge of insurance markets to be in a position to advice his client.
- Submitting quotation received from insurance companies for consideration of a client.
- Providing the information required about the client or the subject matter to be insured, to enable insurer to properly assess the risk and give a premium quotation.
- Updating customer about the progress of the proposal submitted and providing written acknowledgements.
- Assisting clients in paying premiums.
- Assisting clients in negotiation of claims and maintenance of claim records.

Question 4

(i) Discuss the concept of Human Life Value (HLV) and its importance in building family financial security. From the given details calculate the HLV of Mr. R :

Name : Mr. R
Age : 30 years
Annual gross income : Rs. 2,40,000
Working life expectancy : 30 years
Expected income tax liability : Rs. 15,000/- p.a.
Expected Annual Personal maintenance expenses : Rs. 60,000
Discount rate : 6% per annum.

(6 marks)

(ii) Discuss the implication of the following clauses in a health insurance policy :

- *Pre-existing conditions clause*
- *Policy reinstatement clause*

(6 marks)

Answer 4(i)

Human Life Value (HLV) is the foundational principle based on which the adequacy of insurance coverage is to be evaluated for an individual as a philosophy and framework for building family financial security. HLV is a capitalized value of the net future earnings. Probable income of the insured person or the total income the person is likely to earn during the remaining part of working life. E.g. A person aged 24 will work till 60 years of age. If he is expected to earn Rs. 90 lakhs throughout his life, then his HLV is Rs. 90 lakhs.

From the given details, it can be seen that Mr. R is 30 years old and his working life span is: 30 years.

His annual gross income: Rs. 2,40,000

Working life expectancy: 30 years

Expected income tax liability: Rs. 15,000 p.a.

Expected Annual Personal maintenance expenses: Rs. 60,000

Discount rate: 6% per annum.

Annual Gross Income - Personal expenses = Rs. 2,40,000 - (60,000 + 15,000)

= 2,40,000 - 75,000

= 1,65,000 x (13.765) calculation of PV [1/(1+i)n] = [1/(1+.06)30 = 13.765]

= Rs. 22,71,225

Thus, the Human Life Value or HLV of Mr. R is Rs. 22,71,225. In other words, this is the amount that the family would loose in case, Mr. R would die. This is the amount that is required to be capitalized to ensure that the family would to meet life expenses. Thus HLV denotes that Mr. R's individual's discounted value of future net earnings which would be lost in the event of death today are Rs. 22,71,225. No other financial tool will replace it. But insurance replaces it. It bequeaths part of his economic value to the family members.

Answer 4(ii)

Health insurance contracts have many inbuilt conditions, warranties and clauses. The implication of the Pre-existing clause is to prevent adverse selection. There may be some physical or mental conditions of the insured, which may have existed prior to the date on which the policy takes effect. Pre-existing conditions will be covered after a waiting period, which differs from insurer to insurer.

According to the new terms, only those diseases that are prevalent and have been diagnosed before buying the insurance are considered Pre Existing Diseases (PED). Therefore, if you have an illness that you were unaware of or was not diagnosed before the insurance came into effect, it would not be considered under PED.

This new amendment helps the policyholders in such a way that they won't have to wait for a couple of years to claim their insurance for pre-existing diseases. The PED insurance would cover the costly treatments of such diseases.

Some of the most common pre-existing conditions include thyroid, high blood pressure, diabetes, asthma, cholesterol, etc. Most health insurance companies have a waiting period that can last from a couple of months to a few years before you start covering pre-existing illnesses.

Under the Policy reinstatement clause when the premium is not paid even within the grace period, the policy lapses. However, the policy may be reinstated if the premium is received at least within 45 days. Sometimes a fresh application is required. There is a waiting period for sickness, not accidents, for the reinstated.

Several companies offer this reinstatement facility whereby the limit of the person insured is reinstated before the end of the term of the policy. This has its benefits as the person who is insured has the peace of mind that even though, they have used the health policy due to a claim, there is still adequate protection that is present for them which can still be used.

It becomes useful when a claim is made and can be especially beneficial when there is a situation of multiple claims, especially on a floater policy.

Question 5

(i) Underwriters are the people who decide :

- *Accept the insurance proposal at standard rates*
- *Accept with special conditions*
- *Accept with extra premium*
- *Reject the proposal.*

Discuss all these four situations which influence the underwriter's decision.

(ii) Explain the concept of Mortality table, mortality risk, and enumerate the basic elements that are considered for premium computation. Calculate the premium to be charged given that 2000 persons all aged 50 yrs are insured for Rs. 1,00,000 for 1 year, and the rate of mortality denoted as (q_{50}) is 0.004.

(6 marks each)

Answer 5(i)

Underwriting is the process of evaluation and classification of risk. It is this core function of the company that determines its financial soundness. It is rightly termed as assumption of liability. With the issuance of every policy, the insurer makes a future promise and is therefore undertaking a liability. Underwriting essentially involves the selection of policyholders after thoroughly evaluating all hazards, establishing prices

and then determining the terms and conditions of the insurance policy. The underwriters aim to generate profits and minimize losses through a well-balanced underwriting policy. The objectives of underwriting include producing a large volume of premium income that is sufficient to maintain and enlarge the insurance company's operations and to achieve a better spread of the risk portfolio, thereby earning a reasonable amount of profit on insurance operations.

Types of hazards which can influence to accept or reject risk are:

a. Physical hazards: These are hazards that affect the physical characteristics of whatever is being insured. For example a building made of wood represents a higher level of physical hazard than one made of brick.

b. Moral hazards: These hazards refer to the defects that exist in a person's character that may increase the frequency or the severity of loss. Such a character may tend to increase the loss for the company e.g., taking a policy of insurance with an intention to cheat or commit fraud.

c. Financial hazards: If the value of the risk is beyond the capacity of the insurer he may reject the risk, or share the same.

d. Morale hazard: This hazard refers to the attitude of the insured which is reflected through his behaviour because of existence of insurance towards his belongings. For example, an insured may take minimum precaution of safety because he knows he has insurance policy.

Therefore, the Underwriter has the following choices:

The underwriter can accept a proposal, reject it or accept it with certain modifications. Some of the modifications that can be made are:

- Hazard incidence can be reduced: For loss prevention and minimisation, underwriters can recommend certain changes that will safeguard against physical hazards. For example, installing sprinkler systems and better fire-fighting equipment in offices will reduce damages in case of fire.

- Changing rating plans and policy terms: Sometimes a proposal that seems unacceptable at one rate may become a desirable business under another rating plan or with Special Conditions such as 'compulsory excess'

Answer 5(ii)

A mortality table, also known as a life table or actuarial table, shows the rate of deaths occurring in a defined population during a selected time interval, or survival rates from birth to death.

A mortality table, also known as a life table or actuarial table, is a statistical tool used in actuarial science and demography to represent the mortality or survival patterns of a population over time. These tables provide a systematic way to analyze and quantify the probability of death at different ages. Mortality tables are commonly used in the insurance industry, pension planning, and social sciences to assess mortality risk and make predictions related to life expectancy.

Key components of a mortality table include:

1. Age : The table is typically organized by age intervals, with each interval representing a specific age range (e.g., 0-1, 1-5, 5-10, etc.).

2. lx (Survival Function): This represents the number of individuals alive at the beginning of the age interval (denoted by x). It is also known as the survivorship function.

3. qx (Mortality Function): This represents the probability of dying during the age interval (x to x+1) for those who have survived up to the beginning of the interval. It is calculated as the number of deaths during the interval divided by the number alive at the beginning.
4. Tx (Total Person-Years): This represents the total number of person-years lived by a cohort up to age x. It is the sum of the lx values for all ages up to x.
5. Ex (Life Expectancy at Age x): This is the expected number of years a person of age x will live, assuming current mortality rates persist throughout their remaining lifetime. It is calculated as the ratio of Tx to lx.

Mortality risk is the risk that an insurance company can suffer financially because too many of their life insurance policyholders die before their expected lifespans. On the other hand, Mortality risk is the risk associated with the variability in liability cash flows due to the incidence of death. Level, trend, volatility and catastrophe risk components are calculated for all individual and group life insurance products that are exposed to mortality risk.

Mortality risk refers to the likelihood of death within a given population or age group. Actuaries and researchers use mortality tables to assess mortality risk and make predictions about future mortality rates. Insurance companies, for example, use mortality tables to calculate premiums and reserves for life insurance policies and annuities. Understanding mortality risk is crucial for making informed decisions in various fields, including pension planning, healthcare, and public policy

The basic element that are to be considered at the time of premium calculation include the following:

- Mortality costs
- Morbidity costs
- Other Direct costs
- Indirect costs
- Cost of Bonus
- Profit Margin

In addition, the premium has to be loaded with extra charge based on the loss experience of the insured.

The formula for the premium (P) can be expressed as:

Number of insured persons × Insured amount per person × Mortality rate

P=Number of insured persons × Insured amount per person × Mortality rate

Given the information:

Number of insured persons (n) = 2000

Insured amount per person (A) = Rs 100,000

Mortality rate (m) = 0.004

P=2000×100000×0.004

P=800,000

Therefore, the premium to be charged for insuring 2000 persons, all of age 50, for Rs 100,000 each for 1 year with a mortality rate of 0.004 is Rs 800,000. This premium amount is intended to cover the expected claims due to the mortality risk associated with the insured population.

Question 6

(a) Differentiate between insurance and wager.

(b) Explain the role of Insurance in Risk Management.

(c) "Liability generally arises out of negligence and breach of duty." Discuss the relevance of Liability Insurance.

(4 marks each)

Answer 6 (a)

A contract of Insurance, i.e. life, accident, fire, marine, etc. is not a wager though it is performable upon an uncertain event. It is so because; the principle of insurable interest distinguishes insurance from a wagering contract. Insurable interest is the interest which one has in the safety or preservation of the subject matter of insurance. Where insurable interest is not present in insurance contracts, it becomes a wagering contract and is therefore void. The following are the points of distinction between wagering agreements and insurance contracts.

- The parties have no insurable interest in a wagering agreement. But the holder of an insurance policy must have an insurable interest.
- In wagering agreement, neither party has any interest in happening or non-happening of an event. But in a contract of insurance, both the parties are interested in the subject matter.
- Contracts of insurance are contracts of indemnity except life insurance contract, which is a contingent contract. But a wagering agreement is a conditional contract.
- Contract of insurance are based on scientific and actuarial calculation of risks, whereas wagering agreements are a gamble without any scientific calculation of risk.
- Contracts of insurance are regarded as beneficial to the public and hence encouraged by the state but wagering agreements serve no useful purpose. A contract of insurance is a valid contract whereas as a wagering agreement is void being expressly declared by law.
- Insurance is generally viewed as a socially responsible practice, providing individuals and businesses with a safety net in times of need. Wagering, particularly in the context of excessive gambling, is sometimes associated with ethical concerns, as it can lead to financial hardship and addiction.
- In insurance, there must be an insurable interest, meaning the insured party must stand to suffer a financial loss if the insured event occurs. This ensures that insurance is based on the principle of indemnity and is not used for speculative purposes. Wagering does not require an insurable interest. It is a bet placed on an outcome without necessarily having a financial interest in the outcome.

Answer 6 (b)

'Risk, in insurance terms, is the possibility of a loss or other adverse event that has the potential to interfere with an organization's ability to fulfill its mandate, and for which an insurance claim may be submitted'. Risk management ensures that an organization identifies and understands the risks to which it is exposed. Risk management also guarantees that the organization creates and implements an effective plan to prevent losses or reduce the impact if a loss occurs. A risk management plan includes strategies and techniques for recognizing and confronting these threats. Good risk

management doesn't have to be expensive or time consuming; it may be as uncomplicated as answering these three questions:

Key aspects of the role of insurance in risk management:

1. Financial Protection : Insurance serves as a financial safety net by compensating policyholders for covered losses or damages. This protection helps individuals and businesses avoid financial ruin in the face of unforeseen events such as accidents, natural disasters, or other perils.
2. Risk Transfer : Insurance involves the transfer of risk from the insured (policyholder) to the insurer. Policyholders pay premiums to the insurer in exchange for the promise of compensation in the event of a covered loss. This risk transfer mechanism helps individuals and businesses manage their exposure to various risks.
3. Indemnification : The principle of indemnity is central to insurance. It ensures that policyholders are restored to the same financial position they were in before the occurrence of a covered loss. Insurers provide compensation to help policyholders recover from financial setbacks caused by unforeseen events.
4. Promotion of Economic Stability : Insurance contributes to economic stability by absorbing and spreading risks across a large pool of policyholders. This risk-sharing mechanism prevents the concentrated impact of losses on individuals or businesses, reducing the overall economic volatility associated with unexpected events.
5. Encouragement of Risk Reduction Measures: Insurance companies often encourage and reward policyholders for implementing risk reduction measures. By promoting safety practices, security measures, and other preventive actions, insurers aim to reduce the frequency and severity of claims, benefiting both the insured and the insurer.
6. Facilitation of Long-Term Planning: Insurance provides a foundation for long-term financial planning by offering certainty and predictability. Individuals and businesses can plan for the future with greater confidence, knowing that they have protection against potential risks.
7. Support for Credit and Investment: Insurance coverage can enhance creditworthiness for individuals and businesses. Lenders often require insurance as a condition for loans or investments to protect their interests. This requirement helps ensure that borrowers can meet their financial obligations even in the face of unexpected events.
8. Social and Community Resilience: Insurance contributes to social and community resilience by assisting individuals and businesses in recovering from disasters or emergencies. This, in turn, helps communities rebuild and recover more rapidly, reducing the overall societal impact of such events.

Answer 6(c)

Liability insurance is an insurance product that provides protection against claims resulting from injuries and damage to other people or property. Liability insurance policies cover any legal costs and payouts an insured party is responsible for if they are found legally liable. Intentional damage and contractual liabilities are generally not covered in liability insurance policies.

The liability generally arises out of negligence or breach of duty. Whenever liability arises under Civil Law (Tort), compensation (damages) becomes payable. Besides

this, there may be legal costs awarded against the insured and also legal costs of defence of the claim incurred by the insured.

For example, under the Law of Tort, due to negligence, bodily injuries and/or damage to the property of third parties may be caused for which damages become payable.

Similarly under Statutory law - liability to pay for relief for personal injuries and/ or damage to property of third parties under any statutory laws or acts may become payable.

Lastly under the Law of contract - liabilities arising in the discharge of professional duties due to negligence may also result in damages payable.

While Tort takes numerous forms, such as libel, slander, etc. Negligence "absence of care". Negligence can be established when the following conditions are satisfied: namely Existence of duty of care towards the injured party, Breach of that duty, Injury or damage as a consequence of the breach, Casual connection between the breach of duty and injury or damage. In all liability claims the compensation that is awarded through the judiciary procedures is called as damages. Damages for personal injury (fatal or non-fatal) claims fall into two categories: namely Special Damages relating to actual loss of earnings, medical, nursing or other expenses, funeral expenses etc. and General Damages comprising of pain, suffering and distress, loss of enjoyment of life and loss of amenities, loss of recreational ability etc.

The relevance of liability insurance:

1. Coverage for Legal Costs: Liability insurance typically covers legal defense costs, including attorney fees and court expenses, which can be substantial in the event of a lawsuit. This is crucial because legal proceedings arising from negligence claims or breach of duty can be complex and expensive.
2. Risk Transfer Mechanism: Liability insurance operates as a risk transfer mechanism. Instead of individuals or businesses having to bear the full financial burden of a liability claim, the insurance company assumes the responsibility for covered losses, allowing the insured to transfer and manage the risk effectively.
3. Product Liability Coverage: Product liability insurance is a form of liability coverage that protects businesses from claims related to injuries or damages caused by their products. This is particularly relevant in cases where a product's design, manufacturing, or labeling is alleged to be negligent or in breach of duty.
4. Promotion of Responsible Conduct : Liability insurance encourages responsible conduct by providing a safety net for potential mistakes or accidents. Individuals and businesses are more likely to engage in risk management practices and adhere to safety standards when they know they have insurance coverage to protect them in case of unforeseen events.

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INTELLECTUAL PROPERTY RIGHTS – LAWS AND PRACTICES

(Elective Paper 9.3)

Time allowed : 3 hours *Maximum marks : 100*

Total number of questions : 6

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

Question 1

Nestled in the tropical forests of the Agasthyamalai hills of the Western Ghats, a mountain range in Kerala state, India, live the indigenous Kani tribe, traditionally a nomadic people with a population of almost 25,000. The Kani have a rich tradition of using wild plants found in the region for health reasons, and their tribal physicians — known as Plathi — are the exclusive holders of the traditional medicinal knowledge of the tribe. The use of traditional knowledge for herbal medicines among the Kani tribes inhabiting the forests of the Western Ghats region is quite rich. The herbal lore that this community possesses regarding the large number of wild plants in the region has helped them survive for generations.

In December 2007, Dr. Swaminathan, director of the Royal Garden and Research Institute (RGRI) in Kerala, was leading a team from the All India Coordinated Research Project on Ethnobiology (AICRPE) on an ethnobotanical expedition to the Western Ghats.

Knowing that the Kani knew the area better than anyone, Dr. Swaminathan employed some of them as guides. While traversing through the rough terrain, the team was surprised that after several hours their Kani guides did not feel tired, while they themselves were constantly feeling fatigued. Curious as to why, the observed their guides and saw them continuouslymunching black fruits of some plants. Seeing their exhaustion, the Kani guides offered some of the fruit to the AICRPE team. Upon eating the fruit, the team immediately felt full of energy and vitality.

The team inquired about the fruit but the Kani guide were reluctant to tell them because according to Kani tribal customs, only the Plathi (tribal physicians) have the right to transfer and disseminate their traditional medicinal knowledge. Because of this, the Kani guides were reticent to share with the AICRPE team the source of the revitalizing fruit. However after a great deal of pressure, the Kani led the team to a plant known locally as "arogyapacha" (known scientifically as trichopus zeylanicus ssp. Travancoricus).

With first-hand experience of the medicinal benefits of arogyapacha, Dr. Swaminathan knew that the effect of the plant's berries was unusual, and that it had significant sales potential if it proved to be safe. He and his team of scientists took the plant back to RGRI's research facilities and began to analyze it through a multitude of chemical and pharmacological tests. Their research discovered that not only did the plant (particularly the fruit and leaves) have anti-stress and immune-stimulating properties, but it also boosts stamina, relieves fatigue, helps control tumors and activates the body's natural defenses and cellular immune system.

After seven years, RGRI's research isolated twelve active chemical compounds in the plant that yielded the effects they experienced. The traditional way in which the Kani used arogyapacha was to eat its fruit. RGRI discovered that crushing the plant's leaves was the most effective way to get to the twelve compounds. These chemicals were then combined with three otherplants and RGRI produced a scientifically verified and standardized herbal formulation for its reproduction. With a standardized formulation in hand, RGRI continued its research and development (R&D) program, particularly through clinical trials in which it was administered orally to one hundred human subjects in studies involving either healthy or unhealthy individuals. The research focused on determining the ability of these people to withstand adverse conditions (such as an increased work load), the quality of work completed under stress, athletic performance, any increase in mental alertness and overall work output. Results of the clinical trials were very successful and was found to exert favorable effects in a number of situations. RGRI's research scientifically demonstrated the important medicinal benefits of the arogyapacha plant, and proved that when used alone or combined with other ingredients, it can be more effective and safer than ginseng.

RGRI has applied the success of this project to other R&D projects as it believes that the project is a model for bringing beneficial traditional medicinal plants to the world market. The purpose was to make sure that these valuable plants remain available, and that science into their medicinal uses continues.

RGRI named this formulation "Jeevani," which means "giver of life." The product comes in granules and is mixed with hot water or milk.

"Jeevani" drug, which was developed by scientists at the Royal Garden and Research Institute (RGRI), based on the tribal medicinal knowledge of the Kani tribe in Kerala, South India. "Jeevani" is a restorative, immuno-enhancing, anti-stress and anti-fatigue agent, based on theherbal medicinal plant arogyapaacha, used by the Kani tribals in their traditional medicine. The research technology of RGRI is licensed to the Arya Vaidya Pharmacy, Ltd., an Indian pharmaceutical manufacturer pursuing the commercialization of Ayurvedic herbal formulations. The Arya Vaidya Pharmacy Ltd in order to protect this formulation so obtained from RGRI applied for patent. Ram wants to oppose this application.

Based on the above facts answer the following :

(a) Advise Ram the grounds on which this application can be opposed.

(b) Based on the opposition filed by Ram patent application was rejected by the Indian patent office. Advise Arya Vaidya Pharmacy another way to obtain the patent.

(c) "The Evergreening of patents is a practice of tweaking drugs in order to extend their patent term and thus their profitability. The Indian Patents Act 1970 introduced many provisions to prevent the mischievous practice of Evergreening of patents." Examine the statement with help of decided cases.

(d) Enumerate various kinds of patent infringement.

(10 marks each)

Answer 1(a)

The patent refers to the exclusive right which is granted to an inventor for inventing a new product or process, which offers a new method of doing something or provides a technical solution to a problem. The owner of the patent acquires monopoly rights and can prevent others from commercially exploiting the invention without his consent. Due to the monopoly nature of a patent, it is important to ensure that it is awarded only to those innovations which fulfil the criteria for a valid patent.

Opposition proceedings refer to the administrative procedure available in most jurisdictions that enable third parties to formally challenge the granted patent or the pending application for a patent. The purpose is to filter frivolous, incomplete, or false claims. In this manner, "opposition proceedings can be said to be a litmus test for inventions claiming the protection of a patent."

The Indian Patent Act, 1970 provides a mechanism that allows the public to raise objections against the grant of a patent by filing an opposition with the Patent office. There are 2 types of opposition proceedings in place depending on the stage of grant of the patent:

I. *Pre-grant opposition* : Where the opponent can challenge a pending application prior to the grant of a patent. (Section 25(1)) of Patents Act.

II. *Post-grant opposition* : Where the opponent challenges the validity of a patent that has already been granted (Section 25(2)) of Patents Act.

In this case Ram will move his application under section 25(1) for pre grant opposition. Grounds available to him are:

I. *Prior knowledge or use* : The invention is known or used by the public before the priority date. In the case of a process that is being patented, it is deemed to have been publicly known or used if a product made by that process was imported in India, before the first date of filing of the application. (Section 25(1)(d)).

II. *Non-patentable subject matter* : The subject of the application is not considered to be an invention under the Patent Act or falls in the category of "non-patentable inventions". (Section 25(1)(f)).

III. *Traditional knowledge* : The invention was anticipated taking into consideration the knowledge possessed by indigenous communities anywhere in the world. (Section 25(1)(k)). It falls under non patentable because as per section 3(p) "An invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components". Traditional knowledge means knowledge which was already existing (in prior art). This knowledge was with public from a long/ ancient/ historical and passed from generation to generation.

