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Roll No. ..... **OPEN BOOK EXAMINATION**

Time allowed : 3 hours ***Maximum marks : 100***

Total number of questions : 6 ***Total number of printed pages : 15***

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

1. Read the case study carefully and answer the questions given at the end :

DK Swan Limited (DK) was subject to Corporate Insolvency Resolution Process (CIRP) initiated by an Operational Creditor under Section 9 of Insolvency Bankruptcy Code, 2016 (IBC). During the CIRP, claims were invited by the Interim Resolution Professional (IRP).

Sunrise filed its claim in Form C as a financial creditor for a sum of ₹ 62.60 lakh on 15th June, 2017. Thereafter, Sunrise filed a revised Form C for a sum of ₹ 119.11 lakh on 25th June, 2017. Sunrise had filed the revised claim Form on the basis of an alleged Memorandum of Understanding dated 17th September, 2010 executed with the Corporate Debtor, which stated that Inter Corporate Deposits (ICDs) of ₹ 36.55 lakh have been granted to the Corporate Debtor by Sunrise bearing interest of 24% repayable in terms of the mutual agreement between the parties.

However, Sunrise has submitted that it has granted ICDs of ₹ 76.00 lakh (approx.) to the Corporate Debtor between July, 2008 and February, 2012. Out of this amount, Sunrise is claiming a principal amount of ₹ 33.00 lakh. The balance amount of ₹ 53.60 lakh was credited in the account of XYZ, which is a wholly owned subsidiary of Sunrise. The total claim of Sunrise has increased to ₹ 119.11 lakh in 7 years on account of interest at the rate of 24%.

XYZ filed its claim before the IRP in Form F as a creditor other than a financial creditor or operational creditor for a sum of ₹ 103.90 lakh on 15th June, 2017. Thereafter, XYZ filed a revised claim in Form C as a financial creditor for a sum of ₹ 119.72 lakh on 28th June, 2017. It had entered into a Development Agreement dated 6th April, 2011 with the Corporate Debtor for a sale consideration of ₹ 42.80 lakh to purchase development rights in a project. On 30th November, 2011, the Development Agreement was terminated and an Agreement to sell, along with a Side Letter, was executed between XYZ and the Corporate Debtor for purchase of flats. The sale consideration for the Agreement to sell was enhanced to ₹ 96.01 lakh from ₹ 42.80 lakh under the Development Agreement. XYZ paid a sum of ₹ 53.06 lakh as advance payment under the Agreement to Sell. This amount was adjusted out of the ICDs payable to Sunrise as noted above. The claim of XYZ is with respect to the principal amount of ₹ 53.06 lakh, which along with interest at the rate of 18% increased to ₹ 119.72 lakh in 5 years.

Phantom is also a financial creditor of the Corporate Debtor and is a part of Committee of Creditors (CoC). Its claim is based on a registered Deed of Assignment in its favour dated 2nd January, 2015, pursuant to which, Karnataka Bank Limited had assigned the non-performing assets relating to the credit facilities granted to the Corporate Debtor. The voting share of Phantom was reduced to 3.58% on account of XYZ and Sunrise being included in the CoC.

The CoC was constituted on 27th June, 2017. On 30th June, 2017, the IRP rejected the claim of Sunrise, *inter alia*, on the ground that the claim was not in the nature of a financial debt in terms of Section 5(8) of IBC since there was an absence of consideration for the time value of money, *i.e.*, the period of repayment of the claimed ICDs was not stipulated.

The IRP also rejected the claim of XYZ on the ground that its claim as a financial creditor in Form C was filed after the expiry of the period for filing such a claim.

The IRP in his letter dated 30th June, 2017 has noted that as per the ledger provided by Sunrise, no interest was claimed on the alleged debt and no adjustment was made regarding the payment of principal or interest by the Corporate Debtor to Sunrise. It has been submitted in the written submissions filed on behalf of Sunrise and XYZ that the auditors of the Corporate Debtor had been putting a note in its balance sheets stating that the interest of 12% was not being paid to Sunrise due to a dispute.