In *Hindustan Lever Ltd.* v. *Godrej Soaps, 1996*, Hindustan filed two patent applications, the subject matter was a detergent bar. Godrej Soaps filed a pre-grant opposition on the grounds of obviousness, lack of inventive step, prior public knowledge and insufficiency of description of the invention. After conducting a hearing, the Controller ordered for amendment of the specifications. The applicant amended the specifications and the opposition was dismissed.

In *Novartis* vs. *Cipla*, 2011, a patent application was filed by Novartis in 2005, for "Dispersible tablets comprising Defracirox" at Chennai office. Cipla filed a pre-grant opposition under sections 25(1) (e), 25(1) (f) and 25(1) (h) of the Patents Act. The representation was allowed by the Controller after a hearing and the case was decided. In this decision, the Controller concluded that the claims were obvious in view of the cited art because the claims read upon the previously disclosed ranges. Additionally, the claimed composition merely had additive properties (which is expected from a mere admixture) and hence non- patentable under section 3(e) of the Act. Cipla won the case.

Procedure for Pre-Grant Opposition : Rule 55 of Patents Rule, 2003, lays down the procedure to be followed for pre grant opposition. Any person can file a pre-grant opposition by way of a representation to the Controller against the grant of patent based on any of the grounds mentioned above, wherein: Representation for opposition shall be filed in Form 7(A) may be given at the appropriate office along with a statement and evidence in support of the opposition. The Controller shall forward the notice along with representation to the Applicant. Upon receiving the representation, Applicant, if desires may choose to reply to the representation within three months from the date of notice. Controller may either reject the opposition/ representation or require the amendment of complete specification within one month of receiving the reply from the Applicant.

Answer 1(b)

Biological components play a significant role in the existence of humankind. Hence it becomes pertinent for every individual to have access to such natural resources and share the benefits. This concept is popularly known as Access and Benefit Sharing (ABS). The principle facilitates sharing of biological resources, specifically genetic resources, fairly and equitably between innovators/users and creators/conservers/ providers, thereby enabling innovation and biodiversity conservation incentives.

The other option available to the company to get its patent is through benefit sharing as provided under Biodiversity Act. While Traditional Knowledge (TK) promotes community interests, patent supports individual monopoly. With concurrence of both these worlds in cases of "TK-derived inventions", there is a necessity to get a balance between the two. In India, this balance is struck by the Biodiversity Act, 2002. Section 2 (a) of the Act read with Section 6 (2), brings the concept of 'benefit sharing' with respect to the product or process derived or made with the help of knowledge and for commercial purpose which is conserved with the 'benefit claimers.' Benefit claimers are referred to the ones are the holders of knowledge of the use and benefits of such biological resources and innovation in relation to the use and application.

Those who hold the traditional knowledge is referred as 'benefit holder'. National Biodiversity Authority has been taking initiative to protect the benefits of the benefit holders by way of agreements in relation to benefit-sharing that is made between the TK holder and the inventor who wants to exploit TK-deprived inventions in commercial market. Such agreements acts as a win-win for both the parties — TK holder and his rights are appreciated and the patent holder gains monopoly in the commercial market.

Application for intellectual property rights not to be made without approval of National Biodiversity Authority:

As per section 6 (1) of Biodiversity Act no person shall apply for any intellectual

property right, by whatever name called, in or outside India for any invention based on any research or information on a biological resource obtained from India without obtaining the previous approval of the National Biodiversity Authority before making such application. Provided that if a person applies for a patent, permission of the National Biodiversity Authority may be obtained after the acceptance of the patent but before the seating of tile patent by the patent authority concerned: Provided further that the National Biodiversity Authority shall dispose of the application for permission made to it within a period of ninety days from the date of receipt thereof.

Further, as per Subsection (2), the National Biodiversity Authority may, while granting the approval under this section, impose benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilization of such rights. (3) The provisions of this section shall not apply to any person making an application for any right under any law relating to protection of plant varieties enacted by Parliament. (4) Where any right is granted under law referred to in sub-section (3), the concerned authority granting such right shall endorse a copy of such document granting the right to the National Biodiversity Authority.

Answer 1(c)

Evergreening is the process by which businesses apply for a patent extension with minor product or process adjustments just before the first patent, which has a 20-year lifespan, expires. For a brief amount of time, patents grant their owners market exclusivity. In the case of medicines, this exclusivity should endure for the length of the primary patent's validity, which is normally 20 years and refers to the medicine's active pharmaceutical ingredient (API). The price of medicines will drop significantly once patent exclusivity is lifted. Pharmaceutical companies are compelled to come up with innovative strategies to extend their exclusivity due to the fear of this drastic drop in income. Evergreening works by filing additional patents related to the original patent. This allows patent holders to extend the life of their inventions and protect them from competitors for longer periods of time. The process typically involves filing multiple follow-up patents that build off of the original patent in order to provide further protection for the invention. The goal is usually to ensure that there are no loopholes that competitors can use to bypass the original patent and create a competing product or service without infringing on it.

Evergreening, sometimes known as secondary patenting, is a technique used by businesses to prevent the entry of generic competitors. Obtaining additional patents on the original drug's modifications, such as new dosages, new forms, new releases, or new combinations, is known as secondary patenting or "evergreening."

The fundamental tenet of our nation's patent law is that a patent can only be issued for an invention that is both novel and useful. Patenting incremental advances, sometimes known as "evergreening," is prohibited by Section 3(d) of India's patent legislation.

Benefits of Evergreening Patents

1. *Extended life of patents* : It provides increased protection for inventions over an extended period of time. This is especially beneficial for companies who have invested heavily in research and development and want to protect their investments from competitors as long as possible.

2. *Maintain profitability* : Evergreening can also help companies maintain market

share by preventing competitors from entering the market with similar products or services.

3. *Lawful protection* : Evergreening can also provide other legal benefits such as increased damages in infringement cases or a decrease in licensing fees due to increased protection.

According to Section 3(d) of the Patents Act of 1970 "the mere discovery of a new form of a known substance or the discovery of any new property or new use for a known substance or of the use of a known process, machine, or apparatus is not patentable" unless the known process produces a new product or uses at least one new reactant.

The Supreme Court affirmed this clause in 2013 when it rejected Novartis' request to have its cancer medication Glivec patented. Evidence of improving therapeutic efficacy is required under Section 3(d). The clause forbids patents for novel applications and novel traits of substances already known to exist. Since Glivec was essentially a modified version of imatinib in the Novartis case, the patent for Glivec was denied in accordance with section 3(d) of the Patents Act. According to Section 2(1)(ja), the product in question must have a technical improvement over the prior model that is not obvious to a person of ordinary skill. Patents for mixtures of well-known compounds are only permitted, according to Section 3(e), if there is a synergistic effect.

The recent ruling by India's Supreme Court on the Novartis case has brought attention to the issue of evergreening of patents. Novartis, a Swiss drug company, sought to obtain a patent for a new version of its cancer drug Gleevec, claiming that it was more effective in fighting leukemia. However, India's patent law, specifically Section 3(d) of the Patents Act of 1970, prohibits evergreening by preventing the grant of patents for minor modifications of existing patents.

Novartis challenged the validity of Section 3(d) in court, arguing that it breached international agreements such as the TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement and Article 14 of the Indian Constitution. The case went through various stages, including the Madras High Court and the Intellectual Property Appellate Board, before reaching the Supreme Court of India. The two-judge bench of the Supreme Court rejected Novartis' appeal, stating that there was no proven newness in their patent application after a thorough comparison with the existing patent, and thus no new patent could be granted to prevent evergreening.

The Supreme Court's ruling has been hailed as a godsend for individuals who cannot afford life-saving treatments due to exorbitant costs charged by pharmaceutical companies. Evergreening allows existing patent holders to make minor changes to their patented drugs and claim them as new inventions, thus extending their market monopoly. This practice is often seen as a way to avoid investing in expensive research and development (R&D) for genuinely new drugs after the patent expires. R&D for existing drugs costs significantly less, around 10% of the expense required for developing a completely new drug. However, this approach also carries risks, as seen with recent failures in clinical trials of new drugs, such as with COVID-19 vaccinations.

The Supreme Court's ruling against the evergreening of patents is a significant step in preventing the abuse of patent monopolies and promoting genuine innovation in the pharmaceutical industry. It upholds the intent of the Patent Act, 1970, which aims to

ensure that patents are granted only for truly novel and non-obvious inventions, and not for minor tweaks to existing patented products. This decision has far-reaching implications, as it helps protect access to affordable medicines for those in need, encourages genuine innovation, and safeguards the public interest in the field of healthcare.

Answer 1(d)

Violation of a patentee's right with respect to some invention is known as patent infringement. When the rights of the patent holder or the claims in the patent are violated by a third party, without the consent or license of the patent holder, such third party is said to have infringed the patent rights of patent holder. While doing a patent infringement risk analysis, it is necessary to understand the types of patent infringements to ensure that the invention is not likely to infringe any of the existing patent rights. The various types of patent infringement occur when a person or business uses parts of a patented idea, method, or device without permission. Patent infringement is also known as patent violation or even stolen ideas.

I. Direct Infringement

Making, using, selling, trying to sell, or importing something without obtaining a license from the patent holder is considered direct patent infringement. The offender must complete this act willfully. Direct infringement is the most apparent and common type of infringement. This infringement includes marketing, sale or commercial use of a similar patented item or invention that performs substantially identical functions. Direct infringement is of two types - literal and nonliteral. Literal infringement occurs when every component in the patent specification has been used in the alleged infringing product/ device or process. Non-literal infringement occurs when the infringing device or process may be similar or equivalent to the claimed invention (performs substantially the same function, in substantially the same way and to achieve substantially the same result.

II. Indirect infringement is when the infringement has happened, however the infringement is facilitated by someone else. Indirect infringements are of two types:

a) *Inducted infringement* – where one actively induces the other person to infringe a patent by encouraging, assisting, aiding, inducing him/her to do so. Patent infringement by inducement typically means that the inducer willingly and knowingly aided in the infringement but may or may not have specifically intended to violate a patent infringement.;

b) *Contributory infringement* – where there is an intentional participation/ assistance by one party in an act of infringement to the other party making them vicariously liable for the acts of the infringer. This type of infringement involves the purchase or importation of a part that aids in creating a patented item. To prove contributory infringement, one must show that the component's main use would be to create a patented item. A generic item that has other uses usually doesn't qualify in proving contributory infringement.It is a type of indirect infringement, where a person or corporation is held liable for infringement even if they have not actively participated in infringing activities. Therefore, it happens when a party sells a product which they know is used

in the infringing product. In usual cases, this product will have no commercial standing out of its use in the infringing product.

Contributory infringement is triggered when a seller provides a part or component that, while not itself infringing any patent, has a particular use as part of some other machine or composition that is covered by a patent.

III. Willful Infringement

Willful infringement exists when a person demonstrates complete disregard for someone else's patent. Willful infringement is especially damaging to defendants in a civil suit. The penalties are much higher, and typically defendants must pay all attorney and court costs if they are found guilty.

IV. Literal Infringement

To prove literal infringement, there must be a direct correspondence between the infringing device or process and the patented device or process. As the word "literal" signifies, literal infringement is the type of direct patent infringement where every component of the patent specifications is taken to constitute the infringing product or process. In other words, all the claims in the patent specification match the features of the infringing product or process. A pertinent case law in this regard is the case of *Polaroid Corp* v. *Eastman Kodak Co. (1986)*, where Kodak was considered to have committed literal infringement of Polaroid's patented instant camera technology. To make things more precise, if a claimed invention is missing from the infringing product or process, then such infringement will not be a literal infringement.

In another case, Larami Corp. v. Amron (1993), Amron sued Larami for infringing its patented toy water gun. The allegedly infringing device was a toy called SUPER SOAKERS, which had a separable and removable water tank, unlike the patented invention, which had an "elongated housing having a chamber therein for a liquid." The Court held that Larami's SUPER SOAKERS did not infringe Amron's patent.

Question 2

Gujarat Cooperative Milk Marketing Federation (GCMMF) founded in India in 1946, is engaged in dairy products manufacturing and marketing with an average of 4.85 million liters of milk collection every day. Its AMUL trademark is the largest food brand in India and a famous trademark in India. It says that AMUL trademark is the world's biggest vegetarian brand of cheese and the biggest pouched milk brand in the world.

A broad variety of food products like cheese, ghee, butter, ice cream, beverages, yogurts, cream, and associated products (milk powder, buttermilk, condensed milk), coffee, chocolates, sweets, spreads, desserts, and bread are being marketed and sold at Gujarat. The AMUL trademark is a prominent well known trademark in international sphere. For over 60 years in newspapers, magazines, radio & television, and now, online, via its own website as well as Google and YouTube, it has also been widely advertised both in India and internationally. In 2018, GCMMF received several complaints with respect to fraudulent websites using the well-known trademark 'Amul'

as part of their domain names. These parties not only deceived the public by offering distributorship, dealership, jobs, etc. at Amul, but were also asked to deposit money to their bank accounts.

(a) What remedy is available with Gujarat Cooperative Milk Marketing Federation to protect its trademark ?

(b) Deceptive Similarity is also considered as the ground for not granting a Trademark registration. Elaborate the statement with the help of decided cases.

(6 marks each)

Answer 2(a)

The case in question is a matter of cybersquatting. Cyber squatters are those who register domain name of trademarks owned by other with the intention of selling, renting or transferring them to the rightful owner for a consideration. In India, unlike many developed countries, there is no law which can provide protection for domain names. So, cases of cybersquatting are settled under the Trade Marks Act, 1999.

Acknowledging the gap in such specific issues due the absence of specific law, courts in India extend the domain of the Trade Marks Act, 1999 to such conflicts. The definition of cybersquatting can be best summarised in the case of *Manish Vij and Ors.* vs. *Indra Chugh and Ors*. The court held that "an act of obtaining fraudulent registration with an intent to sell the domain name to the lawful owner of the name at the premium.

The Court in *Yahoo Inc.* v. *Aakash Arora & Anr* barred the defendants from using Yahoo as a Trade Mark or domain name on the web platform, as well as from using the same code as Yahoo. The Court observed that the defendants were trying to take advantage and encash the recognition of the MNC's Trade Mark and declared that registration of a domain name on the web platform should be understood as grants of lawful rights to use the registered domain name just because of the reason of its registration, the registrant can still be held guilty of infringement of claimant's owned Trade Mark.

In *Tata Sons Limited and Anr* v. *fashion ID Limited*, the Hon'ble High Court of Delhi held that "The use of the same or similar domain name might cause a deviation of users that might result from such users coincidentally accessing one domain name rather than another. This might occur in e-commerce with its fast progress and instant (and the erotically limitless) accessibility to users and potential customers and particularly so in areas of specific overlap. Standard consumers/users seeking to discover the functions available under one domain name may be confused if they accidentally appear at a different but alike website that offers no such services. Such users might well presume that the first domain name owner had misrepresented its goods and services through its promotional activities and also the first domain owner would thereby lose their customer. It is apparent that a domain name may have all the characteristics of a trademark and could find an action for passing off".

Answer 2(b)

The Trade Marks Act, 1999, defines 'Deceptive Similarity' under Section 2(h) as "a mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion."

Section 11(1) of the Trade Marks Act, 1999 states that "a trademark cannot be

registered if it is deceptively similar, or identical, with the existing trademark and goods and services, that is likely to create confusion in the mind of the public at large". The Supreme Court established the criteria for evaluating "Deceptive Similarity" in *Cadila Health Care Ltd.* v. *Cadila Pharmaceutical Ltd.* The following criteria must be taken into account while determining misleading similarity:-

- Nature of the mark (word, label or composite mark)
- The degree of alikeness between the marks
- Nature of the goods (services for which the Trade mark is used)
- The level of judgment and diligence shown by the buyer when making a purchase of products or services
- The method by which the customer made the purchase or placed the order
- The similarity between the rival dealers' commodities in terms of their nature, functionality, and personalities.

One of the best examples of fraudulent use of marks is making a deceptively similar trademark with the purpose of attracting one's customers towards himself for economic benefits. In the recent case of *Hamdard National Foundation (India)* vs. *Sadar Laboratories Pvt. Ltd. (2022)*, or to relate this case to every household, we can call this as *'Rooh Afza* vs. *Dil Afza'*, in this case, it was alleged that the plaintiff's mark 'Sharbat Rooh Afza' had been infringed by the defendant's deceptively similar Mark 'Sharbat Dil Afza' but in January 2022, the single-judge bench of the Delhi High Court had refused to grant an interim injunction, but in January 2023, the division bench has set aside the judge of the single-judge while holding that the mark 'Rooh Afza' has been functioning as the identifier of the appellant's products since 1907, resulting this mark holds a high degree of importance and granted an injunction to the plaintiff/appellant by stating that the defendant would gain an undue advantage if allowed to continue using the 'Sharbat Dil Afza' mark.

In another case of *Parle Products (P) Ltd.* v. *JP Co. Mysore*, the Hon'ble Supreme Court established a standard to evaluate whether two trademarks are deceptively similar. It said that a thorough examination of both marks was not required. Instead, the degree of general resemblance should be assessed based on the possibility of customer misunderstanding that it could result.

Starbucks Corporation vs. *Sardarbuksh Coffee and Co. & Ors.*

In this case, *Starbucks Corporation* vs. *Sardarbuksh Coffee and Co. & Ors.* the plaintiff possessed the registered trademark "STARBUCKS". The name of the company the defendants formed was "Sardarbuksh Coffee & Co." The defendant and the plaintiff both provided the same sorts of goods and services. In the opinion of the Delhi High Court, the name Sardarbuksh Company resembled the "Starbucks" logo both visually and phonologically, qualifying it as having "Deceptively Similarity." The Court ordered Sardarbuksh to change the name of its business to "SARDAR-JI-BAKSH" or "SARDAR-JI-BAKSH COFFEE & CO" as well as alter its logo. Further instructions were issued to Sardarbuksh to use a new name when filing a new trademark registration application. It was agreed that if a third party had been found employing the mark "BAKSH" with no authorization, the defendant could bring a lawsuit against them.

In the case of *Corn Products Refining Company* vs. *Shangrila Food Products Limited*

(1959), the Supreme Court of India, taking into account the facts of the case and all things considered, came up with a test to ascertain the similarity between the two marks: i) to judge a mark as a whole instead of breaking it apart and comparing each part with the other mark; ii) to take into account the ordinary intelligence of the general public; iii) imperfect recollection from past incidents instead of comparing the two marks by placing them side by side.

Question 3

In the year 1912, cream-filled sandwich cookies were introduced in the worldwide market by National Biscuit Corporation (NBC) under the brand name OREO. The company is the owner of the OREO brand of biscuits. Oreo was launched in India in 2011 taking its pace into the biscuit category in India. In 2020, OREO came to know that chocolate-vanilla cream biscuits are being sold by Parle in the name of FABIO or FAB! O. NBC filed the suit for trademark infringement seeking injunction against Parle Products Private Limited from using its FAB! or FAB!O marks which is similar to the plaintiffs OREO mark and from manufacturing and selling its vanilla cream filled chocolate sandwich biscuits.

CONTENTIONS BY THE PLAINTIFF (OREO) :

1. *That the defendant Parle Products Pvt. Ltd., has introduced its own range of chocolatevanilla biscuits under the brand FAB!O in or after January 2020. The plaintiff alleges that, prior to 2020, the defendant was using the brands FAB and FAB! for its biscuits. After 2020, the defendant introduced vanilla cream filled chocolate sandwich biscuits under the mark—FAB! O or FABIO.*

2. *That the FAB! O mark is being used only for cream filled chocolate sandwich biscuits which were identical to the biscuits manufactured and sold by the plaintiff under the OREO trademark. The plaintiff alleges that the mark on the defendant's biscuit, though written as FAB! O is bound to be pronounced FABIO. Therefore, according to the plaintiff, the defendant's mark is deceptively similar to that of plaintiffs mark.*

3. *That the design of the defendant's cookied copies all the essential features of the design of the plaintiff's cookie, in which the plaintiff holds trademark registrations. The Plaintiff contended that the defendant's FAB!O range of vanilla cream filled chocolate sandwich biscuits was sold in a package, the trade dress of which was nearly identical or, at the very least, deceptively similar, to the trade dress of the plaintiff's OREO biscuit packages.*

CONTENTIONS BY THE DEFENDANT (PARLE) :

1. *That there is no phonetic similarity between—OREO and—FAB! O. The only common letter, between these two words, he points out is—O. Submits that, where the first syllable of the two marks is different, it cannot be said that they are phonetically similar. Also, the defendant submits that the mark FAB! O, as used by the defendant on its biscuit packs is structurally, visually and phonetically dissimilar to the OREO mark of the plaintiff.*

2. *That the aspects emphasized by the plaintiff as being common to the packaging in which the plaintiff sells its OREO biscuits and the defendant sells its F—*

AB!O biscuits are all common to the trade. In fact, the defendant submits that the plaintiff is claiming exclusivity on the basis of the overall appearance of its packing which, again, is common to the trade. Based on the above facts answer the following :

(a) Based on the above facts will OREO succeed in getting injunction ? Elaborate your answer with the help of decided cases.

(b) Geographical indication may be registered in respect of any or all of the goods, comprised in such class of goods as may be classified by a region or locality in that territory. Discuss.

(6 marks each)

Answer 3(a)

Injunctions are common to every branch of law and are governed by the Specific Relief Act. However, the procedure for seeking an injunction is laid down in the Civil Procedure Code. There are essentially two types of injunctions as contemplated under the Specific Relief Act – temporary and perpetual.

A perpetual injunction is generally granted upon merits of the suit when the suit is finally decreed. By virtue of this decree, the plaintiff can assert exclusive rights over the mark in comparison to the defendant who is completely prohibited from use of the mark or commission of any act which would go against the rights to be enjoyed solely by the plaintiff.

Temporary injunction, as the name suggests, is for a stipulated period of time or until any further court order and can be granted at any stage of the suit. This would be of utmost concern to any aggrieved party because unless the court grants temporary injunction, the other party can continue to use the mark and this would go against the very purpose of filing a suit of infringement or passing-off. As we know, time is of essence in such cases because there is the fear of losing out on reputation and goodwill.

In India, trademarks are protected by a legislation called the Trade Marks Act, 1999. The Act states all the necessary provisions which deal with the registration, protection and penalties against the infringement of trademarks. Trademark infringement refers to the use of a mark that is unauthorised and is identical or deceptively similar to a trademark that is already registered.

Deceptive similarity

Under this provision, the trademark that is being alleged to be used by a person who is unauthorised to do so has to be identical or "deceptively similar" to the original design in order to be called a trademark infringement. It has to be sufficiently similar so as the consumer might be confused and might mix up the two products thinking of them to be the same. Here, this only has to be a possibility, i.e. it "may" happen and there is no burden of proof to prove it to be actually happening, there only needs to be a possibility of this happening. Even if there is a chance of such confusion or misrecognition happening, it is enough to prove a trademark infringement.

- "The nature of the marks
- The degree of resemblances between the marks, phonetically or ideally similar
- The nature of the goods in respect of which they are used as trademarks.

- The similarity in the nature, character and performance of the goods of the rival traders.
- The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.
- The mode of purchasing the goods or placing orders for the goods and
- Any other surrounding circumstances which may be relevant."

It is important to note that whenever a case of infringement is made out, an injunction has to necessarily follow and that it is no defence to the defendant to urge that the user of the allegedly infringing mark was honest and concurrent. An injunction's role is defined as preventing one individual from carrying out a specific action or task through the judicial process. In simple terms, an injunction is a Court order that prohibits a party from taking certain actions such as continuing sales of an infringing product. An injunction can completely bar the unauthorized use of the trademark by a party through the judicial process. The Court grants protection to the owner of trademark through a temporary or permanent injunction. Injunction is one of the civil remedies recognised under the Trade Marks Act, along with damages or account of profits. It is the most essential remedy sought in every suit for infringement. Injunctive relief can be interim or permanent. Interim injunctions are granted for a specific time or during the pendency of the legal proceedings. A permanent injunction is granted when the plaintiff succeeds in their claim of infringement and a final decree is awarded. Indian law safeguards businesses from unlawful interference and groundless threats of legal proceedings. For example, Section 142 of the Trade Marks Act provides that if a person or entity is threatened by someone with legal proceedings for infringement of a registered trademark, they have the option to file a civil suit against the person so threatening to seek a declaration that such threats are unlawful, seek injunction against the continuation of such threats and claim damages if there has been any loss.

Answer 3(b)

Geographical Indication is a sign used on products that has a specific geographic origin and includes the qualities or reputation of that origin. A geographical indication is given mainly to agricultural, natural, manufactured, handicraft arising from a certain geographical area. Geographical indications (G.I.) are one of the forms of Intellectual Property Rights which identifies a good as originating in the respective territory of the country, or a region or locality in that particular territory, where a given quality, reputation or other characteristic related to good is essentially attributable to its geographical origin.

Section 2 (1)(g) of the Geographical Indication of Goods (Registration and Protection) Act 1999, designs geographical indication in relation to goods to mean and identification which identifies such goods as agriculture goods, natural goods or manufactured goods as originating or manufactured in the territory of a country or a region or locality in that territory where a given quality reputation or other characteristics of such goods is essentially attributable to its geographical origin and in the case where such goods are manufactured goods, one of the activities of either the production aur of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.

For the purpose of this provision, any name that is not the name of a country, region or locality of that country shall also be considered a geographical indication if it relates to a specific geographical area and is used upon or in relation to a particular goods originating from the country, region or locality, as the case may be.

Section 8 of the Geographical Indications of Goods (Registration and Protection) Act, 1999 deals with Registration to be in respect of particular goods and area. It provides that:

(1) A geographical indication may be registered in respect of any or all of the goods, comprised in such class of goods as may be classified by the Registrar and in respect of a definite territory of a country, or a region or locality in that territory, as the case may be.

(2) The Registrar shall classify the goods under sub-section (1), as far as may be, in accordance with the international classification of goods for the purposes of registration of geographical indications.

(3) The Registrar may publish in the prescribed manner an alphabetical index of classification of goods referred to in sub-section (2).

(4) Any question arising as to the class within which any goods fall or the definite area as referred to in sub-section (1) in respect of which the geographical indication is to be registered or where any goods are not specified in the alphabetical index of goods published under sub-section (3) shall be determined by the Registrar whose decision in the matter shall be final.

The relationship between objects and place becomes so well known that any reference to that place is reminiscent of goods originating there and vice versa. It performs three functions:

- First, they identify the goods as to the origin of a particular region or locality;
- Secondly, they suggest to consumers that goods come from a region where a given quality, reputation, or other characteristics of the goods are essentially attributed to their geographic origin;
- Third, they promote the goods of producers of a particular region. They suggest the consumer that the goods come from this area where a given quality, reputation or other characteristics of goods are essentially attributable to the geographic region.

Geographical Indication is a kind of sign used for goods that have a specific geographical origin and possess qualities or a reputation that are due to that particular place of origin. Basmati rice and Darjeeling tea are examples of G.I. from India.

Question 4

U.S Company Mars Incorporation filed a case against School Shoe Co. Mars filed a case against School Shoe Co. alleging infringement of registered design. These designs are related to perforated and non-perforated designs. Mars claim that it is the owner of the registered design and School Shoe Co. is imitating the design of the footwear of Mars. Whereas on the other hand School Shoe Co. had contended there

could not be any piracy as the disputed design registration is invalid. The School Shoe Co. has argued that registered design of Mars, when it was registered was not new or original design and the design concerning which Mars claims exclusive entitlement was in public domain already on its website since December, 2002 and the registration done by Mars for the design in India and U.S. was done in the year 2004.

Based on the above facts answer the following :

(a) Based on the above fact do you think Mars Incorporation will succeed in stopping School Shoe Co. to use its design ? Substantiate your answer with case law(s).

(b) Trade secrets seems to be a neglected field in India, as there is no enactment or policy framework for the protection of trade secrets. This form of Intellectual property is a new entrant in India. How this important form of IP is protected in India ?

(6 marks each)

Answer 4(a)

The question is based on the case of *Crocs Inc. USA ('Crocs')* v. *Liberty Shoes Limited & Ors. and Other* footwear manufacturers in India the Delhi High Court rejected Crocs' applications for interim injunctions for piracy of copyright in their registered design. Crocs had obtained design registrations under the Designs Act, 2000 for its perforated and non-perforated clog-type slippers/shoes in May of 2004.

Crocs brought various infringement suits against the Defendants who were manufacturing and selling sandals with clog-type designs largely similar to Croc registered design. The Delhi High Court was of the opinion that the registered designs ought not to have been registered in the first place and the registrations were liable to be cancelled as these designs were published and disclosed prior to their registration dates. This finding was arrived at on the basis of internet archival pages dated 2002 (which disclosed similar designs) from the website of Holey shoes.

Evidence was also gathered from Crocs' own website prior to 2004 which also revealed largely similar designs. On the issue of novelty and originality, the Court was of the view that the designs registered by Crocs were neither original nor novel as they were not significantly distinguishable from products already existing in the market and were mere 'trade variants' of a sandal, which did not deserve any exclusivity or monopoly.

Design is that aesthetic feature which adds the exclusive quality to the product. Any product can become visually appealing through its design. Designs, as defined under the Design Act, is the *'features of shape, configuration, pattern, ornament or composition of lines or colors applied to any article in two or three-dimensional form, or both, by any industrial process or means – whether manual, mechanical or chemical, separate or combined – which in the finished article appeal to and are judged solely by the eye'.*

In this context, the Court held that the plaintiffs design cannot be considered truly inventive or new because of prior publication in various companies and medium. Hence, the plaintiffs cannot allege infringement or piracy. The Judge also referred to *Pentel Kabushiki Kaisha & Anr.* vs. *M/S Arora Stationers & Ors.*, to further determine if the design was new and original. The subject matter of the said design was a pen.

The counsels had argued that as sweat and labor goes in making of such a design it can be said that the new design was novel. The Court reasoned that a mere superficial difference in the design will not about to a new creation. The above mentioned principle was applied to the present case to determine if the product was new or not. In the final analysis, the Court seems to have come to the correct conclusion, particularly given the prior disclosure of the designs, which is fairly clear cut.

However, in venturing into 'newness' and 'originality', the court seems to have firstly gone against the trend in returning to the 'sweat of the brow' principle for IPR protection, one that has been rejected in Indian Courts in the past. The Court reiterated that according to Section 19 of the Design Act a design, which existed in the public domain prior to grant of registration under the Act, is a ground for cancellation of the design. Rejecting the contentions of the Plaintiff, the Court prima facie accepted that such design existed in public domain prior to Plaintiff's registration, the Plaintiff therefore, cannot claim exclusivity for its registered design merely on the ground that Plaintiff 's footwear/ registrations does have a strap at the back of its footwear.

Answer 4(b)

Confidential Information is the information disclosed by one party to the other party in the course of business and it shall not be disclosed to the public. The concept of Confidential Information is based upon the doctrine of law of confidence and equitable principle i.e, the person who has received the information must not use it for unfair advantage to the detriment of the person who provided the information without their consent. Trade Secret, the name itself defines the secret of any trade or business that is known to a limited group of persons and has a commercial value. According to WIPO (World Intellectual Property Organisation), Trade Secrets are intellectual property right(s) on confidential information which may be sold or licensed. Trade Secrets do not require registration, unlike other Intellectual Property Rights.

Essentials of a trade secret

- It should have commercial value as it is a secret
- It should not be widely known except to a limited group of persons related to the business
- To keep the information secret, the owner has taken reasonable steps.

A trade secret is a kind of Confidential Information. All trade secrets are confidential information, but not all confidential information is trade secrets. Confidential Information is the information that has valuable and sensitive secrets attached to it and the person who receives it, owes the duty neither to disclose it nor to use it for a purpose other than that for which the disclosure has been made. For example, Company Profits and Revenues, Clients, customer lists, employee records, etc. The protection of Trade Secret and Confidential Information is governed by:

- Section 27 of the Contract Act is the specific law that bound the parties not to disclose information contrary to the terms of the contract between the parties i.e. Non-Disclosure Agreements.
- Copyright Law also protects the trade secrets involved in business data. Further,

the Personal Data Protection Act, 2023 provides specialised regulatory approach for the Protection and Privacy of Data of Personal and Non-personal Data in any form (digital or non-digital).

- Section 72 of Information Technology, 2000 imposes a penalty for breach of confidentiality and privacy.
- Section 405-409 of the Indian Penal Code, 1860 deals with the cases when there is a Criminal Breach of trust.
- *American Express bank ltd.* vs. *Ms Priya Puri (2006)* - A trade secret is "a formula, technical know-how, or a particular mode or method of business established by an employer which is unknown to others.
- *Mr. Anil Gupta & Anr.* vs. *Mr Kunal Dasgupta & Ors. (2002)* - In this case, the Delhi High Court addressed the confidentiality of the information and stated that "The concept developed and evolved by the plaintiff is the result of the work done by the plaintiff upon the material which may be available for the use of anyone but what makes it confidential is the fact that the plaintiff has used his brain and thus produces a result in the shape of a concept.
- In *John Richard Brady & Ors* vs. *Chemical Process Equipment P Ltd & Anr (AIR 1987 Delhi 372)*, principles of confidentiality were discussed for the first time in this case. The Court held that "the law on this subject does not depend on any implied contract. It depends on the broad principles of equity that who has received information in confidence shall not take unfair advantage of it".

Question 5

(a) "Human Rights and Intellectual Property, though two different sets of law with no apparent connection, have gradually becoming intimate bedfellows." Elucidate the statement.

(b) In a digital world, where information and data are the currency, protecting one's Intellectual property becomes even more critical. In the light of this statement explain the importance of IPR in digital era.

(6 marks each)

Answer 5(a)

Human rights and Intellectual property rights that were once divergent subjects / areas are now witnessing a convergence. For decades the two subjects developed in virtual isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property laws on the one hand and human rights law on the other.

Thought the linkage between the two field have been in seen in Universal Declaration of Human Rights (UDHR) the fundamental foundational document of human Rights Law protects authors "moral and material interests" in their "scientific, literary or artistic production[s]" as part of its catalogue of fundamental liberties.

Also in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has now been ratified by nearly 150 countries. Nations for years, intellectual property

remained a normative backwater in the human rights pantheon, neglected by treaty bodies, experts, and commentators while other rights emerged from the jurisprudential shadows. Also there have been no references of the human rights in major international intellectual property treaties such as Paris and Berne Conventions and TRIPS Agreement as well.

The relationship between human rights and contributions to knowledge has been at the centre of important debates over the past several years. The International Covenant on Economic, Social and Cultural Rights (Covenant) is in many ways the most crucial legal instrument through which the relationship between the two fields can be examined. Firstly, it recognises, for instance, the rights to health and food which are some of the rights whose realisation can be affected in developing countries that adopt or strengthen intellectual property rights frameworks based on the commitments they take under the TRIPS Agreement or other intellectual property rights treaties.

Secondly, it recognises at Article 15(1) c the need to reward individuals and groups that make specific intellectual contributions that benefit society. It must be noted at the outset that the rewards which are recognised under the Covenant are not related to existing intellectual property rights regimes. There may be cases where the realisation of this right may be effected through existing intellectual property rights but on the whole, there is no necessary correspondence between the rights recognised in the Covenant at Article 15 and existing intellectual property rights. This is important as it indicates that the Covenant provides a basis for the recognition of all intellectual contributions and not only the ones that fit within the existing intellectual property rights paradigm.

In other words, Article 15(1) c is broad enough to accommodate the claims of traditional knowledge holders for instance.For resolving the conflict between Human Rights and Intellectual Property Rights, the precise Rights which are being undermined should be identified. The Human Rights Organizations should develop specific interpretations of the ambiguous Rights (mainly economic, social and cultural rights) in order to comply with the terms of the TRIPS Agreement. Secondly, if the TRIPS Agreement is seen from the Human Rights perspective, then the consumers of Intellectual Property products will be on an equal stage with the owners of Intellectual Property Rights.

The agreement regards the consumers of these products inferior to the owners. But if the Human Rights purview is added to the agreement, then the consumers will also be the holders of these internationally guaranteed Rights. Thirdly, rather than advocating minimum standards for Intellectual Property Rights protection, the Government should impose maximum standards for Intellectual Property Rights protections.

This would act as a limit for the multiplying standards of Intellectual Property Rights protection. It is also suggested for better protection of the Human Rights if a minimum required standard of the protection of the Human Rights is to be maintained while realizing any kind of Intellectual Property Rights.

Lastly, the international forums on Intellectual Property Rights, such as the World Intellectual Property Organisation (WIPO), the World Trade Organisation (WTO), etc., while making new Laws on Intellectual Property Rights, should analyse the Laws with a Human Rights perspective. It is only in such circumstances that the Human Rights Law and Intellectual Property Rights Law will be able to co-exist with one another properly.

It is quite evident that the contention regarding conflict or coexistence is not something which can be settled in such a short span of time right after there are clear sides on the topic. The thing which can be removed from the list is the 'Stranger' tag. It can be said with utmost sincerity that the interactions these spheres of law have undergone in the past cannot be neglected.

Answer 5(b)

Innovation has led to enormous technological advancements, resulting in an exponential growth of the world economy. With the onset of the digital economy, digital technologies increasingly take the forefront of innovation ecosystem as compared to physical technologies. The protection of intellectual property plays a vital role in facilitating the process of taking innovative technology to the marketplace and enhancing competitiveness of technology-based enterprises.

Intellectual property comes in many forms including patents, trademarks, copyright, industrial design, and trade secrets. Each form of intellectual property can cover different areas or aspects of technology therefore it is important for an organization to identify the intellectual property right and put it to best effect.

Digital technology is systemic and can be developed on an ongoing basis. As a result, IP decisions need to be flexible to enable and adapt to changes in technologies, business models and strategies. It is imperative to understand the utmost importance of having proper IP portfolios in place. In any given sector, a company becomes successful only if it understands how to create large and strategically driven IP portfolios focusing on several relevant, emerging, and converging technologies.

One of the biggest challenges of intellectual property in the digital age is copyright infringement. With the widespread availability of digital content, it has become much easier for people to copy and share copyrighted works without permission. This has led to significant losses for creators and distributors of intellectual property and has made it difficult to enforce intellectual property rights. Another challenge is the impact of open-source software on intellectual property. Open-source software is software that is made available to the public with its source code, allowing users to modify and distribute it freely. This can make it difficult for companies to protect their intellectual property, as their code can be freely copied and distributed.

To address these challenges, several legal and technological solutions can be employed. For example, governments can strengthen intellectual property laws and improve enforcement efforts. Companies can also use digital rights management technologies to protect their intellectual property, while also exploring alternative business models that rely less on traditional intellectual property rights. Overall, intellectual property in the digital age poses complex challenges that require careful consideration and innovative solutions. All stakeholders need to work together to address these challenges and ensure that intellectual property is protected in a way that benefits both creators and consumers alike.

Strategic Importance of IPR in a Digital World

Intellectual Property Rights (IPR) have always been important in various industries, and with the digital world, their strategic importance has increased even more. In a digital world, where information and data are the currency, protecting one's intellectual property

becomes even more critical. Some of the strategic importance of IPR in a digital world are:

- *Protecting innovation* : IPR plays a vital role in protecting innovation in a digital world. With the ease of copying and sharing digital content, innovators need to protect their ideas and inventions from being stolen or misused. Patents, trademarks, and copyrights provide legal protection to creators and innovators, allowing them to protect their ideas and inventions from being copied or stolen.
- *Revenue generation* : IPR can be a significant source of revenue for businesses. By protecting their intellectual property, companies can charge licensing fees for the use of their patents or trademarks, generating a new stream of revenue. In a digital world, where information and data are valuable assets, protecting them through IPR can help companies generate revenue from licensing agreements and other forms of monetization.
- *Brand reputation* : IPR protection can help companies build and maintain a strong brand reputation. Trademarks, for example, can protect a company's brand identity, preventing others from using a similar name or logo that could confuse consumers. By protecting their brand identity, companies can maintain their reputation, and build trust with their customers.
- *Legal protection* : IPR can provide legal protection to businesses, allowing them to take legal action against those who infringe on their intellectual property rights. In a digital world, where copyright infringement and other forms of intellectual property theft are prevalent, businesses need to protect their intellectual property to take legal action against those who misuse their property.

The production, dissemination, and accessibility of intellectual property have all changed as a result of the digital revolution. Almost all types of creative information may now be effortlessly copied, transmitted, and shared around the world with just a few clicks, from music and movies to software and literature. For artists and copyright holders, this ease of reproduction and distribution has both opened up opportunities and caused difficulties.

The widespread infringement of works protected by copyright is one of the biggest problems in the digital era. Unauthorised people may now more easily reproduce and distribute copyrighted works without permission thanks to online platforms and file-sharing networks, which has had a significant negative financial impact on authors and rights holders.

Copyright infringement has become more difficult to establish and punish because of the blurred borders created by the digital environment. Issues like remixes, mashups, and fan fiction raise questions concerning fair use and transformative works. Finding the limits of violation in the digital world is still a difficult issue.

The global difficulty of enforcing intellectual property rights has arisen as a result of the internet's global reach, as the rules and statutes that govern Intellectual Property Rights are distinct from nation to nation. IPR is the Law of the Land that makes these rights more difficult to protect with uniform rules for the protection of IPRs in the era of digital enhancement.

Patent protection in the digital age will continue to be a complex and evolving issue. It is important for companies and organizations to consider their intellectual property rights carefully and to work with legal experts to navigate the complex landscape of patent law. By doing so, they can help ensure that their inventions are protected and that they can continue to innovate in the digital age.

Trademarks are intellectual property right that protects brands, logos, and other identifying marks used to distinguish one company's products or services from those of another. In the online world, there are several challenges to trademark protection.

Question 6

Yash Raj Films (YRF), a renowned production house, is the producer of the Bollywood film, ***Band Baja Baarat*** *which was released on December 10, 2010 in India and other countries. The YRF holds copyright in various original works in this film, including but not limited to the storyline, dialogues, theme, concept, plot, script, music, lyrics and character sketches. YRF had not sold the copyrights of the film to any third party and was the sole owners of the same. Around December 2011, the YRF came to know that Sri Sai Ganesh Productions (SSGP) intended to remake the film in Telugu. The YRF sent two cease and desist notices to the SSGP, one in January 2012 and the other in April 2012 but received no response. Subsequently, the SSGP released a trailer, following that the YRF issued the Third Legal Notice requesting a copy of the Impugned Movie and the Script before the release of the Movie. The SSGP did not respond to the third notice either, and instead released the film titled* ***Jabardasth*** *in February 2013. The SSGP had also sold their rights to a Tamil production house for its remake. The YRF filed a copyright infringement suit against the defendants for blatantly copying the plot, theme and character-sketch of their movie.*

Based on the above facts answer the following :

(a) Will YRF succeed in this case of copyright infringement ? Decide based on the judicial pronouncements of the court.

(b) Education is a basic and fundamental human right enshrined in the Universal Declaration of Human Rights and also under the Constitution of India. Education is considered to be an important means of socialization; it transforms a human being into a social being, and is instrumental in improving the life. How Copyright Act, 1957 has tackled the problem of Access to Education for Visually Impaired Person ?

(6 marks each)

Answer 6(a)

In *R.G. Anand* v. *M/s Deluxe Films and Ors*., (1978) 4 SCC 118 case, the Hon'ble Supreme Court laid down the following proposition to determine the breach of copyright:-

- An idea or a plot cannot form a part of the copyright, but what does, is how they are subject to presentation. If the same is such that suggests imitation, it would be equivalent to a breach of copyright.
- If the idea or the plot is the same, the existence of similarities cannot be avoidable.

The courts will need to examine if any such similarities could cause a potential breach of someone's copyright.

- If an ordinary man can point out that there is a replication of someone else's work, it would amount to a breach of copyright.
- The theme of the work can be identical, but its execution must be different to constitute originality.
- More dissimilarities than similarities will indicate that there was never any intention to copy off someone else's work.
- If there is any clear evidence that seeks to hint at piracy, then in such a case, the breach of copyright would amount to an act of piracy.
- It is for the appellant to prove that there has been a breach of his copyright.

The Court compared the kernel of the two advertisements of the two films and observed that the defendant has infringed the copyright of the film "Band Baja Baaraat".If thoughts are protected like physical goods, individuals can't convey the same notion. This wouldn't encourage unrestricted idea sharing. It's important to exclusively attribute authorship to the material manifestations of artists' works, not their concepts.

The Supreme Court introduced a broader definition of "copying" and standards for spotting intellectual property crimes after this case. First, ideas, plots, topics, concepts, stories, or historical facts cannot be copyrighted. This was important. Art shapes, frames, and expresses the concept. Second, a notion expressed in multiple ways keeps its original properties.

The 'Lay Observer Test' was created in *R.G. Anand* v. *Delux Films and Others*, the Court decides that an infringement has occurred if the spectator has the "unmistakable impression that the following work seems to be a clone of the first." If "a person with common memory can distinguish between the original and reproduced work," it's not a copyright violation. There is no intellectual property infringement when two works share the same underlying idea but portray it differently.

The idea of dichotomy has the following exceptions the doctrine of Merger: in the form of the merger doctrine, which states that copyright would not apply even to the statement in question. In most cases, this occurs when the expression of the thought is inextricably intertwined with the notion itself. The *Indian case of Mattel* v. *Jayant Agarwalla and Others*, which was heard by the Delhi High Court, is regarded as an authoritative source in this area (2008). 'scènes à faire': The phrase 'scènes à faire' literally translates to "obligatory scenes." This philosophy acknowledges that there are specific characteristics of a particular genre that are unavoidable and cannot be changed. However, the mere appearance of such elements cannot be used as grounds for alleging a violation of copyright. This legal principle was first articulated in the *Cain* v. *Universal Pictures* case that was tried in the United States (1942).

A movie is assessed as a "cinematograph film," and also the term "author" refers to the motion picture's producer. The term "copyright" is defined in Section 14 of the Copyright Act because the owner's perquisite to adapt a literary, dramatic, musical, or artistic work. Additionally, section 51 of the Copyright Act states that a copyrighted work is

infringed if a personal does something to which the owner of the copyright has been granted exclusive rights without first obtaining a license from that owner.

However, the connotations of the term "copy" are covered by the phrase "adaptation" within the case of a cinematograph film, giving the owner of the copyright in a very cinematograph film (i.e., the motion picture's producer) the only real right to create a replica of the film. As a result, the copyright holder has the right to remake a film supported a fundamentally similar narrative, albeit with modernization or updating features. Of course, the proper to create a remake is assigned and/or licensed; otherwise, manufacturing a remake without permission from the producer may be a copyright violation of the first work. The degree of intentional resemblance between the 2 works would be the criterion for determining whether a movie could be a remake or not. The Indian Copyright Act, 1957, unlike many other nations' copyright laws, particularly in Europe and USA doesn't include the word "derivative work." The New Work developed as a results of a "adaptation" of the first work, on the opposite hand, is interpreted as add India, which can equate to the term "derived work" as defined in other jurisdictions.

According to Indian law, when an owner offers a 3rd party a license to remake a cinematograph film, the licensee creates new work, and therefore the copyright to it new work is transferred to the licensee unless there's a contract to the contrary.

If the first work's owner wishes to retain ownership of the copyright within the remake, the licensee must convey these rights to the initial owner through an express contract. It's a piece of joint authorship when a piece is made by the collaboration of two or more authors, and one author's contribution isn't distinguishable from the contribution of the opposite author or authors.

If the first owner and therefore the licensee collaborate to form a brand new work employing a common design within the event of a remake, they'll be considered joint authors and/or co-producers of the new work. With this difficulties surrounding the remakes of assorted films, it's only a matter of your time until obtaining suitable licenses for the assembly of a remake becomes commonplace.

Pnthecaseof Shree Venkatesh Films Pvt. Ltd. The court said, citing Raghunath Rai Bareja & Anr, Bengali film "Poran Jaye Joliya Rae" infringed on Bollywood film "Namaste London". The court found that a 'copy' of a film need not be a physical copy, but might also have a considerable likeness to the original. "Image content, foundation, and core" must be evaluated to determine infringement. In other words, a copy may include modifications or inspirations. The court concluded that the Bengali film is a copy or translation of the Hindi film. Namastey London is innovative, according to Purab Aur Paschim. The film's Begali idea and script were ignored.

Answer 6(b)

In India, prior to the 2012 Amendment, Copyright Laws hindered access to persons with disabilities since the owner of copyright in a work had the exclusive right to adapt, make copies, communicate to the public etc. Therefore, any conversion of a book into accessible formats such as Braille, audio books, etc., for the benefit of persons with print disabilities was considered as copyright infringement unless it was undertaken by the owner of copyright or with the permission of the owner of copyright. The Amendment of 2012 does away with the necessity to seek the consent of the authors for converting

their books into accessible formats. Of the numerous changes brought about in the new Indian copyright regime, exceptions and limitations for persons with disabilities were incorporated in the following provision-

Section 52(1)(zb) of the Copyright Act, 1957 provides that the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, by- (i) any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research; or (ii) any organisation working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons: Provided that the copies of the works in such accessible format are made available to the persons with disabilities on a non-profit basis but to recover only the cost of production: Provided further that the organisation shall ensure that the copies of works in such accessible format are used only by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.

Explanation - For the purposes of this sub-clause, "any organization" includes an organisation registered under section 12A of the Income Tax Act, 1961 and working for the benefit of persons with disability or recognised under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection or Rights and Full Participation) Act, 1995 or receiving grants from the government for facilitating access to persons with disabilities or an educational institution or library or archives recognised by the Government. Thus, to this extent, the Act provides that it would not be a copyright infringement if any individual or any organization working for the benefit of the persons with disabilities and on a non-profit basis creates accessible format copies or distributes them to persons with disabilities.

The activities tend to be undertaken by any person to facilitate access to the beneficiaries or non-profit organizations for the disabled peoples' interest. Effective implementation of this copyright provision is of great benefit to the visually impaired persons in India, as it has several advantages such as enabling the reduction of unwanted duplication costs of accessible format copies by sharing it among themselves. Section 31-B of the Copyright Act 1957, which deals with the issuance of a compulsory license to the disabled, is applicable to persons working for their benefit on a profit basis.

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LABOUR LAWS & PRACTICE

Time allowed : 3 hours *Maximum marks : 100*

Total number of questions : 6

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

Question 1

Case Study :

Arihant Textiles Ltd. (ATL) is a company engaged in the business of manufacturing of Bed Sheets, Cushion Covers, Towels, Curtains and like items. The company is having its Corporate Office in Mumbai and works office at Solapur.

After purchasing the cotton seeds, the cotton is processed by the company to manufacture yarn. The processing method involves cleaning, picking, carding, combing, drawing, roving, and spinning. The cotton fibers are separated from the seeds in cotton ginning. The compressed fiber is unraveled using a mixing and blowing machine, cleaned, and processed into sheetshaped to begin the spinning process.

The machinery section where the cotton seeds are segregated and cleaned through machines is very much hazardous. The vapour of cotton gets spread in the hall which directly affects the respiratory system of human being. Although a partition curtain (between the ginning machine and outer tray for storage of cotton balls) is put in place, however the workers are advised to keep a double folded mask on their face (covering nose, mouth and ear) to prevent the inhalation of cotton particles.

The company hires the workers as per the requirement. The cotton is planted from March to June and harvested from August to December. Since during the off season the supply of raw cotton seeds are short, accordingly the less number of workers are hired and in peak season the number is increased. However, on an average 200 to 225 workers usually works in the factory throughout the year, which includes both the gender. The factory do not have separate wash room and rest room facility for the women, where the women workers may feel comfortable during the lunch hours and may feed to their newborn child.

For unskilled labour who work in ginning section, the company usually hires women of the local village. Around 125 women have been provided employment in the factory. Most of the women are required to do the work near the cotton ginning machine which remains in motion, while removing cotton balls from the cotton-openers. The machine also requires periodical cleaning and oiling, which are also being performed by women workers.

Vikrant, is the Supervisor in the factory. He resides in village Vadapur which is around 40 km away from Solapur. He used to travel on bike from his hometown. His wife, Ms. Chanda is the Sarpanch in village Vadapur. Ms. Parvati is a domestic helper in the house of Ms. Chanda. Ms. Chanda on and often misbehaves with Ms. Parvati and sometimes, when the domestic work is not according to the expectation of Ms. Chanda, she speaks abusive words and insults Ms. Parvati in presence of neighbors. One day, some village people visited Ms. Chanda's house to discuss the village development issue. Ms. Chanda called on Ms. Parvati to serve water and tea to the villagers, but Ms. Parvati was busy in feeding her 4 months old baby, so she requested to wait for some time. Annoyed with this, Ms. Chanda passed on sexually coloured remarks on Ms. Parvati. Ms. Parvati, felt very ashamed. In the evening, Ms. Parvati told this incident to Kailash, her husband. Kailash on the advice of an Advocate, decided to

take an action against Ms. Chanda under The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act).

A group of some women workers working in the factory, requested Vikrant to provide some job to their children. Vikrant talked to the management and got the verbal approval to hire 10 children in the age group of 12 to 15 years. Out of 12 children, 2 were female children. During the peak season, Vikrant instructed all the workers to do work for extra hours upto 9 P.M. For doing the work for extra hours the management will pay the overtime. These instructions were also applicable on female workers as well on child workers.

However, increase in the working hours, did not result into more output, as expected. There was a considerable gap between the work load and the available workhours. So, the management decided to give the labour-oriented work to an outside contractor. Contractor will provide his labour force and payment will be made directly to the Contractor. It will also avoid the groupism and will also increase the productivity and ultimately the Contractor will be responsible to give targeted output at a pre-fixed cost of wages. Accordingly, the company management contacted M/s Akshay Manpower Suppliers (AMS), for supply of workforce and to undertake the supply of entire labour force.

The M/s Akshay Manpower Suppliers (AMS) took over all the workers of the Arihant Textiles Ltd. (ATL) on its payroll as per the terms and conditions set out by the AMS. The workers were asked to give certain parameters of output, else will loose their jobs.

Arihant Textiles Ltd. (ATL) in the meeting of its Board of Directors, decided to enter business of manufacturing and selling of hosiery items. For this the company wants another factory building. Since in the existing factory premises, some vacant land is available, so the company decided to construct a factory structure on it. It took the necessary permission for construction of the site and engaged M/s Jasraj Constructions (A Civil Contractor) for the civil work. Around 100 workers of the Contractor started the work of construction at Arihant Textiles Ltd.

Considering the above case, answer the following questions :

(a) What are the obligations on the part of the factory occupier to take measures with regard to health, safety and welfare measures specifically for the women workers under the Factories Act, 1948 ?

(8 marks)

(b) Kailash on the advice of an Advocate, decided to take action against Ms. Chanda under the POSH Act for misbehaving with her wife Ms. Parvati. It is a common belief that POSH Act comes into play only when there is a sexual harassment of woman at workplace. In the given case, there is no office/workplace and there is no harassment of woman by any man. Hence, the provisions of the POSH Act shall not be applicable. Do you agree with this contention ? Substantiate your answer.

(8 marks)

(c) (i) Whether hiring of children in the age group of 12 to 15 years is permissible under the law ?

(ii) What are the working hour conditions prescribed for employment of children?

(iii) Whether the working hours for all the workers can be increased or is there any restriction for female workers ?

(2+3+3=8 marks)

(d) M/s Akshay Manpower Suppliers (AMS) entered into the contract with the Arihant Textiles Ltd. (ATL) for supply of labour force on contract basis.

(i) In the new changed scenario who shall be regarded as the Principal Employer ?

(ii) What are the provisions relating to the registration of establishment ?

(iii) What is the effect of non-registration of establishment ?

(2+3+3=8 marks)

(e) M/s Jasraj Constructions sent around 100 workers to do the civil work for Arihant Textiles Ltd. In light of this :

(i) Whether these building workers are required to get any registration with Registration Officer ?

(ii) Arihant Textiles Ltd or Jasraj Constructions, which one, shall be termed as 'Establishment' ?

(iii) Whether registration of establishment is different from the registration of building worker ?

(3+2+3=8 marks)

Answer 1(a)

Various sections of the Factories Act, 1948, narrates obligations on the part of the factory occupier to take measures with regard to health, safety and welfare measures specifically for the women workers as under:

I. Obligations under Health Measures

- **Latrines and urinals (Section 19)**

  Section 19(1)(b) provides that in every factory, separate enclosed accommodation shall be provided for male and female workers.

  Section 19(3) states that the State Government may prescribe the number of latrines and urinals to be provided in any factory in proportion to the numbers of male and female workers ordinarily employed therein, and provide for such further mailers in respect of sanitation in factories, including the obligation of workers in this regard, as it considers necessary in the interest of the health of the workers employed therein.

II. Obligations under Safety Measures

- **Work on or near machinery in motion (Section 22)**

  Section 22 (2) provides that no woman or young person shall be allowed to clean, lubricate or adjust any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion, or to clean, lubricate or adjust any part of any machine if the cleaning, lubrication or adjustment thereof would expose the woman or young person to risk of injury from any moving part either of that machine or of any adjacent machinery.

- **Prohibition of employment of women and children near cotton- openers (Section 27)**

  No woman or child shall be employed in any part of a factory for pressing cotton in which a cotton opener is at work. Provided that if the feed-end of a cotton-opener is in a room separated from the delivery end by a partition extending to the roof or to such height as the Inspector may in any particular case specify in

writing, women and children may be employed on the side of the partition where the feed- end is situated.

III. Obligations under Welfare Measures

- **Washing facilities (Section 42)**

  Section 42(1)(b) provides that in every factory separate and adequately screened washing facilities shall be provided for the use of male and female workers.

- **Creches (Section 48)**

  (1) In every factory wherein more than thirty women workers are ordinarily employed there shall be provided and maintained a suitable room or rooms for the use of children under the age of six years of such women.

  (2) Such rooms shall provide adequate accommodation, shall be adequately lighted and ventilated, shall be maintained in a clean and sanitary condition and shall be under the charge of women trained in the care of children and infants.

  (3) Follow the rules made by State Government for the creches facilities for women workers employed in factories.

Answer 1 (b)

For applicability of the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act), we refer the following provisions of the POSH Act:

- **Whether Ms. Parvati is an aggrieved woman:**

  In terms of Section 2(a), "aggrieved woman" means—

  (i) in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent;

  (ii) in relation to dwelling place or house, a woman of any age who is employed in such a dwelling place or house.

  Thus, as per Section 2(a)(ii), Ms. Parvati is an aggrieved woman in this case, since the incident was happened in a dwelling house, where she is working as domestic helper.

- **Whether domestic worker is included in POSH Act:**

  In terms of Section 2(e) "domestic worker" means a woman who is employed to do the household work in any household for remuneration whether in cash or kind, either directly or through any agency on a temporary, permanent, part time or full time basis, but does not include any member of the family of the employer. Therefore, Ms. Parvati is a domestic worker and an aggrieved woman.

- **Whether Ms. Chanda is considered as 'Employer':**

  In terms of Section 2(g)(iv) "employer" means in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of domestic worker, irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker. Hence, Ms. Chanda shall be considered as 'Employer'.

- **Whether dwelling place is to be considered as 'workplace':**

  In terms of Section 2(o)(vi) "workplace" includes a dwelling place or a house. Thus,

the dwelling place where the Ms. Parvati is working, shall be considered as her workplace.

- **Definition of sexual harassment**

  In terms of Section 2(n), "sexual harassment" includes any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:—

  (i) physical contact and advances; or

  (ii) a demand or request for sexual favours; or

  (iii) making sexually coloured remarks; or

  (iv) showing pornography; or

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

  Thus, in terms of Section 2(n)(iii) & (v), there is sexual harassment.

- **Whether a woman can sexually harass another woman:**

  In terms of Section 2(m) "respondent' means a person against whom the aggrieved woman has made a complaint under section 9.

Here, the respondent is Ms. Chanda. In the POSH Act, no where it is mentioned that the respondent should be man only. It could be of any gender. The word used in Section 2(m) is 'person' and not the '**man**' or '**woman**'. Thus, any person against whom a complaint under Section 9 of the Act is made, is called a 'Respondent'.

Referring the provisions mentioned above, we disagree with the contention as given in the question and Ms. Parvati can initiate action against Ms. Chanda before the Local Complaints Committee.

Answer 1(c)(i)

Prohibition of employment of young persons

Section 67 of the Factories Act, 1948 provides that no child who has not completed his 14 years shall be required or allowed to work in any factory.

In the given case, the children of the age group between 12 to 15 have been provided employment, hence, the hiring of children is not permissible who have not completed 14 years of age as per the above legal provisions.

Answer 1(c)(ii)

Section 71 of the Factories Act, 1948 prescribes the Working hours for children.

(1) No child shall be employed or permitted to work, in any factory -

  a) for more than four and a half hours in any day;

  b) during the night.

  Here, 'night' shall mean a period of at least twelve consecutive hours which shall include the interval between 10 P.M. and 6 A.M.

(2) The period of work of all children employed in a factory shall be limited to two shifts which shall not overlap or spread over more than five hours each; and each child shall be employed in only one of the relays which shall not, except with the previous permission in writing of the Chief Inspector, be changed more frequently than once in a period of thirty days.

(3) The provisions of section 52 related to weekly holidays shall also apply to child workers and no exemption from the provisions of that section may be granted in respect of any child.

(4) No child shall be required or allowed to work in any factory on any day on which he has already been working in another factory.

(5) No female child shall be required or allowed to work in any factory except between 8 A.M. and 7 P.M.

Answer 1(c)(iii)

The working hours of adults are governed by Chapter VI of the Factories Act, 1948.

- **Weekly Hours (Section 51)**

  No adult worker shall be required or allowed to work in a factory for more than 48 hours in any week.

- **Daily Hours (Section 54)**

  Subject to the provisions of section 51, no adult worker shall be required or allowed to work in a factory for more than nine hours in any day.

- **Extra wages for overtime (Section 59)**

  Section 59(1) provides that where a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages.

- **Further restrictions on employment of women (Section 66)**

  Section 66(1) states that the provisions of this Chapter VI shall, in their application to women in factories, be supplemented by the following further restrictions, namely: —

  a) no exemption from the provisions of section 54 may be granted in respect of any woman;

  b) no woman shall be required or allowed to work in any factory except between the hours of 6 A.M. and 7 P.M.;

     However, the State Government may, by notification in the Official Gazette, in respect of any factory or group or class or description of factories, vary the limits laid down in clause (b), but so that no such variation shall authorize the employment of any woman between the hours of 10 P.M. and 5 A.M.;

  c) there shall be no change of shifts except after a weekly holiday or any other holiday.

Therefore, subject to restrictions mentioned above the working hours may be increased.

Answer 1(d)(i)

In terms of Section 2(1)(g) (ii) of the Contract Labour (Regulation and Abolition) Act, 1970, the “principal employer” means -

(i) in relation to any office or department of the Government or a local authority, the head of that office or department or such other officer as the Government or the local authority, as the case may be, may specify in this behalf,

(ii) in a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named,

(iii) in a mine, the owner or agent of the mine and where a person has been named as the manager of the mine, the person so named. Here, the expressions "mine", "owner" and "agent" shall have the meanings as defined in section 2 of the Mines Act, 1952.

(iv) in any other establishment, any person responsible for the supervision and control of the establishment.

Thus, as per Section 2(1)(g)(ii) still M/s Arihant Textiles Ltd. (ATL) shall be treated as 'Principal Employer'.

Answer 1(d)(ii)

Section 7 of the Contract Labour (Regulation and Abolition) Act, 1970 deals with the registration of certain establishments which makes it mandatory for every principal employer of an establishment to which this Act applies to make an application to the registering office in the prescribed manner for registration of the establishment. The appropriate Government may, by notification in the Official Gazette, fix time period for making such application with respect to establishments generally or with respect to any class of them.

If the application for registration is complete in all respects, the registering officer shall register the establishment and issue to the principal employer of the establishment a certificate of registration containing such particulars as may be prescribed.

Section 7 (1) of this Act read with Rule 17 (1) of The Contract Labour (Regulation and Abolition) Central Rules, 1971 (Rules) mandates that every principal employer of an establishment to which this Act applies shall, in the time limit so fixed, make an application in triplicate, in Form I, to the registering office in the prescribed manner for registration of the establishment accompanied by treasury receipt showing payment of the fees for the registration of the establishment [Rule 17(2)].

Such application shall be either personally delivered to the registering officer or sent by registered post. [Rule 17(3)].

The Registering Officer may at his discretion entertain any such application for registration after expiry of the period fixed in this behalf upon being satisfied that there is sufficient cause for delay. The Registering officer, on being satisfied, issue a certificate of registration.

The registering officer shall maintain a register in Form III showing the particulars of establishments in relation to which certificate of registration have been issued by him. [Rule 18(3)]. Further, Rule 18(4) mandates that, if there is any change, in the particulars specified in the certificate of registration, the principal employer of the establishment shall intimate to the registering officer, within 30 (Thirty) days from the date when such change takes place, the particulars of, and the reasons for such changes.

Answer 1(d)(iii)

Effect of non-registration:

According to Section 9 of the Contract Labour (Regulation and Abolition) Act, 1970, no principal employer of an establishment, to which this Act applies, shall employ contract labour in the establishment after the expiry of the period of registration of the establishment for the purpose under section 7 and after the revocation of registration of such establishment under Section 8 of the Act.

If any person contravenes the provisions of the Act shall be liable for penalty as per Chapter VI (Section 23, 24 and 25) of the Contract Labour (Regulation and Abolition) Act, 1970.

Answer 1(e)(i)

Section 11 of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 states that subject to the provisions of this Act, every building worker registered as a beneficiary under this Act shall be entitled to the benefits provided by the Board from its Fund under this Act.

Therefore, the building workers should get registered with Registration Officer as beneficiaries of the Building and Other Construction Workers' Welfare Fund.

Answer 1(e)(ii)

In terms of Section 2(1)(j) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 "establishment" means any establishment belonging to, or under the control of, Government, anybody corporate or firm, an individual or association or other body of individuals which or who employs building workers in any building or other construction work; and includes an establishment belonging to a contractor, but does not include an individual who employs such workers in any building or construction work in relation to his own residence the total cost of such construction not being more than rupees ten lakhs.

In view of the above legal provisions, M/s Jasraj Construction shall be termed as 'Establishment'.

Answer 1(e)(iii)

Registration of establishments [Section 7 of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996]

(1) Every employer shall: —

a) in relation to an establishment to which this Act applies on its commencement, within a period of sixty days from such commencement; and

b) in relation to any other establishment to which this Act may be applicable at any time after such commencement, within a periodof sixty days from the date on which this Act becomes applicable to such establishment, make an application to the registering officer for the registration of such establishment. Provided that the registering officer may entertain any such application after the expiry of the period aforesaid, if he is satisfied that the applicant was prevented by sufficient cause from making the application within such period.

(2) Every application under sub-section (1) shall be in such form and shall contain such particulars and shall be accompanied by such fees as may be prescribed.

(3) After the receipt of an application under sub-section (1), the registering officer shall register the establishment and issue a certificate of registration to the employer thereof in such form and within such time and subject to such conditions as may be prescribed.

(4) Where, after the registration of an establishment under this section, any change occurs in the ownership or management or other prescribed particulars in respect of such establishment, the particulars regarding such change shall be intimated by the employer to the registering officer within thirty days of such change in such form as maybe prescribed.

Registration of building workers as beneficiaries [Section 12 of Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996]:

Every building worker who has completed eighteen years of age but has not completed sixty years of age and who has been engaged in any building or other construction work for not less than ninety days during the preceding twelve months shall be eligible for registration as a beneficiary by submitting an application for registration to the Officer authorised by the Board in this behalf along with such documents together with such fee not exceeding fifty rupees as may be prescribed. After being satisfied Officer authorised by the Board shall register the name of building worker as a beneficiary under the Act. Any person aggrieved by the decision of the Board may within thirty days from the date of such decision, prefer an appeal to the Secretary of the Board or any other Officer specified by the Board in this behalf.

Based on above provisions, it is clear that registration of establishment is different from the registration of building worker and are dealt by different provisions.

Question 2

(a) Ms. Chesta after passing BE got a job in Bombay Datamatics Ltd (an IT Company). She was placed in Kalyan Office of the Company. In Kalyan Office, Rohan was also doing job as a Software Consultant.

After sometime, Rohan and Ms. Chesta came closer. They took a flat in Kalyan area and started living in a 'live-in-relationship' from May 2022. However, they did not disclose their relationship in the Office nor to any of their family/relatives. Ms. Chesta, on the request made by her, was allowed to do the office work from home. (Work from Home).

In December, 2022, Ms. Chesta undergone a miscarriage. She applied for maternity leave but the company denied to sanction the paid leave quoting the reason that as per its record, Ms. Chesta was unmarried. The HR official of the Company, in a mail to Ms. Chesta, informed that there is no provision/policy of the Company to grant maternity leave on account of miscarriage/pregnancy to an unmarried woman. Aggrieved to this Ms. Chesta approached a lawyer.

(i) Whether Ms. Chesta will get the benefit of maternity leave as described under the Maternity Benefit Act, 1961, inspite of the fact that she is not married (i.e., living in 'live-in-relationship') ?

(ii) What maternity benefits can be claimed by Ms. Chesta ?

(iii) Whether contention of the Company is right in denying the maternity benefit to Ms. Chesta or the Company will be held liable for the contravention of the provisions of the Maternity Benefit Act, 1961 ?

(2+2+2=6 marks)

(b) Bhima and his wife Ms. Kamla are doing labour work in Progressive Construction Company Ltd. Bhima and Ms. Kamla are being paid ₹ 500 and ₹ 400 per day for their labour work. Like Bhima and Kamla, there are many other workers, working in the Construction Company and the Company is following the practice of paying less wages to the female worker in comparison to male workers.

Kamla and many more female workers raised their voice before the management to give wages at par with the male workers. To handle this situation, the management reduced the wages of the male workers and kept it

as ₹ 400. Now irrespective of any gender, the wages of both the gender are ₹ 400 per day.

(i) Whether reducing of the wages of the male workers to follow the principle of 'Same work–Same pay' is justified ? Give your answer in light of the provisions of the Code of Wages, 2019.

(ii) If in the above case, instead of reducing the wages of the male workers, the Company argues that the work assigned to the male and female are entirely separate and not the same work, hence there is difference in wages. In such circumstances, which Authority shall decide the dispute, whether the work allocated to male and female workers are different or same ?

(iii) Whether Bhima and Ms. Kamla are to be treated as 'Employee' or 'Worker' of the Construction Company ? Explain.

(2+1+3=6 marks)

Answer 2(a)(i)

In terms of Section 3(o) of the Maternity Benefit Act, 1961 'woman' means a woman employed, whether directly or through any agency, for wages in any establishment.

The definition of woman as prescribed under the Act do not specify that a woman to get the benefits under the Act should be married only. Any woman whether 'married' or 'unmarried' or living in 'live-in- relationship' is covered under the definition of woman as prescribed under the Act. It simply says that the 'woman' means any woman who is employed for wages in any establishment, whether employed directly or through any agency.

Further Section 5(1) states that every woman shall be entitled to the payment of maternity benefit. In the given case, since Ms. Chesta is a woman, she has been employed in the Company for wages, hence, she is eligible to get all the benefits as prescribed under the Maternity Benefit Act, 1961 inspite of the fact that she is not married.

Answer 2(a)(ii)

In terms of Section 3(h) of the Maternity Benefit Act, 1961 "maternity benefit" means the payment referred to in Section 5(1).

Section 5(1) states that subject to the provisions of this Act, every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day.

The maximum period for which any woman shall be entitled to maternity benefit shall be twenty-six weeks of which not more than eight weeks shall precede the date of her expected delivery. However the maximum period entitled to maternity benefit by a woman having two or more than two surviving children shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery. If a woman dies during this period, the maternity benefit shall be payable only for the days up to and including the day of her death. Where a woman, having been delivered of a child, dies during her delivery or during the period immediately following the date of her delivery for which she is entitled for the maternity benefit, leaving behind in either case the child, the employer shall be liable for the maternity benefit for that entire period. If the child also dies during the said period, then, for the days up to and including the date of the death of the child. A woman who legally adopts a child below the age of three months or a commissioning mother shall be entitled to maternity benefit for a

period of twelve weeks from the date the child is handed over to the adopting mother or the commissioning mother, as the case may be.

In case where the nature of work assigned to a woman is of such nature that she may work from home, the employer may allow her to do so after availing of the maternity benefit for such period and on such conditions as the employer and the woman may mutually agree.

Answer 2(a)(iii)

The contention of the Company is not right in denying the legitimate right of Ms. Chesta.

Penalty for contravention of Act by employer:

Section 21 of the Maternity Benefit Act, 1961 provides that -

(1) If any employer fails to pay any amount of maternity benefit to a woman entitled under this Act or discharges or dismisses such woman during or on account of her absence from work in accordance with the provisions of this Act, he shall be punishable with imprisonment which shall not be less than three months but which may extend to one year and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees.

However, the court may, for sufficient reasons to be recorded in writing, impose a sentence of imprisonment for a lesser term or fine only in lieu of imprisonment.

(2) If any employer contravenes the provisions of this Act or the rules made thereunder, he shall, if no other penalty is elsewhere provided by or under this Act for such contravention, be punishable with imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both. However, where the contravention is of any provision regarding maternity benefit or regarding payment of any other amount and such maternity benefit or amount has not already been recovered, the court shall, in addition, recover such maternity benefit or amount as if it were a fine and pay the same to the person entitled thereto.

Answer 2(b)(i)

According to Section 3(1) of the Code of Wages, 2019 there shall be no discrimination in an establishment or any unit thereof among employees on the ground of gender in matters relating to wages by the same employer, in respect of the same work or work of a similar nature done by any employee.

Further Section 3(2) states that no employer shall, —

(i) for the purposes of complying with the provisions of sub-section (1), reduce the rate of wages of any employee; and

(ii) make any discrimination on the ground of sex while recruiting any employee for the same work or work of similar nature and in the conditions of employment, except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force.

In light of the above stated legal provisions, reducing the wages of the male workers by construction company to follow the principle of 'Same work- Same wages' is not justifiable, instead of reducing the wages it should increase the wages of female worker to Rs. 500/- in order to keep it at par with the male workers.

Answer 2(b)(ii)

Section 4 of the Code on Wages, 2019 provides that where there is any dispute as to

whether a work is of same or similar nature for the purposes of section 3, the dispute shall be decided by such authority as may be notified by the appropriate Government.

Answer 2(b)(iii)

The Code of Wages, 2019 defines the meaning of 'Employee' and 'Worker' as under:

Meaning of 'Employee'

In terms of Section 2(k) of the Code, "Employee" means, any person (other than an apprentice engaged under the Apprentices Act, 1961), employed on wages by an establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and also includes a person declared to be an employee by the appropriate Government, but does not include any member of the Armed Forces of the Union.

Meaning of 'Worker'

In terms of Section 2(z) of the Code, "Worker" means any person (except an apprentice as defined under clause (aa) of section 2 of the Apprentices Act, 1961) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and includes -

(i) working journalists as defined in clause (f) of section 2 of the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955; and

(ii) sales promotion employees as defined in clause (d) of section 2 of the Sales Promotion Employees (Conditions of Service) Act, 1976, and for the purposes of any proceeding under this Code in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched or otherwise terminated in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person -

  (a) who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957; or

  (b) who is employed in the police service or as an officer or other employee of a prison; or

  (c) who is employed mainly in a managerial or administrative capacity; or

  (d) who is employed in a supervisory capacity drawing wage of exceeding fifteen thousand rupees per month or an amount as may be notified by the Central Government from time to time.

In the given case, Bhima and Ms. Kamla have been employed to do the labour related work and not the managerial work, hence both will be treated as 'Worker' and not the 'Employee'.

Question 3

(a) Radha is engaged in providing services as domestic helper in a residential society. She used to serve in 10 flats in a day. However, she is not happy with the malpractices played by the flat owners. Some of the issues were of not giving paid leave, timely payment of the services rendered, payment of gift/bonus on festivals, medical and emergency help etc. She wants to form a trade union to protect the interest of the domestic helpers and approaches you to seek guidance for formation of a trade union. Describe whether Radha can

initiate the formation of trade union ? If yes, what procedures has to be complied with by her ?

(6 marks)

(b) *Safe Golden Transport Company Ltd. (SGTC) is engaged in providing transportation of goods from one place to another. Its area of operation is mainly within Rajasthan. The SGTC has 50 trucks and 300 staff members including the drivers, helpers, clerks and officers. The employees and workmen are being paid salary on a monthly basis, which is paid on the last day of the month. Apart from the salary, the company also pays bonus on every Diwali festival, which is usually one month's salary. However, the bonus for the Diwali time for the year 2022 could not be paid by the company on account of losses. Some of the truck drivers stopped the work and remained on unauthorized leave for a period of one week. The employer accordingly deducted one week's salary of the concerned truck drivers. Aggrieved from this, the employees made a complaint to the Regional Labour Commissioner for non-payment of wages to the workers and employees.*

(i) *Whether SGTC, a transport company comes under the meaning of the industrial establishment as per the Payment of Wages Act, 1936 ?*

(ii) *Whether non-payment of bonus on Diwali time by the SGTC comes under the definition of wages ?*

(iii) *Whether the deduction of one week's salary by the employer is justifiable ?*

(2+2+2=6 marks)

Answer 3(a)

Trade union is a voluntary organization of workers pertaining to a particular trade, industry or a company and formed to promote and protect their interests and welfare by collective action. Therefore, Radha can initiate the formation of trade union.

Since Radha is engaged in providing the services as a domestic helper and want to form a trade union to protect the interest of the domestic helpers, the provisions contained in the Trade Union Act, 1926 relating to the formation and registration of the trade union has to be followed.

In terms of Section 2(h) of the Act 'Trade Union' means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions.

Mode of Registration of Trade Union under Trade Union Act, 1926

Section 4(1) of the Act provides that any seven or more members of a Trade Union may, by subscribing their names to the rules of the Trade Union and by otherwise complying with the provisions of this Act with respect to registration, apply for registration of the Trade Union under this Act.

However, no Trade Union of workmen shall be registered unless at least ten per cent or one hundred of the workmen, whichever is less, engaged or employed in the establishment or industry with which it is connected are the members of such Trade Union on the date of making of application for registration. Further, no Trade Union of workmen shall be registered unless it has on the date of making application not less than seven persons as its members, who are workmen engaged or employed in the establishment or industry with which it is connected.

Radha should first approach to the other domestic helpers working in that complex or nearby complex and explain them the purpose and benefit of forming such trade union. If Radha is able to convince the domestic helpers and sufficient number of domestic helpers are gathered as per the requirement of the Act, the trade union may be formed and apply for its registration.

Section 5(1) describes about the application for registration. It provides that -

(1) Every application for registration of a Trade Union shall be made to the Registrar, and shall be accompanied by a copy of the rules of the Trade Union and a statement of the following particular's, namely: —

(a) the name, occupation and address of the members making the application;

(b) in the case of a Trade Union of workmen, the names, occupations and addresses of the place of work of the members of the Trade Union making the application;

(c) the name of the Trade Union and the address of its head office; and

(d) the title, name, age, address and occupation of the office bearers of the Trade Union.

A Trade Union shall not be entitled to registration under the Act, unless the executive thereof is constituted in accordance with the provisions of the Act, and the rules thereof.

Certificate of Registration

The Registrar, on being satisfied that the Trade Union has complied with all the requirements of the Act in regard to registration, shall register the Trade Union by entering in a register, to be maintained in such form as may be prescribed, the particulars relating to the Trade Union contained in the statement accompanying the application for registration. The Registrar, on registering a Trade Union under section 8, shall issue a certificate of registration in the prescribed form which shall be conclusive evidence that the Trade Union has been duly registered under the Act.

Answer 3(b)(i)

In terms of Section 2(ii) (a) of the Payment of Wages Act, 1936, 'industrial or other establishment' means any tramway service, or motor transport service engaged in carrying passengers or goods or both by road for hire or reward. Since the SGTC is engaged in the business of providing transportation of goods which is fully covered under the definition as prescribed under Section 2(ii)(a). Hence, the SGTC comes under the category of 'Industrial or other establishment'.

Answer 3(b)(ii)

In terms of Section 2(vi) (1) of the Payment of Wages Act, 1936 'wages' means all remuneration (whether by way of salary, allowances, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, but does not include any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court.

Since the bonus does not come within the definition of wages, the non- payment of bonus does not amount to violations of the provisions of the Payment of Wages Act, 1936.

Answer 3(b)(iii)

Whether the deduction of one week's salary by the employer is justifiable:

Section 7(2) of the Payment of Wages Act, 1936 provides that deduction from the wages of an employed person shall be made only in accordance with the provisions of this Act, and may be of the following kinds only, which inter-alia covers the Deduction for absence from duty.

Since some of the truck drivers remained on unauthorized leave for one week, hence the employer can make appropriate deduction in salary on account of absence from duty.

Question 4

(a) Utkarsh, Alisha and Eknath are friends and are fellow members of the Institute of Company Secretaries of India (ICSI). They decided to engage in practice of CS Profession, so they all resigned from their respective services and formed a Limited Liability Partnership under the name and style of UAE and Associates LLP. (UAE). The UAE also engaged three CS Students as Apprentice on a monthly stipend as per the norms prescribed by the ICSI.

(i) Whether UAE can be treated as 'Industry' within the meaning of Industrial Disputes Act, 1947 ?

(ii) Whether the student undergoing training as Apprentice can be treated as 'Workers' within the meaning of Industrial Disputes Act, 1947 ?

(3+3=6 marks)

(b) Khushi Ram is having a farm land near Sri Ganganagar (Rajasthan) admeasuring 10 hectares. He cultivates seasonal crops on it, like wheat, maize etc. For doing farm work, the labours have been engaged. Ten labours are permanent, which get the compensation on monthly basis while others are temporary which are hired as per the requirement, during the crop season. During the last 12 months Khushi Ram hired 25 such labours. The temporary labours continue to be hired for one full crop season, the period of which runs around 3 to 4 months.

(i) Which of the Labour Act shall be applicable in the given case ?

(ii) Whether Khushi Ram is required to get the registration under such Act?

(iii) If Khushi Ram sold this farm land to another person named Mahesh, whether Mahesh can continue with the old registration ?

(2+2+2=6 marks)

Answer 4(a)(i)

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

After discussing the definition from various angles, in the case of Bangalore Water Supply and Sewerage Board, the Supreme Court, laid down the following tests to determine whether an activity is covered by the definition of "industry" or not. It is also referred to as the **triple test.**

I. (a) Where there is -

(i) systematic activity,

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

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

(b) Absence of profit motive or gainful objective is irrelevant wherever the undertaking is whether in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organisation is a trade or business, it does not cease to be one because of philanthropy animating the undertaking.

II. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to over-stretch itself. Undertaking must suffer a contextual and associational shrinkage, so also, service, calling and the like. This yields the inference that all organised activity possessing the triple elements although not trade or business, may still be "industry", provided the nature of the activity, *viz*., the employer - employee basis, bears resemblance to what we find in trade or business. This takes into the fold of "industry", undertaking, callings and services, adventures analogous to the carrying on of trade or business. All features, other than the methodology of carrying on the activity, viz., in organising the co- operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms, there is analogy.

III. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition, nothing less, nothing more.

Thus, a CS Firm can be an 'industry' (as per Bangalore Water Supply Case) since it satisfies the triple test.

Answer 4(a)(ii)

In terms of Section 2(s) of Industrial Disputes Act, 1947, 'workman' means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person: —

(i) who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

Since the definition of 'workman' include apprentice, hence the CS students who are with CS Firm as trainee are to be treated as 'workman'.

Answer 4(b)(i)

In the given case, the Plantations Labour Act, 1951 shall be applicable. Section 1(4) of the Act describes the applicability. It applies to the following plantations, that is to say: —

(a) to any land used or intended to be used for growing tea, coffee, rubber, cinchona or cardamom which admeasures 5 hectares or more and in which fifteen or more persons are employed or were employed on any day of the preceding twelve months;

(b) to any land used or intended to be used for growing any other plant, which admeasures 5 hectares or more and in which fifteen or more persons are employed or were employed on any day of the preceding twelve months, if, after obtaining the approval of the Central Government, the State Government, by notification in the Official Gazette, so directs.

In the given case, the following conditions are being satisfied:

(i) Khushi Ram is having a farm land admeasuring 10 hectares (which is more than 5 hectares, as prescribed under the Act)

(ii) Khushi Ram has employed 10 persons which are of permanent nature. The temporary labours were employed for one full crop season which runs from 3 to 4 months. The number of temporary labours employed by Khushi Ram during the last 12 months were 25 in number.

Since the conditions stipulated in Section 1(4)(b) of the Plantations Labour Act, 1951 have been fulfilled hence the said Act shall be applicable.

Answer 4(b)(ii)

Section 3B of the Plantations Labour Act, 1951 deals with the registration of plantations. It *inter-alia* states that –

(1) Every employer of a plantation, existing at the commencement of the Plantation Labour (Amendment) Act, 1981 shall, within a period of sixty days of such commencement, and every employer of any other plantation coming into existence after such commencement shall, within a period of sixty days of the coming into existence of such plantation, make an application to the registering officer for the registration of such plantation;

(2) Every application made under sub-section (1) shall be in such form and shall contain such particulars and shall be accompanied by such fees as may be prescribed.

Thus, Khushi Ram is required to make an application in accordance with above stated provisions to the registering officer for the registration of such plantation.

Answer 4 (b) (iii)

Section 3B (5) of the Plantations Labour Act, 1951 provides that where, after the registration of a plantation under this section, any change occurs in the ownership or management or in the extent of the area or other prescribed particulars in respect of such plantation, the particulars regarding such change shall be intimated by the employer to the registering officer within thirty days of such change in such form as may be prescribed.

Therefore, after registration when there is a change in the ownership, Mahesh should intimate such changes to the registering officer, in the prescribed form within 30 days and thus, Mahesh can continue with old registration.

Question 5

(a) Makrana is a well-known name for its fine quality marble. It is regarded as the oldest place in India with marble mines. The State Government has its own marble mines in the area and hundreds of labours, skilled and unskilled are engaged in it. The labours of marble mines were demanding for wage revision since it was not revised for the last 10 years. The Union Leader raised a Charter of Demands for the wage revision before the management and informed to go on strike, if the demands were not adhered to within a reasonable time.

Based on the above facts, answer the following questions :

(i) Whether the Marble Mines comes under Scheduled Employment under the Minimum Wages Act, 1948 ?

(ii) Who shall be the Appropriate Government Authority for revision of the wages ?

(iii) What shall be the procedure for revising the minimum wages ?

(1+1+4=6 marks)

(b) Vinayak Airlines runs its aircrafts between the metro and major cities of India. The air route of Mumbai to Chennai named as VA-471 was on its scheduled flight on 10th August, 2023. Suwas is the captain of the VA-471 and 3 other persons are crew members. While running on the Chatrapati Shivaji Maharaj International Airport, Mumbai for taking off, the front tyres of the aircraft burst on the runway and the aircraft slipped off from the runway. The pilot died on the spot, one crew member badly injured and some passengers also injured.

What is the provision of compensation to legal heirs of the captain and crew members ?

(6 marks)

Answer 5(a)(i)

In terms of Section 2(g) of the Minimum Wages Act, 1948 “Scheduled employment” means an employment specified in the Schedule or any process or branch of work forming part of such employment.

Marble is a stone and ‘Employment in stone mines’ is covered in Part I of the Schedule of the said Act. Hence, it comes under the Scheduled Employment.

Answer 5 (a)(ii)

In terms of Section 2(b) of the Minimum Wages Act, 1948, “Appropriate Government” means-

(i) in relation to any scheduled employment carried on by or under the authority of the Central or a railway administration, or in relation to a mine, oilfield or major part or any corporation established by a Central Act, the Central Government, and

(ii) in relation to any other scheduled employment, the State Government.

Since the ‘Employment in stone mines’ is covered in Part I of the Schedule, hence the Appropriate Government in this case shall be the State Government i.e Government of Rajasthan.

Since the mines at Makrana are owned by State Government (i.e., Government of Rajasthan) hence, the Appropriate Government in this case shall be the Government of

Answer 5(a)(iii)

Section 5 of the Minimum Wages Act, 1948 provides that in fixing minimum rates of wages in respect of any scheduled employment for the first time or in revising minimum rate of wages, the appropriate Government can follow either of the two methods described below:

- **First Method [Section 5(1)(a)]**

  This method is known as the 'Committee Method'. The appropriate Government may appoint as many committees and sub-committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision as the case may be. After considering the advice of the committee or committees, the appropriate Government shall, by notification in the Official Gazette fix or revise the minimum rate of wages. The wage rates shall come into force from such date as may be specified in the notification. If no date is specified, wage rates shall come into force on the expiry of three months from the date of the issue of the notification.

- **Second Method [Section 5(1)(b)]**

  The method is known as the 'Notification Method'. When fixing minimum wages under Section 5(1)(b), the appropriate Government shall by notification, in the Official Gazette publish its proposal for the information of persons likely to be affected thereby and specify a date not less than 2 months from the date of notification, on which the proposals will be taken into consideration.

  Section 5(2) of the Act provides that after considering the advice of the committee or committees appointed under clause (a) of sub-section (1), or as the case may be, all representations received by it before the date specified in the notification under clause (b) of that sub-section, the appropriate Government shall, by notification in the Official Gazette, fix, or, as the case may be, revise the minimum rates of wages in respect of each scheduled employment, and unless such notification otherwise provides, it shall come into force on the expiry of three months from the date of its issue.

  Provided that where the appropriate Government proposes to revise the minimum rates of wages by the mode specified in clause (b) of sub- section (1), the appropriate Government shall consult the Advisory Board also.

Answer 5(b)

Section 15A of the Employees Compensation Act, 1923 deals with the matter. As per Section 15A, this Act shall apply in the case of employees who are captains or other members of the crew of aircrafts subject to the following modifications, namely:

1. The notice of the accident and the claim for compensation may, except where the person injured is the captain of the aircraft, be served on the captain of the aircraft as if he were the employer, but where the accident happened and the disablement commenced on board the aircraft it shall not be necessary for any member of the crew to give notice of the accident.

2. In the case of the death of the captain or other member of the crew, the claim for compensation shall be made within one year after the news of the death has been received by the claimant or, where the aircraft has been or is deemed to have been lost with all hands, within eighteen months of the date on which the aircraft was, or is deemed to have been so lost.

Provided that the Commissioner may entertain any claim for compensation in any case notwithstanding that the claim has not been preferred in due time as provided in this sub-section, if he is satisfied that the failure so to prefer the claim was due to sufficient cause.

Where an injured captain or other member of the crew of the aircraft is discharged or left behind in any part of India or in any other country, any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the Central Government or any State Government shall, in any proceedings for enforcing the claims, be admissible in evidence:

a. if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made;

b. if the defendant or the person accused, as the case may be, had an opportunity by himself or his agent to cross- examine the witness;

c. if the deposition was made in the course of a criminal proceeding, on proof that the deposition was made in the presence of the person accused,

and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and that the deposition if made in a criminal proceeding was made in the presence of the person accused shall, unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

Question 6

(a) (i) Which of the Act provides an integrated need based social insurance scheme, that protects the interest of workers in contingencies such as sickness, maternity and employment injury, temporary or permanent physical disablement, death due to employment injury resulting in loss of wages or earning capacity and guarantees reasonably good medical care to workers and their immediate dependants. Also discuss the applicability of such Act.

(ii) Explain the concept of 'Theory of Notional Extension of Employment' in case of deciding the 'Employment Injury'. Do you agree that there should be a nexus or casual connection between the accident and employment.

(2+4=6 marks)

(b) Examine the accountability of employer for payment of gratuity in the following cases, along with reasons thereof :

(i) Ms. Sulabha is working as professor in a private engineering college. Every year she gets a contractual appointment letter in the beginning of the academic year and the services comes to an end at the end of the academic year. Fresh appointment is issued after following the due process of interview. Sulabha after serving 10 years in this manner, joined another college. She claimed gratuity for serving in the previous college.

(ii) Ankur is a partner in a firm of Company Secretaries. After 15 years of his association with the CS Firm he decided to leave the firm and voluntarily expressed his willingness to resign, which was accepted by all other remaining partners. Ankur now wants to claim gratuity for the period he has served in the CS Firm.

(iii) Ms. Shravika joined a bank as Assistant Manager. Nearly after a year of service, she met with an accident and died. Her legal heirs claimed the gratuity.

(iv) *Vikram Singh was terminated from the service of an insurance company for an offence involving moral turpitude in the course of his employment. He had served in the company for a continuous period of 10 years.*

(v) *Ms. Alia retired from a bank after serving a continuous period of 30 years. She was designated as Assistant General Manager in the Bank and was also provided a bank's flat, in Mumbai. She did not vacate the flat after retirement due to her mother's illness and requested the management to allow her to continue for a further period of one year. She was ready to offer the rent after retirement date, till she continues the possession of the flat. The management forfeited her gratuity and informed to pay only after vacation of the bank's flat.*

(vi) *Shubham Singh is a local union leader, working as a clerk in a bank branch. He is also an active member of a leading political party. During 'Bharat Band' agitation, the leaders of that political party forcefully entered in to the branch premises and broke down the furniture and fixtures in the branch. Shubham Singh was also actively involved in creating viorence and breaking the assets of the bank branch. All these incidents were captured by the CCTV of the branch. The branch manager submitted a detailed report of the incident and involvement of Shubham Singh. As a result, the disciplinary committee conducted examination and terminated Shubham Singh from the services of bank. The bank management also withheld the payment of his gratuity.*

(1 mark each=6 marks)

Answer 6(a)(i)

'The Employees State Insurance Act, 1948' provides for certain benefits to employees in case of sickness, maternity and employment injury and containing provisions for certain other matters in relation thereto.

Applicability

Section 1(4) of the Employees State Insurance Act, 1948 provides that it shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories.

Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.

Answer 6(a)(ii)

Theory of notional extension of employment

In terms of Section 2(8) of the Employees State Insurance Act, 1948, 'employment injury' means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India.

It is well settled that an employment injury need not necessarily be confined to any injury sustained by a person within the premises or the concern where a person works. Whether in a particular case the theory of notional extension of employment would take in the time and place of accident so as to bring it within an employment injury, will have to depend on the assessment of several factors. There should be a nexus between the circumstances of the accident and the employment. On facts no case could be an authority for another case, since there would necessarily be some differences between

the two cases. Therefore, each case has to be decided on its own facts. It is sufficient if it is proved, that the injury to the employee was caused by an accident arising out of and in the course of employment no matter whenand where it occurred. There is not even a geographical limitation.

Nexus or casual connection between the accident and employment

The accident may occur within or outside the territorial limits of India. However, there should be a nexus or casual connection between the accident and employment. The place or time of accident should not be totally unrelated to the employment *(Regional Director, E.S.I. Corpn.* v. *L. Ranga Rao,* 1982 I-L.L.J. 29). Where an employee who is on his way to factory meets with an accident, one K.M. from the place of employment, the Court held that the injury cannot be said to be caused by accident arising out of and in the course of his employment. Mere road accident on a public road while employee was on his way to place of employment cannot be said to have its origin in his employment in the factory *(Regional Director ESI* v. *Francis de Costa,* 1997 LU 1 34 SC).

Answer 6(b)

i. The employer of Ms. Sulabha is not liable to give her gratuity, since her service period shall not be counted as continuous service period in terms of Section 2A of the Payment of Gratuity Act, 1972.

ii. The relation between Ankur and CS Firm was of Partner and Partnership Firm and not of the Employee and Employer. Therefore, Ankur is not entitled to claim gratuity.

iii. The proviso to Section 4(1) of the Payment of Gratuity Act, 1972 states that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement. The second proviso to Section 4(1) further states that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

    In view of the above legal provisions, Shravika's legal heir(s) is/are eligible to get the gratuity amount, irrespective of the fact that she has not served in the bank for a continuous period of 5 years.

iv. Section 4(6)(b)(ii) of the Payment of Gratuity Act, 1972, provides that the gratuity payable to an employee may be wholly or partially forfeited, if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment. In the given case, Vikram Singh was terminated for an offence involving moral turpitude, hence, the insurance company may wholly or partly forfeit the amount of gratuity.

v. Alia cannot be denied of payment of the gratuity. The payment of gratuity can only be withheld / forfeited on account of the reasons explained in Section 4(6)(b) of the Payment of Gratuity Act, 1972. Further, in the case of Air India vs. Authority under the Act, [1999 CLA 34 Born. 66], it was held that gratuity cannot be withheld for non-vacation of service quarters by retiring employees.

vi. Section 4(6)(a) of the Payment of Gratuity Act, 1972 provides that the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property

belonging to the employer, shall be forfeited to the extent of the damage or loss so caused. Section 4(6)(b)(i) further states that the gratuity payable to an employee may be wholly or partially forfeited if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part. Therefore, the bank management may either wholly forfeit the amount of gratuity or may recover the loss so caused due to riotous activity from the gratuity payable.

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INSOLVENCY – LAW AND PRACTICE

Time allowed : 3 hours *Maximum marks : 100*

Total number of questions : 6

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

Question 1

Background:

You are a dynamic management consultant, extrovert, academically erudite, graduated from a top notch business school in Mumbai and subsequently qualified as a Company Secretary. With a keen interest in academic research, you also obtained a Doctorate Degree for your excellent research on the topic "Effectiveness of Insolvency and Bankruptcy Code, 2016– Empirical Evidence from India".

You are known in the corporate arena as a renowned personality for your interactive deliberations in all gamut's of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016). As an avid speaker, you passionately share your deep and incisive knowledge in India at various events organized by the ICSI, ICAI, Trade organizations and other reputed professional and academic Institutes. You started a consultancy firm in Navi Mumbai and expanded your network by opening branches at Pune, Nagpur and Shimla in Himachal Pradesh. Your firm provides scratch to end business advisory solutions to listed and unlisted corporates. Your corporate clients are also spread across the Country and you have a sizeable team of professionals working under your entire advisory practice. To meet clients' needs and to exceed their expectations is your primary goal.

Recently, you have been approached by ABT Techsoft Products Limited (ABT) a flagship Company of OM Group of Companies based out of Chennai to sort out/clarify certain matters concerning IBC, 2016 having a potential application for the Company and its subsidiary companies.

About ABT:

ABT is one of the India's start-up companies incorporated at Chennai in the year 2012. The main objects of the Company is to develop a niche, never invented before, customized software packages for two and three wheeler automobile manufacturers in India. It also caters to the various software needs of diverse global audiences. With its wide range of e-Commerce market place products, it assists prospects in establishing a successful e-Commerce business. Along with e-Commerce, web, and mobile software development, ABT also provides digital marketing, branding, and ORM services. The company became a listed entity, in the year 2017 and got its shares listed with the BSE and NSE.

Initial Interaction:

During your initial interactions with the top management, you highlighted the current state of affairs, compliance standards and regulatory assessment hygiene affecting the application of economic laws and regulations framed thereunder for the Company. Thereafter, you were ready for a detailed discussions with the Management.

The necessary data and other inputs for your consideration as given by the top management of ***ABT including its subsidiaries are summarized in the following paragraphs*** *and the questions raised, clarifications sought etc., are summarized hereunder :*

(A) *As at 31-03-2023, ABC Limited, a Wholly Owned subsidiary of ABT had the following debts:*

Creditors Name	***Nature of Debt***	***Amount (₹ in Lakhs)***
A.	*Financial Debt*	*300*
B.	*Financial Debt*	*250*
C.	*Financial Debt. (Related Party)- Not regulated by the Financial Sector Regulator*	*175*
D.	*Operational Debt*	*175*
E.	*Operational Debt*	*325*

In view of the brunt of heavy losses and liquidity crisis, ABC Limited could not pay the above debts. As a result, Creditor 'D' filed an application with the Adjudicating Authority (NCLT) to initiate a Corporate Insolvency Resolution Proccss (CIRP) against ABC Limited and the application was accepted.

(B) *In terms of the relevant provisions of the IBC, 2016, a liquidation order was passed against MNO Limited (Another Subsidiary of ABT and also being the Corporate Debtor) by the Adjudicating Authority (NCLT). Mr. Arvind was appointed as the Liquidator by the NCLT. Upon resuming his mantle, Mr. Arvind started collecting claims from all the creditors within the time frame as prescribed in the IBC, 2016.*

While initiating the liquidation process, Mr. Arvind proposed to include the equity shares of another subsidiary company of MTPL as part of the liquidation estate in relation to the Corporate Debtor. Besides this, one of the unsecured financial creditor demanded that, at the time of distribution of liquidation proceeds, his dues may be paid before the government dues are paid. Mr. Arvind also observed that pending legal proceedings against the Corporate Debtor, Q Limited, an Operational Creditor, has filed a case with the Arbitral Tribunal praying for an arbitral award against MNO Limited.

(C) *A Financial Creditor, namely Mr. Z has filed an application before the Adjudication Authority (AA) (NCLT) for initiation of Insolvency Resolution Process against* ***MAPL (Corporate Debtor)*** *on 01-04-2023. As this application was pending for disposal by the AA, the Corporate Debtor has also made an application on 10-04-2023 to the AA for initiating Pre-Packaged Insolvency Resolution Process.*

(D) *Another Financial Creditor namely Mr. E, through an assignment agreement, assigned his debt to a Trust. The Trust filed a petition for initiation of* ***Corporate Insolvency Resolution Process against the Corporate Debtor (MTPL).***

(E) *Further,* ***ABT is considering the purchase*** *of used plant and machinery but of the latest technology from 'Four Spin Limited' which is undergoing a Corporate Insolvency Resolution Process (CIRP) in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016. ABT is waiting for the resolution plan to be unveiled through which they can understand which plant and machinery they can buy. But, in the mean-time, an authorized Deputy Director from the office of the Enforcement Directorate (ED) conducted a 'Search and Seizure' at the premises of the Four Spin Limited and issued a provisional attachment order of*

180 days under the relevant provisions of the prevention of Money Laundering Act, 2002, attaching properties of Four Spin Limited on the basis of findings during the search and seizure proceedings. In this order, the immovable and movable properties including plant and machinery were provisionally attached. The Insolvency Professional, C.S. Sudha Kumar, who was appointed as a Resolution Professional for CIRP of Four Spin Limited, opposed the order of provisional attachment of assets by ED on the grounds of declaration of moratorium by the Adjudicating Authority on the assets of Four Spin Limited as per the provisions of the IBC, 2016 and made an appeal seeking the release of assets.

(F) ***AFP Ltd (Corporate Debtor), an Associate Company of ABT*** *is classified as a Small Enterprise urder Section 7 (l) of the Micro, Small and Medium Enterprises Development Act, 2006. It owes ` 60 lakhs to its creditors. Due to the brunt of deep rescission in the business, the Corporate Debtor was not in a position to recover money from Sundry Debtors as per the payment schedule and as result of which, it committed default in settling dues to the Sundry Creditors. The Corporate Debtor, eventually, decided to go for a 'Pre-Packed Insolvency Resolution Process (PPIRP) under the IBC, 2016 and took recourse to the following steps to initiate PPIRP.*

(i) *The Financial Creditors of the Corporate Debtor, not being the related parties, representing 66% in value of the financial debt due to them, proposed Ms. Jaiswithaa Iyer, the Insolvency Professional, to be appointed as a Resolution Professional to conduct PPIRP.*

(ii) *The majority of the directors of the Corporate Debtor made a declaration that PPIRP is not being initiated to defraud any person and nothing more is contained in the declaration.*

(iii) *The members of the Corporate Debtor passed an Ordinary Resolution approving the filing of an application for initiating PPIRP. There were no further approvals obtained from the Financial Creditors/Board of Directors on any matters.*

(G) *Kirutika Muralidharan, the financial creditor, was an investor and a debenture-holder of 'Optionally, Convertible Debenture Bond (OCBD) payable on maturity with redemption premium issued by* ***Q Limited (Corporate Debtor).*** *The zero interest OCDB bonds amounted to ₹ 3 crore was matured in 2019. The Corporate debtor failed to discharge this liability on due dates. Kirutika Muralidharan, filed an application to initiate the CIRP before the NCLT.*

(H) *M Fabrics Ltd, (Corporate Debtor), has defaulted in repayment of its loan of ` 300 lakhs obtained for its business purpose from a Financial Institution (Financial Creditor). Repeated follow up by the financial institution with the Corporate Debtor for repayment of dues did not evoke any meaningful response. In view of this, it was unanimously decided by the financial institution to apply to the NCLT for starting a CIRP against the Corporate Debtor. On filing of an application by the Financial Creditor, the CIRP was commenced, declaring a moratorium by an order of the Adjudicating Authority on 30th May, 2023 and Ms. Sowmya Ashwanth, was appointed as an Insolvency Resolution Professional. The High Court, having jurisdiction, in disposing of the pending petition of some other creditors which was filed prior to May 2023, passed an order for auction of the assets of the Corporate Debtor on 6th June, 2023.*

With reference to the above data, answer the following :

(a) *In respect of the inputs given in Para-A above, briefy answer the following questions :*

(i) *Who all will form part of the Committee of Creditors (CoC) from the list of creditors given ?*

(2 marks)

(ii) *Whether the above Operational Creditors have a right to vote in the CoC meeting ?*

(2 marks)

(iii) *What is the mandatory agenda that should be discussed in the first meeting of CoC ?*

(1 mark)

(iv) *What shall be the quorum of the CoC meeting if it is conducted through video conferencing ?*

(1 mark)

(v) *In respect of the inputs given in Para-B above under IBC, 2016, answer the following :*

(i) *Whether the proposal of Mr. Arvind to include the equity shares of the Subsidiary Company of MTPL as part of liquidation estate tenable ?*

(2 marks)

(ii) *How should Mr. Arvind deal with the demand of the unsecured financial creditor ?*

(2 marks)

(b) (i) *In respect of the inputs given in Para-C above under IBC, 2016, state which of the following act of the Adjudicating Authority shall be valid :*

(a) *The Adjudicating Authority shall first dispose off the application of the Corporate Debtor.*

(b) *The Adjudicating Authority shall first dispose off the application of the Financial Creditor.*

(c) *The Adjudicating Authority shall dismiss both the applications and direct the Corporate Debtor to file a fresh application.*

(d) *The Adjudicating Authority shall dismiss both the applications and refer the dispute to Arbitration.*

(2 marks)

(ii) *In respect of the inputs given in Para-D above under IBC, 2016, find out the correct statement :*

(a) *Trust is out of purview of the provisions of the IBC, 2016.*

(b) *The Trust may be authorized by the Financial Creditors to file an application.*

(c) The Trust in the capacity of a Financial Creditor, can file a valid application.

(d) The Trust being an assignee, cannot file a Petition.

(2 marks)

(iii) In respect of the inputs given in Para-E above, examine whether the appeal moved by C.S. Sudha Kumar, the appointed Resolution Professional of Four Spin Limited is tenable ? Whether the assets so provisionally attached shall be released or not and provisions of which Act/Code will prevail ? Provide your answer on the basis of the relevant case law as applicable to the facts of the case.

(6 marks)

(c) (i) In respect of the inputs given in Para-F above, briefly answer the following questions :

(a) Whether the act of the financial creditors proposing the name of Ms. Jaiswithaa Iyer as Resolution Professional is valid ?

(b) Whether the declaration made by the Board of Directors is in accordance with the provisions of IBC, 2016 ?

(c) Whether the resolution passed by the members of the Company is in compliance with the provisions of IBC, 2016?

(d) Are there any requirements to get the approval of the Financial Creditors/ Board of Directors on any other matters? If yes, state the relevant provisions of the IBC, 2016.

(1.5×4 = 6 marks)

(ii) In respect of the inputs given in Para-G above, briefly answer the following questions :

(a) Whether Kirutika Muralidharan is eligible for filing an application for initiation of CIRP ?

(b) Whether the redemption of debenture bonds payable on maturity date amounts to a debt ?

(4 marks)

(d) In respect of the inputs given in Para-H above, briefly answer the following questions :

(a) Advise the financial creditor whether the order of the High Court is valid and can be challenged ?

(3 marks)

(b) Advise Ms. Sowmya Ashwanth on 'independence' with the corporate debtor.

(3 marks)

(c) In the light of the inputs given, advise M Fabrics Ltd. whether initiation of a CIRP can be made only by a financial creditor or can it be made by its corporate debtor also ?

(4 marks)

Answer 1(a)(i)

As per Section 21(2) of the Insolvency & Bankruptcy Code, 2016 the Committee of Creditors (CoC) shall comprise of all financial creditors of the Corporate Debtor. The Resolution Professional shall identify the financial creditor and constitute CoC. Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

Accordingly, in the given case, all the creditors given in the question, A, B, C, D and E can form Coc, but right to vote in such Coc meetings shall only lie with A & B, the financial creditors.

Answer 1(a)(ii)

According to Section 24(3)(c) of the Insolvency & Bankruptcy Code, 2016 the resolution professional shall give notice of each meeting of the committee of creditors to operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt; however, they won't have any right to vote in such meeting.

As per Section 24(4) of the Insolvency & Bankruptcy Code, 2016, the directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

In view of the above, D and E, operational creditors will not have a right to vote in the CoC meeting.

Answer 1(a)(iii)

The mandatory agenda to be discussed in the first meeting of CoC is stated in Section 22(2) of the Insolvency & Bankruptcy Code, 2016 which provides that at the first meeting of the committee of creditors, which is held within seven days of its constitution, the committee of creditors by a majority vote of not less than sixty-six percent of the voting share of the financial creditors, may either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Answer 1(a)(iv)

In terms of Regulation 22(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations. 2016, a meeting of the CoC shall be quorate if the members of the CoC representing at least 33% of the voting rights are present either in person or by video conferencing or other audio and visual means.

Answer 1(a)(v)(i)

Section 36(3) of the Insolvency & Bankruptcy Code, 2016 provides that subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following assets to be included in the liquidation estate:

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

In view of the above, the proposal of Mr. Arvind to include the equity shares of the subsidiary Company of MTPL as part of liquidation estate is tenable.

Answer 1(a)(v)(ii)

According to Section 53 of the Insolvency & Bankruptcy Code, 2016 out of the proceeds from the sale of liquidation assets, financial debts owed to unsecured creditors shall be distributed in priority over the amount due to the Central aid State Government. (clauses iv and v of Section 53(1).

In view of the above, Mr. Arvind has to fulfil the demand of the unsecured financial creditor, at the time of distribution of liquidation proceeds to pay his dues, before the Government dues are paid.

Answer 1(b)(i)

Correct Option — Option A

(A) The Adjudicating Authority shall first dispose of the application of the Corporate Debtor.

Answer 1(b)(ii)

Correct Option — Option C

(C) The Trust in the capacity of a Financial Creditor, can file a valid application.

Answer 1(b)(iii)

The facts given in the case study are similar to what was decided in the case of *M/s. PMT Machines Limited Vs. The Deputy Director. Director of Enforcement, Delhi* (FPA-PMLAS - 2792/DLI/2019) by the Appellate Tribunal (New Delhi) on l6th September, 2019.

The Appellate Tribunal observed that the mortgaged properties were acquired much prior to the date of alleged offence. The date of charge of properties are also much prior to the date of the alleged offence committed. Counsel appearing on banks and financial institution has informed that on the basis of their complaint, an action was taken against the borrowers.

The Appellate Authority under the PMLA, 2002 has upheld the prevalence of the IBC over the provisions of PMLA after critically considering Section 5 of the PMLA, 2002 and distinguishing the objectives of the PMLA and the IBC.

The Tribunal held that the order is being passed in relation to mortgaged properties in favour of banks which are not purchased from proceeds of crime. The same were purchased and mortgaged with the banks prior to the crime period. ED is not precluded to attach other private properties and all other assets of the alleged accused. The Tribunal quashed the provisional attachment order by allowing the appeal.

Hence, in the given case, the appeal moved by CS Sudha Kumar, the appointed Resolution Professional of Four Spin Limited is tenable on the basis of the judgment given in the case and the assets so provisionally attached shall be released and provisions of IBC will prevail in this specific case.

Answer 1(c)(i)(a)

In terms of Section 54A (1) of the Insolvency & Bankruptcy Code, 2016 an application for initiating PPIRP may be made in respect of a Corporate Debtor classified as a Micro, Small or Medium Enterprise under Section 7(1) of the Micro, Small and Medium Enterprise Development, Act, 2006.

In terms of Section 54 A (2) of the Insolvency & Bankruptcy Code, 2016, an application for initiating PPIRP can be made in respect of a corporate debtor who commits a default referred to in Section 4 subject to a condition specified in Section 54A2(e), whereby the financial creditors of the corporate debtor not being its related parties, representing such number and in such manner as may be specified, have proposed the name of the Insolvency Professional to be appointed as an Insolvency Professional for conducting the PPIRP of the Corporate Debtor and the financial creditors of the corporate debtor not being its related parties representing not less than 66% in value of the financial debt due to such creditors have approved in such form as may be specified.

Therefore, in view of the above, the act of the financial creditors proposing the name of Jaiswithaa Iyer as the Resolution Professional is valid.

Answer 1(c)(i)(b)

In terms of Section 54A(2)(f) of the Insolvency & Bankruptcy Code, 2016, an application for initiating PPIRP can be made if the majority of the Directors or Partners of the Corporate Debtor, as the case may be, have made a declaration, in such form as may be specified, stating inter alia -

i. The Corporate Debtor shall file an application for initiating a PPIRP within a definite period of 90 days.

ii. The PPIRP is not initiated to defraud any person.

iii. The name of the Resolution Professional proposed and approved to be appointed as resolution professional under clause (e) of Section 54A.

In view of the above, only a declaration by the majority of the Directors of the Corporate Debtor that the PPIRP is not being initiated to defraud any person is not sufficient.

The declaration shall also contain the matters contained in 2f(i) of Section 54A and (iii) above.

Answer 1(c)(i)(c)

No. As per section 54A(2)(g) of the Insolvency & Bankruptcy Code, 2016 the members of the corporate debtor are required to pass a special resolution, or at least three-fourth of the total number of partners, as the case may be, of the corporate debtor to pass a resolution, approving the filing of an application for initiating pre-packaged insolvency resolution process. Hence, passing of ordinary resolution is not sufficient.

Answer 1(c) (i)(d)

Yes. As per section 54A (3) of the Insolvency & Bankruptcy Code, 2016, the Corporate Debtors shall obtain approval from its financial creditors representing atleast 66% in value of the financial debt due to such creditors for filing of an application for initiating a PPIRP.

A declaration is required from majority of the directors of the corporate debtor stating that the corporate debtor shall file an application for initiating a PPIRP within a definite time period not exceeding 90 days and the name of the insolvency professional proposed and approved to be appointed as a resolution professional.

Answer 1(c)(ii)(a)

In the given case, Kirutika Muralidharan was a financial creditor and debenture holder of OCDB payable on maturity by Q Limited (Corporate Debtor) which it failed to

discharge on due date. According to Section 21 (6)(A) of the Insolvency & Bankruptcy Code, 2016, where a financial debt is in the form of securities or deposits and the terms of the financial debt provide for the appointment of a Trustee or an Agent to act as Authorized representative for all the financial creditors, such trustee or the agent shall act on behalf of such financial creditors.

According to the proviso to Section 7 of the Insolvency & Bankruptcy Code, 2016,

it is provided that for the financial creditors, referred to in clauses (a) and (b) of subsection (6A) of section 21, an application for initiation corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less.

Accordingly. Kirutika Muralidharan, is entitled for filing an application for initiating CIRP subject to fulfilling the criterion of 100 creditors of same class or 10% as stated in the proviso to section 7 (1).

Answer 1(c)(ii)(b)

Yes. Redemption of debenture Bonds payable on maturity amounts to debt. Debt under the code means a liability or obligation in respect of a claim which is due from any person and includes a financial and operational debt. Financial Debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes and amount raised pursuant to a note purchase facility, or the issue of bonds, notes, debentures, loan stock or any similar instrument.

Answer 1(d)(a)

According to Section 14(1) of the Insolvency & Bankruptcy Code, 2016, on the insolvency commencement date, the Adjudicating Authority, by an order, declare moratorium prohibiting the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or any order in any Court of Law, Tribunal, Arbitration Panel or other Authority.

In the given case, moratorium was declared by the order of the Adjudicating Authority commencing CIRP on 30th May, 2023. The High Court passed an order on pending petition on 6th June, 2023, ie, after declaration of moratorium. The passing of an order by the High Court is not valid and yes, it can be challenged.

Answer 1(d)(b)

According to Regulation 3(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 an insolvency resolution professional shall be eligible to be appointed as an IRP or as a RP, as the case may be, for a CIRP of the Corporate Debtor, if he, and all partners, directors of the insolvency professional entity are independent of the corporate debtor.

A person shall be considered independent of the corporate debtor, if he in the last three financial years he:

a. Is eligible to be appointed as an independent director on the Board of the corporate debtor under Section 149 of the companies Act, 2013 where the Corporate Debtor is a Company.

b. Is not the related party of the corporate debtor.

c. Is not an employee or proprietor or partner:

i. Of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor.

ii. Of a legal or a consulting firm that has or had any transaction with the corporate debtor amounting to 5% or more of the gross turnover of such firm.

Accordingly, Ms. Sowmya Ashwanth is advised to consider the above said requirements on the independence with the corporate debtor as her appointment would depend on whether fees charged by her from M Fabrics Ltd was less than 5% of the gross turnover or not.

Answer 1(d)(c)

According to Section 6 of the Insolvency & Bankruptcy Code, 2016 where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate CIRP in respect of the Corporate Debtor.

According to Section 10 of the Insolvency & Bankruptcy Code, 2016 where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating a CIRP with the Adjudicating Authority. For the purpose of this Section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

However, restriction is marked by Section 11 of the Insolvency & Bankruptcy Code, 2016 stating that a corporate debtor undergoing a corporate insolvency resolution process, shall not be entitled to make an application to initiate a CIRP.

Therefore, in the given case study, insolvency resolution process can be initiated by the creditors of M. Fabrics Limited only.

Question 2

You are a corporate consultant and have been serving the corporate world for the past one decade. Academically erudite, you are an extrovert Company Secretary and also a qualified Insolvency Resolution Professional. With keen interest in academic research, you have mastered thoroughly, the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) and select Economic Laws.

SOSAAL Ltd.:

Recently, you have been approached by 'Step One, Step Ahead Automobiles Ltd' (SOSAAL) a listed entity, based out of Chennai, engaged in the manufacture of electric two and three wheeler with nearly 175 dealers across the country.

The CEO of the Company, Mr. Kirti Iyer, along with his senior management officials, has provided the following inputs for your understanding and thereafter, to provide relevant advice on the issues, in the light of the provisions of the IBC, 2016. At a Board Meeting of SOSAAL held on October 2023, the Directors present at the Board Meeting reviewed and took note of the ageing schedule of the amounts receivable from various dealers of the company as under:

Age	***₹ In Lakhs***	***Number of Dealers***
0 to 180 days	*1,505*	*135*
180 to 720 days	*280*	*34*

> 720 days	*905*	*1*
Total	*2,690*	*170*

The Chairman of the Audit Committee, a non-executive Independent Director, who was present at the Board Meeting, informed the Board, that the amounts receivable for more than 2 years is from a dealer, called "My Bike," and the same is being followed up for payment on a regular basis. On this aspect, the other Independent Directors present at the Board Meeting wanted to explore the possibility of taking action against "My Bike" under the provisions of the IBC, 2016.

The CFO of the Company informed that the financial creditors of "My Bike" has already commenced the process of liquidation and the liquidator has reached out the CFO last week to understand the claims of SOSAAL against "My Bike". During the course of discussion with the CFO, the Liquidator shared the following assets and liabilities of "My Bike":

		(₹ In Lakhs)
01	*Realizable value of Fixed Assets*	
02	*Receivables from various customers*	
03	*50% of the receivables is not realizable*	
04	*Cash and Cash Equivalents*	
05	*Bank Loans taken from Bank A*	
06	*Bank Loans taken from Bank B*	
07	*Both the banks have relinquished their security interest and their securities have been realized by the Liquidator for inclusion in the Liquidation estate*	
08	*Payable to SOSAAL (Operational Creditor)*	*905.00*
09	*Payable to ABC (Operational Creditor)*	*75.00*
10	*Outstanding wages to workmen (relate to the period of 24 months preceding to the date of commencement of liquidation)*	*75.00*
11	*Statutory Employer Contributions*	*30.00*
12	*Loan taken from Mr. X, the son of the Promoter Director, who attended the Board meetings to provide guidance/directions on policy matters.*	*75.00*

D Ltd. :

MNO Ltd filed a petition under Section 7 of the IBC, 2016 for initiation of CIRP against D Ltd (Corporate Debtor) and being a wholly owned subsidiary of SOSAAL.

The Adjudicating Authority admitted the petition vide its order dated 26-10-2022 and initiated CIRP by appointing Mr. GM as the Interim Insolvency Professional (IRP). The Insurance of the assets of the corporate debtor was lapsing on 18-12-2022.

Recognizing the urgent need to get the insurance renewed, in order to safeguard the assets of the corporate debtor, the IRP decided to take a new insurance policy at a higher premium as compared to the previous insurance policy without the consent of

the Committee of Creditors (CoC). Accordingly, the IRP entered into a contract with the insurance company for taking a new policy.

You are requested to go through the above facts carefully and answer the following questions :

(a) *Based on the details of assets and liabilities of ''My Bike'' shared by the liquidator, assuming no liquidation costs, examine and calculate the amount that is receivable by SOSAAL from "My Bike" in the light of the provisions of the IBC, 2016.*

(7 marks)

(b) *Identify the date of commencement of CIRP as per IBC, 2016 (Section) in relation to the CIRP initiated by MNO Ltd against D Ltd.*

(2 marks)

(c) *Examine whether Mr. GM (IRP) has the authority to take a new Insurance Policy of D Ltd. at a higher premium without the consent of the Committee of Creditors?*

(3 marks)

Answer 2(a)

Provision: Section 53 of the Insolvency & Bankruptcy Code, 2016 lays the provisions related to distribution of assets or the proceeds from the sale of the liquidation assets.

Distribution of proceeds from the sale of the liquidation assets:

The proceeds from the sale of the liquidation assets shall be distributed in the following order of priority-

a. The insolvency resolution process costs and the liquidation costs paid in full;

b. The following debts which shall rank equally between and among the following:

   i. Workman's dues for the period of twenty -four months preceding the liquidation commencement date; and

   ii. Debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

c. Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

d. Financial debts owed to unsecured creditors;

e. The following dues shall rank equally between and among the following-

   i. An amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

   ii. Debts owed to a secured creditor for any amount unpaid following the enforcement of security interest:

f. Any remaining debts and dues:

g. Preference shareholders, if any: and

h. Equity shareholders or partner as the case may be.

Accordingly:

Realizable value of the fixed assets + Realizable value of receivables (50% of Rs. 225 lakhs) + Cash and Cash Equivalent.

= (Rs.2,800 + Rs.112.5 + Rs.22.5) lakhs = Rs.2,935 lakhs

Less: Outstanding wages to workmen = Rs.75 lakhs.

Less: Unpaid dues on account of statutory employer's contribution treating them as workman's dues = Rs. 30 Lakhs

Less: Amount debts owed to a secured creditor = (Rs.1500+Rs.1050) =Rs.2550 Lakhs

Less: Loan token from Mr. X =Rs. 75 lakhs

Balance amount available = Rs. 2935 - (Rs.75+Rs.30+Rs. 2,550+Rs.75) lakhs = Rs. 205 lakhs (which to be shared between SOSAAL and ABC)

Therefore, amount receivable by SOSAAL (Rs. 205 / Rs. 905) x Rs. 980) =Approx. Rs. 221.99 lakhs.

Answer 2(b)

Insolvency commencement date means the date of admission of an application for initiating Corporate Insolvency Resolution Process (CIRP) by the Adjudicating Authority under Sections 7, 9 or 10 of the Insolvency and Bankruptcy Code, 2016, as the case may be [Section 5(12) of the Insolvency & Bankruptcy Code, 2016].

Accordingly, the date of commencement of CIRP against D Ltd. shall be 26.10.2022.

Answer 2(c)

Financial service includes inter-alia with other services, effecting / implementing contracts of insurance.

According to Section 20(1) of the Code, the interim resolution professional shall have the authority to appoint accountants, legal or other professionals as may be necessary and to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of Corporate Insolvency Resolution Process. Here, since CIRP has commenced, so CoC's approval is required to take new insurance policy at higher premium rate.

Mr. GM (IRP) has taken the new insurance policy without the approval of CoC and after the commencement of CIRP.

Hence, Mr. GM (IRP) has no authority to take a new insurance policy at a higher premium without the consent of the Committee of Creditors.

Question 3

You are a part of a credible, practising firm of Company Secretaries Firm based out of Bengaluru. You are also a Director on the Board, Chairman and/or Member of Committees of the Board of many listed and unlisted entities.

During the month of September and October, 2023 you had been approached by the following entities/persons seeking your expert professional advice and the remedies to overcome the issues. The key facts of the matter to be resolved is as under:

Facts relating to 'Gamma Limited'

There was a corporate insolvency resolution process against Gamma Limited by one of its Operational Creditor, Beta Limited. Mr. 'M' was appointed as the Interim Resolution Professional who is a partner of M & Company, a consulting firm, which had transactions of following amounts with Gamma Limited during the last five years:

Financial Year	***Turnover of M & Co. (₹ in Lakhs)***	***Total Amount of Transactions with Gamma Limited during each F.Y. (₹ in Lakhs)***
2018-2019	*360*	*20*
2019-2020	*360*	*18*
2020-2021	*380*	*18*
2021-2022	*400*	*20*
2022-2023	*420*	*18*

All the financial creditors of Gamma Limited were related parties and it had 28 operational creditors.

Facts relating to 'Alfa Limited':

In view of the deep recession prevailing in the market for the past three years, M/s. Alfa Limited (Corporate Debtor), which was facing the brunt of financial crisis, could not pay salaries and wages to its workmen and employees for the past 6 months. The workmen and the employees, who are the members of a recognized Trade Union ''Alfa Labour Federation.'' made a complaint in this regard. Thereafter, the Trade Union approached and urged the Management of the Company in person and through representations in writing to settle the arrears of wages and salaries due to its members. The Corporate Debtor neither disputed nor took any actions to settle the amount. Under the circumstances, 'Alfa Labour Federation' filed an application before the Adjudicating Authority i.e. with the National Company Law Tribunal for initiating a Corporate Insolvency Resolution process under the Insolvency and Bankruptcy Code, 2016.

Facts relating to 'Big Rammy Limited':

The following particulars relates to Big Rammy Ltd which has gone into Liquidation:

Sl.No.	***Particulars***	***Amount in ₹***
1.	*Amount realized from the sale of liquidation of assets*	*14,00,000*
2.	*Secured creditor who has relinquished the security*	*5,00,000*
3.	*Unsecured Financial Creditors*	*4,00,000*

4.	*Income tax payable within a period of 2 years preceding the liquidation commencement date*	*50,000*
5.	*Cess payable to state government within a period of one year preceding the liquidation commencement date*	*20,000*
6.	*Fees payable to Resolution Professional*	*75,000*
7.	*Expenses incurred by the resolution professional in running the business of the Big Rammy Limited ongoing concern*	*25,000*
8.	*Workmen salary payable for a period of thirty months preceding the liquidation commencement date. The workmen salary is equal per month*	*3,00,000*
9.	*Equity shareholders*	*10,00,000*

Based on the above inputs, you are requested to go through the following queriesmeticulously and answer the following questions :

(a) In which of the following options, Mr. M would have been ineligible to be appointed as the Interim Resolution Professional of Gamma Limited :

(i) M & Company would have entered into transaction(s) of further amount of ₹ 1 Lakh or more with Gamma Limited during any of the last 5 financial years.

(ii) M & Company would have entered into transaction(s) of further amount of ₹ 2 Lakhs or more with Gamma Limited during any of the last 3 financial years.

(iii) M & Company would have entered into transaction(s) of further amount of more than ₹ 3 Lakhs with Gamma Limited during the last 3 financial years.

(iv) M & Company would have entered into transaction(s) of further amount of more than ₹ 4 Lakhs with Gamma Limited during the last 3 financial years.

(2 marks)

(b) In respect of the facts relating to Alfa Limited examine in the light of the decided case law and the provisions of the Insolvency and Bankruptcy Code, 2016 the following :

(i) Validity of the Application

(ii) What will be ''Initiation date'' for initiating the Corporate Insolvency Resolution process ?

(4 marks)

(c) In respect of the facts and figures given related to Big Rammy Limited, state the priority order in which the liquidator shall distribute the proceeds under the Insolvency and Bankruptcy Code 2016.

(6 marks)

Answer 3(a)

Option (iv): M & Company would have entered into transaction(s) of further amount of Rs. 4 Lakhs or more with Gamma Limited during any of the last 3 financial years.

Reason: As per Regulation 3(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, an insolvency professional shall be eligible for appointment as a resolution professional for a corporate insolvency process if he is not an employee or proprietor or a partner of a legal or consulting firm that has or had any transaction with the corporate debtor amounting to five percent or more of the gross turnover of such firm in the last three financial years.

Financial Year	*Turnover of M & Co. (Rs. In Lakhs)*	*Total Amount of Transactions with Gamma Limited during each F.Y. (Rs. In Lakhs)*
2020-2021	380	18
2021-2022	400	20
2022-2023	420	18
Total	**1,200**	56

Here, 5% of Rs. 1200 lakhs come to Rs. 60 Lakhs. And M & Company has already rendered transaction(s) amounting to Rs. 56 Lakhs to Gamma Limited. So, Mr. M would have been ineligible to be appointed as the Interim Resolution Professional of Gamma Limited if M & Company would have entered into transaction(s) of Rs. 4 Lakhs or more with Gamma Limited during any of the last three financial years.

Answer 3(b)

(i) According to Section 5 (20) of the Insolvency and Bankruptcy Code 2016, operational creditors means a person to whom an operational debt is owed and includes any person to whom such debts have been legally assigned or transferred.

Further, operational debt means a claim in respect of provisions of goods or services including "employment" {Section 5 (21)}. Hence, arrear of salaries due to employees is on operational debt. The term 'person' as defined in Section 3 (23) of the IBC, 2016 includes any other entity established under a Statute. A Trade Union, when registered under the Trade Unions Act, 1926 would come within the purview of any other entity 'established' under a statue, meaning it shall be governed by the said Act. The Members of the Trade Union are the workers and employees of the Company to whom dues are pending in the form of salaries and wages from the employer, which is certainly a debt owed for services rendered by each individua1 employee and are collectively represented by the Trade Union. Further in the Note to Rule 6—Form 5, application may be made either in an individual capacity or in a joint capacity by one of them who is duly authorized for the purpose. As the Trade Union is included in the definition of Section 3(23), the application filed by "Alfa Labor Federation." is maintainable.

Case Law: *JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamalpet Jute Mills Company Limited through its Directors & Others* [CA NO. 20978 of 2017: SC (2019).

(ii) "Initiation date" for initiating the Corporate Insolvency Resolution process:

The date of filing the application before the NCLT to initiate CIRP is referred to as the initiation date [Section 5(11)]

Answer 3(c)

As per Section 53 of the Insolvency Bankruptcy Code 2016, the proceeds from the sale of liquidation assets shall be distributed in the following order of priority:

Insolvency Resolution Process cost and liquidation cost to be paid in full.

i.	Fees payable to Resolution Professional in full	75,000
ii.	Expenses incurred by the Resolution professional in running the business on going concern	25,000
iii.	Workmen salary outstanding for a period of 24 months (Proportionate to 24 months only). The balance Rs.1,00,000 is considered as remaining debts and dues and will be settled before	2,00,000
iv.	Preference shareholder / equity shareholder.	
v.	Secured creditor who has relinquished the security'	5,00,000
vi.	Unsecured Financial creditors	4,00,000
vii.	Income tax payable with in the period of 2 years	50,000
viii.	CESS to State Government payable with in a period of one year	20,000
ix.	Balance amount in workmen salary	1,00,000
	Total distribution in the above priority	13,70,000
Amount realized from the sale of liquidation of assets		14,00,000
Balance available to Equity share holder on pro rata basis		30,000

Question 4

Samanvithaa Textiles Ltd (STL), with roots dating back to 1975 manufacturing coarse woollen blankets, has evolved into a leading manufacturer of the finest fabrics in India under the brand name "Samanvithaa". Reckoned for its pioneering innovations and having enjoyed the patronage of millions of consumers, 'Samanvithaa' is amongst the trusted brands in India offering an exquisite range of shirting and suiting fabrics across a plethora of options such as worsted fabrics, cotton, wool blends, linen and denim.

STL has proposed an expansion plan to enter into the business of hosiery garments at a project cost of ₹ 300 crore to be funded through promoters contribution, internal

accruals and bank finance to the tune of ₹ 40 crore for importing and installing high technology machinery. The company approached its bankers and a consortium of bankers sanctioned a term loan of ₹ 40 crore and ₹ 10 crore towards working capital limits.

In consortium of bankers, the lead banker was Star Bank of India. The other bankers and their proportion of share of lending is as under:

Name of the Bank	*Term Loan (₹ in Crore)*	*Working Capital (₹ in Crore)*	*Total (₹ in Crore)*	*% of Share*
Star Bank of India	*15*	*10*	*25*	*50*
Fine Bank	*5*	*0*	*5*	*10*
Orient Bank	*7*	*0*	*7*	*14*
Flex Bank	*8*	*0*	*8*	*16*
Good Bank	*5*	*0*	*5*	*10*
Total	*40*	*10*	*50*	*100*

The machineries were imported and installed. The company started producing hosiery garments for men's wear in premium category, office wears and casuals. The company created a niche in the market for its finest fabrics, variety and affordable pricing.

In March 2020, the brunt of COVID-19 pandemic that spread all over the world, had a severe impact on the company's operations as well due to closure of the production unit for more than a year, skilled labours migrating to their home town, the distribution channel getting effected, lack of demand in most of the urban areas etc. As a result, the cash flows of the company mismatched and the term loan account and cash credit working capital account was classified as Non-Performing Accounts.

At the consortium meeting, the member banks decided to take recourse to legal actions against the borrower company and they issued a recall notice followed by a legal notice from an Advocate.

STL requested the bankers to provide some time to pay the overdue interest on the credit facilities and to regularize the account thereafter. The consortium of bankers agreed to provide one and half years' time to regularize the account. Despite giving one and half years' time to the Company, the situation did not improve and it went from bad to worse.

In view of this situation, the consortium of bankers decided to proceed under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI). The member banks authorized Star Bank of India to initiate action and take possession of the secured assets and also take control of the management of the affairs of the company.

Accordingly, a demand notice was issued under Section 13(2) of SARFAESI, 2002 to repay the entire outstanding of the bankers within a given period, lest, the bank shall exercise its powers given under SARFAESI, 2002 to take possession of the secured assets of the borrower. After the lapse of the specified period as mentioned in the notice, the bankers took possession of the secured assets which were exclusively mortgaged with the financial creditor since the corporate debtor failed to repay the debts due.

After following the procedure as mentioned in SARFAESI, the banker made an advertisement for sale of the secured assets by way of e-auction. The secured assets were successfully auctioned for ₹ 35 crore and the successful bidder deposited 25% of the bid amount (₹ 8.75 crore) instantly and the balance of 75% (₹ 26.25 crore) of the bid amount was supposed to be deposited within 15 days by the successful bidder. In the meanwhile, STL filed an application under Section 10 of the IBC, 2016 on the premise that upon committing a default, the corporate applicant itself can file an application for initiating Corporate Insolvency Resolution Process (CIRP) before the NCLT.

The application filed by the company was admitted by the NCLT and it declared a moratorium under Section 14(1) of the IBC, 2016 and appointed a Resolution Professional (RP).

Subsequently, the financial creditors (all the members of the consortium) filed a claim of ₹ 65 crore with the RP. The operational creditors who supplied the raw materials to the company, also lodged their claim for ₹ 5 crore. Besides, the employees and labour's whose wages and salaries were due, also filed their claim of ₹ 0.75 crore.

The RP admitted the claim and constituted the Committee of Creditors (CoC) which was comprising of the bankers only. The operational creditors and the employees raised the issue before the RP for inclusion of their names as a member of CoC. However, the RP refused to entertain their request for inclusion of their names in the CoC, but he allowed them to only attend the CoC meeting, if they wish so.

However, after receipt of the balance 75% of the bid amount, the Bankers filed a revised claim of ₹ 38.75 crore (₹ 65 Crs.(–) ₹ 26.25 Crs. = ₹38.75 Crores) post disclosing that the bankers had realized the collateral security through e-auction of the secured assets of the corporate debtor.

Thereafter, the company being the corporate debtor filed an application in the NCLT requesting to set aside the sale made by the bankers since moratorium was imposed. The NCLT set aside the sale made by the bankers in the light of the initiation of CIRP and moratorium was imposed.

Aggrieved by the order of the NCLT, the bankers filed an appeal in the NCLAT, New Delhi. On the basis of the above inputs, answer the following :

(a) In the given case, who shall be the members of the Committee of Creditros ?

(1 mark)

(b) The Resolution Professional has included only the bankers as members of the CoC.

(i) Whether the operational creditors have the right to be a member of the CoC ?

(4 marks)

(ii) *What would be your answer, if in any case there are no financial creditors and only operational creditors are there ?*

(2 marks)

(c) *The Bankers have already received 25% of the bid offer and remaining 75% was to be payable within 15 days by the successful bidder. Meanwhile the corporate debtor initiated CIRP. Since the sale exercise through auction was already initiated by the bankers prior to initiation of CIRP, by the corporate debtor, whether such sale transaction will be nullified in light of declaration of moratorium by the Adjudicating Authority ? Elaborate in the light of the decided case law.*

(5 marks)

Answer 4(a)

The Bankers (being the financial creditors) only who shall be the members of the Committee of Creditors.

Reason: Section 21(2) of the Insolvency Bankruptcy Code 2016 states that the Committee of creditors shall comprise all financial creditors of the Corporate Debtor.

Answer 4(b) (i)

Section 21(2) of the Insolvency Bankruptcy Code 2016 states that the Committee of Creditors shall comprise all financial creditors of the Corporate Debtor.

Further Section 21 (3) states that subject to sub-sections (6) and 6(A), where the Corporate Debtor owes financial debts to two or more financial creditors as a part of a consortium or agreement, each such financial creditor shall be a part of the CoC and their voting share shall be determined on the basis of the financial debts owed to them.

Sub-section (6) provides that where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may:

- Authorize the trustee or agent to act on his behalf in the CoC to the extent of the voting share,
- Represent himself in the CoC to the extent of his voting share:
- Appoint an Insolvency professional (other than tie Resolution Professorial) at his own cost to represent himself in the CoC to the extent of his voting share: or
- Exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally

Section 24(3)(c) of the Insolvency Bankruptcy Code 2016 states that the resolution professional shall give notice of each meeting of the CoC to operational creditor or their representatives if the amount of their aggregate dues is not less than 10% of the debt.

Section 24(4) of the Insolvency Bankruptcy Code 2016 states that one representative of the operational creditors may attend the meetings of the CoC, but shall not have any right to vote in such meetings.

According to Proviso to Section 21(8), where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.

Therefore, in the present case, bankers shall be the members of CoC as Operational Creditor may become the members of CoC only if the Corporate Debtor has no financial debt or where all financial creditors are related parties of the corporate debtor.

Answer 4(b) (ii)

Regulation 16 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides as under:

1. Where the Corporate Debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the Committee shall be set-up in accordance with this Regulation.
2. The Committee formed under this regulation shall consist of members as under: -
    a. 18 largest operational creditors by value, provided that if the number of operational creditors is less than 18, the committee shall include all such operational creditors.
    b. one representative elected by all workmen other than those workmen included under sub-clause (a) and
    c. one representative elected by all employees other than those employees included under sub-clause (a).

Answer 4(c)

Section 10(l) of the Insolvency Bankruptcy Code 2016 states that where the corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

Section 14(l) (c) of the Insolvency Bankruptcy Code 2016 provides that on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting any action to foreclose, recover or enforce and security interest created by the corporate debtor in respect of its property' including any action under the SARFAESI. Act, 2002.

The facts given in the question arc similar to that of *Indian Overseas Bank Vs. RCM infrastructure Limited and Others [Company Appeal (AT) (Insolvency) No. 736 of 2020 decided on 26 March, 2021* by NCLAT, New Delhi. NCLAT expressed that imposition of moratorium as per section 14 of IBC is to protect the interest of the Corporate Debtor by protecting the assets of the Corporate Debtor for the sole objective to maximization of the value of the assets. This Tribunal in the matter of "*Encore Asset Reconstruction Company' Pvt. Ltd. Vs. Charu Sandeep Desai and others reported in 2019 SCC online NCLAT 282* also held that Section 238 of IBC will prevail over any of the provisions of SARFAESI Act, 2002 if it is inconsistent with any of the provisions of IBC.

Paragraphs 12. 14 and 15 of the said judgement is reproduced below:

"12. From the explanation below, Section 18, it is clear that the term "assets" do not include the assets owned by a third party in possession of the "Corporate Debtor"

Decision in *"Transcore Vs. Union of India"* was rendered in the year 2008 when the IBC Code was riot in existence. The Code came into force w.e.f. 1st December, 2016 and Section 235 read as follows: "238. Provisions of this Code to override other laws: The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any other instrument having effect by virtue of any such law.

'SARFAESI Act, 2002' being an existing law, Section 238 of the IBC Code will prevail over any of the provisions of the SARFAESI Act, 2002 if it is inconsistent with any of the provisions of IBC Code, 2016.

The NCLAT stated that from the judgment of the Hon'ble Supreme Court, it is clear that when the Adjudicating Authority commences the CIRP proceeding and imposes moratorium, no proceedings shall be continued or commenced and not to carry out any auction of the assets of the Corporate Debtor.

The NCLAT opined that in the facts of the present case and upon deliberating the issues framed in paragraph 22 above, held that:

1. When the moratorium was imposed by the learned Adjudicating Authority, receipt of the balance sale consideration is illegal and the learned Adjudicating Authority rightly set aside the sole transaction.
2. Further, Section 238 of the IBC, 2016 will have overriding effect over other laws as held by the Hon'ble Apex Court and this Tribunal in Encore Asset Reconstruction Company Ltd.

Question 5

You have recently joined as a partner in Sam and Jay Associates, a reputed firm of Company Secretaries, based out of Delhi. The senior partner of the Firm, Ms. Anju has deputed you to attend and provide your expert advisory services to one of its key clients, namely SCL Ltd. which is one of the companies closely monitored by the equity analysts and other stakeholders. The chief promoter directors of the Company were two brothers namely Mr. Narayanan (Chairman) and Mr. Shankara (Managing Director).

Considering the regulatory set-up in India, including the litigation settlement process and the penalties for non-compliances have been made more severe, the top Management wants to keep the Company free of any non-compliances given the multiple challenges impacting the organization.

Upon your visit to the company, the MD briefed you about the company and stated the facts of the situation affecting the provisions of the IBC, 2016 as hereunder: SCL Ltd is involved in Engineering, Textiles and Chemicals businesses being the growth sectors of the economy. In order to reduce the existing debts and to make the company work efficiently in terms of liquidity and solvency, SCL Ltd, in the year 2013, took loans from consortium of Indian banks such as ABC State Bank with an exposure of ₹ 1,250 crore followed by Bank of Ajmer (₹ 1,000 crore), P & G National Bank (` 800 crore) and RV National Bank (₹ 750 crore). Going forward, as the Company wanted to venture into Telecommunication and DTH services in India, it approached foreign banks and obtainedloans from Global Bank of UK (₹ 700 crore), Bank of Netherlands (₹ 450 crore) and Chartered Bank of America (₹ 350 crore). All the loans were personally guaranteed by Mr. Narayanan and SCL Ltd assured the banks to pay all the dues outstanding on time. The company as per their commitments, repaid the instalment on time. Everything went on well but from 2019, due to heavy losses, the company defaulted in paying instalment to all the Indian as well as Foreign banks. Due to the brunt of tough competition in telecommunications market and entry of new giants in the market, the rates of voice call and data plans reduced considerably. In view of the continued defaults, the Banks started sending reminders to SCL Ltd to clear off of their respective dues. RV National bank had a warehouse in Kolkata which it seized in the insolvency proceedings from Amaze Ltd. The said bank tried to sell the property at market price

to recover the loan amount but it was all in vain. After many failure attempts to sell the property, the bank decided to lease the premises. SCL Ltd had come to know about it and approached the Bank in May 2018 to take the premises on lease at an annual lease rent of ` 1.50 crore. As SCL Ltd incurred losses from the year 2019, it defaulted in paying lease rentals for the last four years which amounted to ` 6 crore. SCL Ltd tried to sell its assets to various companies, including its rival Tele Tones Company, to clear the debts but the deals could not crystallize as expected. Later, the insolvency proceedings against SCL Ltd started on a plea filed by a Korean telecoms company after the company failed to clear its dues. The application filed under Section 7 of IBC, 2016 was admitted and an Interim Resolution Professional (IRP) who subsequently became the Resolution Professional (RP) was appointed. The Banks decided to enforce the personal guarantee provided by Mr. Narayanan. But he contended that the demand is not maintainable in view of the ongoing Corporate Insolvency Resolution Process (CIRP).

The Committee of Creditors (CoC) final meeting was scheduled to be held on 25th March 2021, but amid the nation-wide lockdown due to COVID pandemic, it got cancelled. As per the order of NCLT, CoC needs to complete the entire process by 30th March, 2021 and the resolution professional needs to file the resolution plan with the NCLT by 2nd April, 2021. Subsequently, in compliance with the NCLT order, a meeting of CoC was duly conveyed and a resolution plan was submitted by the resolution professional. Both the chief promoter directors of SCL Ltd contended that they were not invited for the meeting of CoC and the notice for the meeting and the draft resolution plans were not shared with them by the resolution professional which is not in accordance with the IBC, 2016 and a reference was drawn to the judgement of Honourable Supreme Court of India in Civil Appeal 8430 of 2018 as was held in the matter of Mr. Vijay Kumar Jain. In the light of the above inputs, answer the following questions with respect to the Constitution of Committee of Creditors (CoC) and matters connected therewith :

(a) *All the four Indian banks, as a consortium gave loans to SCL Ltd. examine as to how they will form part of Committee of Creditors and how their voting shares would be determined ?*

(3 marks)

(b) *RV National Bank is a financial as well as an operational creditor of SCL Ltd. Can RV National Bank club both the debts and claim it as a financial debt ?*

(3 marks)

(c) *The Banks decided to enforce the personal guarantee provided by Mr. Narayanan. But he contended that the demand is not maintainable in view of the ongoing CIRP. Evaluate.*

(3 marks)

(d) *In the opinion of the Resolution Professional, participation of both the promoter directors of SCL Ltd as member of the suspended Board of Directors is not mandatory in the CoC under the IBC, 2016. Whether the contention of the Resolution Professional is correct vis-a-vis the judgement of the Honourable Supreme Court as was held in the matter of Mr. Vijay Kumar Jain (Civil Appeal No. 8430 of 2018). Explain briefly.*

(3 marks)

Answer 5(a)

According to Section 21(3) of the Insolvency Bankruptcy Code 2016 subject to sub-section 6 and 6A, where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement each such financial creditor be part of the Committee of Creditors (CoC) and their voting share shall be determined on the basis of financial debts owed to them. Hence, each of the Indian Banks and foreign banks will form part of the CoC and their voting share would be determined on the basis of financial debts (loan) owed to them by SCL Ltd in line with Section 5(28) of the Insolvency Bankruptcy Code 2016.

Accordingly, the following shall be the voting shares of the lenders of SCL Ltd.

Lenders	Rs. In Crores	Voting Share in %
ABC State Bank	1250	23.58%
Bank of Ajmer	1000	18.87%
P & G National Bank	800	15.09%
RV National Bank	750	14.15%
Global Bank of UK	700	13.21%
Bank of Netherlands	450	8.49%
Chartered Bank of America	350	6.60%
Total	**5300**	**100.00%**

Hence, in the given case all the four Indian banks along with the foreign Banks will form part of the CoC and their voting shares shall be determined as above.

Answer 5(b)

According to Section 21(4) of the Insolvency Bankruptcy Code 2016, where any person is a financial creditor as well as an operational creditor:

Such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor and shall be included in the Committee of Creditors with voting share proportionate to the extent of the financial debts owed to such creditor.

Such person shall be considered as an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

In the above mentioned scenario, RV National Bank has no right to club both the debts and claim it as a financial debt, as the bank would be considered as a financial creditor only to the extent of financial debts owed to it.

Answer 5(c)

As per Section 60 (1) of the of the Insolvency Bankruptcy Code 2016, the Adjudicating Authority, in relation to insolvency and liquidation of corporate persons, including corporate debtors and personal guarantors thereof, shall be the National Company

Law Tribunal having territorial jurisdiction over the place where the Registered Office of the corporate person is located.

Further, as per Section 60(2) of the Insolvency Bankruptcy Code 2016, where a CIRP or liquidation proceedings is pending before the National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal.

Accordingly, in the given question, contention of Mr. Narayanan that the demand for the enforceability of personal guarantee given by him is not maintainable in view of the ongoing CIRP is not correct.

Answer 5 (d)

As per Section 24(3) of the Insolvency Bankruptcy Code 2016, the members of the committee of Creditors may meet in person or by such electronic means. All the meeting of the CoC shall be conducted by the Resolution Professional. Notice of the meeting shall be served to the

a. Members of Committee of Creditors including the Authorized Representatives.

b. Members of the suspended Board of Directors or the partners of the corporate person, as the case may be.

c. Operational creditors or their representatives if the amount of their aggregate dues is not less than 10% of the debt.

The directors, partners and one representative of operational creditors, as referred above, may attend the meetings of the committee of creditors, but shall not have right to vote in such meetings. And in their absence, it shall not invalidate the proceedings of such directing.

Contention of the Resolution professional vis-a-vis the judgement of Hon'ble Supreme Court of India in Civil Appeal 8430 of 2018 as was held in the matter of *Mr. Vijay Kumar Jain* is not correct. In this judgment, the Hon'ble Supreme Court held that the erstwhile Board of Directors i.e., suspended members being interested in resolution plan to be discussed by the members of the Committee of Creditors, must be given a copy of that plan as part of the documents that have to be furnished along with the notice of such Committee of Creditors meetings.

In the light of the stated provision, the Resolution professional shall give notice to all the participants as enumerated in Section 24 of the Insolvency Bankruptcy Code 2016. As members of the suspended Board of Directors, they can attend the meeting as participants to deliberate on the issues, discuss and give their opinion but they cannot vote.

Question 6

(a) You are known in the corporate arena as a renowned personality for your interactive deliberations in all gamuts of the Insolvency and Bankruptcy Code, 2106 and mandate best advisory/reporting practices to a variety of large, reputed, listed and unlisted companies including multi-national companies in the Country. Your institution deserves credit for making this possible.

Last week you were invited for a deliberation and brainstorming session on IBC, 2016 at an event organized under the auspicious of ICSI, Kolkata. The participants

were mainly from corporates, bank officials, students of reputed educational institutions and practising finance and legal professionals.

At the time of brainstorming session, you raised the following queries and the views expressed by the participants are as under:

Sl. No.	*Queries Raised by You*	*Options expressed by the Participants*
1.	*Which one is a prerequisite for preparation of a resolution plan?*	*(a) Receipt of resolution plan(s) from financial creditors of the Corporate debtor.* *(b) Valuation of liquidation estate by at least three registered valuers.* *(c) Formation of Committee of Creditors.* *(d) Vetting of default from at least one information utility.*
2.	*Who shall prepare the list of creditors after passing of the bankruptcy order ?*	*(a) Bankruptcy Trustee.* *(b) Adjudicating Authority.* *(c) Insolvency Professional Entity.* *(d) Information Utility.*
3.	*A Committee of Creditors comprises of .....*	*(a) Financial and Operational Creditors.* *(b) Secured creditors only.* *(c) All financial creditors.* *(d) Independent financial creditors only.*
4.	*A final meeting of the CoC is scheduled to be held on 25th October, 2023. Is it necessary to hold the meeting in person or can it be organized otherwise ?*	*(a) Since it is a final meeting, everyone needs to be present in person.* *(b) Meeting in person is not necessary and it can be held via video conferencing.* *(c) Only the resolution plan can be discussed via video conferencing and voting needs to be done in person.* *(d) With the prior permission of the NCLT, the Resolution Professional can hold the meeting via video conferencing.*
5.	*Whether home buyers can initiate CIRP proceedings under the IBC, 2016?*	*(a) No. Home buyers cannot do so.*

(b) Yes. Home buyers are included in the definition of financial creditors. Hence, they can do so.

(c) Home buyers are neither financial creditors nor operational creditors. Hence, they cannot do so.

(d) None of the above.

6.	*A registered Trade Union was formed for the purpose of regulating relationship between workmen and their employer.* *Such Trade Union can initiate CIRP against the company on behalf of its members ..... .*	*(a) As Financial Creditor.* *(b) As an Operational Creditor.* *(c) Trade Union cannot initiate a CIRP.* *(d) A trade union is neither a financial creditor nor an operational creditor.*

Based on the given inputs, answer the following question :

In the light of the provisions of the Insolvency and Bankruptcy Code, 2016, only one option is correct out of the four options expressed by the participants for each query raised. You are requested to choose the correct option.

(1×6=6 marks)

(b) Roots Infra Ltd, (Operational Creditor) (OC) entered into a lease agreement for 10 years in respect of an office building measuring 16,000 sq. ft. belonging to Sharp Ltd (Corporate Debtor) (CD). A sum of ` 3 crores was paid as interest free security deposit by the OC. The lease was terminated on the expiry of the lease period and accordingly, the CD was liable to refund the security deposit. The CD did not refund the security deposit. On a mutual understanding, both the OC and the OD entered into a Memorandum of Settlement (MoS) whereby it was agreed that the CD would refund the security deposit in three annual instalments. The CD paid the first annual instalment. Despite several oral and written request and reminders, the CD failed to pay the balance two annual instalments. In such circumstances, the OC issued a notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) to the CD to settle the balance ₹ 2 crores based on the MoS as operational debt within 10 days from the date of receipt of notice. Despite this, the CD again failed to refund the security deposit claimed as the defaulted amount. Having no other alternative, the OC filed a petition initiating Corporate Insolvency Resolution process against the CD.

You are requested to analyse the about facts and arrive at a correct conclusion as to whether the petition by the OC is maintainable under the provisions of IBC, 2016.

(3 marks)

(c) Mr. 'S' submitted his candidature for being a resolution applicant of AC Ltd. in pursuant to an invitation made for the names of prospective resolution applicants under the relevant provisions of the Insolvency and Bankruptcy Code, 2016, by Mr. 'A', the resolution professional. Mr. 'S' is a spouse of sister of Mr. 'V' who is going to be involved in the management of AC Ltd. as a director at the time of implementation of the resolution plan and Mr. 'S', being a person resident in India was convicted under the provisions of FEMA Act, 1999, for an act specified under the Twelfth Schedule of the IBC, 2016, with imprisonment for 2.5 years and only 1 year and 3 months has expired from the date of his release of imprisonment, for not paying penalty which arose due to bringing into India from Canada during his temporary visit, 2,00,00,000 worth Indian currency notes. In the light of the given facts, examine whether Mr. 'S' is eligible to be a resolution applicant?

(3 marks)

Answer 6(a)

Sl. No.	*Query Raised*	*Correct Option*
01	Which one is a prerequisite for preparation of a resolution plan?	Option – (c): Formation of Committee of Creditors.
02	Who shall prepare the list of creditors after passing of the bankruptcy order?	Option – (a): Bankruptcy Trustee
03	A Committee of Creditors comprises of ...	Option – (c): All financial creditors.
04	A final meeting of the CoC is scheduled to be held on 25th October, 2023. Is it necessary to hold the meeting in person or can it be organized otherwise?	Option – (b): Meeting in person is not necessary and it can be held via video conferencing.
05	Whether home buyers can initiate CIRP proceedings under the IBC, 2016	Option – (b): Yes. House buyers are included in the definition of financial creditors. Hence, they can do so.
06	A registered Trade Union was formed for the purpose of regulating relationships between workmen and their employer. Such Trade Union can initiate CIRP against the company' on behalf of its members	Option – (b): As an Operational Creditor.

Answer 6(b)

The term "Operational Creditor" is defined under Section 5(20) of Insolvency and Bankruptcy Code, 2016, as a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. Section 5(21) read with Section 5(20) defines "Operational Debt" as a claim in respect of:

- Provision of goods.
- Provision of services including employment.

Or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any Local Authority.

The petitioner Roofs Infra Ltd is not an 'Operational Creditor within the meaning of Section 5(21) as the amount which is claimed to be in default does not arise in relation to amount towards supply of goods or regarding services or in connection with employment or statutory dues.

Roots Infra Ltd should demonstrate that the said amount in default falls within the definition of "claim" as defined in Section 3(b) of the Insolvency and Bankruptcy Code, 2016.

Such a claim should be capable of being treated as debt as defined under Section 3(1l) of IBC, 2016 and should fall within the confines of Section 5(21) of IBC, 2016 namely, it should be capable of being treated as an operational debt.

Such an operational debt must be owned by the Corporate Debtor to a Creditor who can then be considered as an Operational Creditor as defined in Section 5(20) of IBC, 2016.

In view of the above grounds, the petition filed by Roots Infra Ltd is not maintainable under the provisions of the Code.

Answer 6(c)

As per Section 29A(d) of the Insolvency and Bankruptcy Code, 2016. a person shall not be eligible to submit a resolution plan, if such person, or any other person action jointly or in concert with such person has been convicted for an offence punishable with imprisonment for two years or more under the FEMA Act, l999, specified under the Twelfth Schedule.

However, this clause is not applicable to person who is a connected person referred to in clause (iii) of Explanation I.

As per Explanation I-the expression "connected person" means-

> Any person who is the promoter or in the management or control of the resolution applicant; or
>
> Any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

The holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Further, as per Section 5(24A) of the Code, "relative", with reference to any person, inter-alia, includes son, daughter, sister or brother and their spouses, respectively'.

Here in the given case, Mr. ‘S’ being spouse of sister of V, will be considered as a related party to Mr.’ V’ as per section 5(24A) of the Code and consequently will be considered as a ‘connected person’ to Mr. 'V" who is going to be involved in the management of AC Ltd. as a director at the time of implementation of the resolution plan.

Accordingly, the provisions of clause (d) of Section 29A of the Insolvency and Bankruptcy Code, 2016, will not be applicable to Mr. ‘S’ as the case is covered by proviso to the said clause.

Thus, Mr. ‘S’ will be eligible to be a resolution applicant of AC Ltd. in view of the facts given in the present case.

***