Aggrieved by the rejection of their claim as financial creditors, XYZ and Sunrise filed applications before the National Company Law Tribunal (NCLT) to be included in the CoC. The NCLT by its order dated 5th July, 2017 allowed the applications. However, none of the other financial creditors, such as Phantom and YES Bank, were parties to these proceedings. The NCLT observed that XYZ's original claim in Form F was filed on time and it has only amended its claim as one under Form C. The NCLT further observed that the amount given by Sunrise in the form of ICDs has been received as a deposit and is attracting interest as reflected in Form '26AS', deducting TDS on interest. Thus, NCLT allowed Sunrise and XYZ to submit their claims as financial creditors with a direction to the IRP to consider the claims.

On 6th July, 2017, a meeting of the CoC took place which was attended by YES Bank and Phantom, and also by the newly approved financial creditors, XYZ and Sunrise. Following the meeting, YES Bank and Phantom filed applications in the NCLT for the exclusion of XYZ and Sunrise from the CoC on the ground that they are related parties.

The applications filed under Section 60(5) by Phantom also sought similar reliefs for :

(*i*) The removal of Sunrise and XYZ from the CoC; and

(*ii*) Directing the constitution of the CoC in terms of the Insolvency and Bankruptcy (Amendment) Ordinance 2018 (IBC Ordinance 2018).

As noted by NCLT, the Memorandum of Understanding dated 17th September, 2010, on the basis of which Sunrise had filed its claim in Form C before the IRP, was signed two years after the commencement of the purported transaction. The execution of the Memorandum of Understanding was sought to be explained on the basis that a formal document was created for specifying the rate of interest on the ICDs given by Sunrise to the Corporate Debtor. However, despite the creation of a formal document, the rate of interest being charged on the ICDs was 12% as mentioned in the claim before the IRP, which is half of the interest rate of 24% stipulated in the Memorandum of Understanding.

NCLT in its judgement dated 24th August, 2018 said :

(*a*) That Sunrise and XYZ did not qualify to be considered as financial creditors.

(*b*) In relation to the second issue, NCLT held that it ‘‘does not require a reply’’ in view of its above-mentioned finding. However, it took note of the first proviso to Section 21(2) of the IBC, which was introduced with effect from 6th June, 2018. Under the first proviso, *inter alia*, a financial creditor who is a related party of the corporate debtor shall not have the right of representation, participation or voting in the CoC.

In appeal, the National Company Law Appellate Tribunal (NCLAT) proceeded of its decision to observe that admittedly Sunrise and XYZ are the financial creditors of the corporate debtor. Having stated so, the Appellate Tribunal proceeded to enquire into whether XYZ and Sunrise are related parties within the meaning of Section 5(24) of the IBC.

Answering the above issue in the affirmative, the NCLAT held that Sunrise and XYZ are related parties of the Corporate Debtor since :

(*a*) XYZ was a partner of the Corporate Debtor.

(*b*) During the transaction period of 2009 to 2012, Sunrise led by Kunal Kumar was making substantial financial arrangements on the basis of advice provided by the Corporate Debtor led by its Management and Directors.

(*c*) The Corporate Debtor was acting on the directions/instructions of Kunal Kumar who, along with his family, is the majority shareholder in Sunrise, of which XYZ is a wholly-owned subsidiary.

(*d*) On the basis of the same reasons, Kunal Kumar was also held to be a person participating in the policy-making process of the Corporate Debtor.

Aggrieved by order of NCLAT, Phantom approached the Hon'ble Supreme Court.

Referring the relevant case and relevant provisions of IBC, its Rules and Regulations made thereunder, answer the following questions :

(*a*) Explain whether Sunrise and XYZ are financial creditors of the Corporate Debtor ?

(*b*) Explain based on Supreme Court's decision, if Sunrise and XYZ are related parties of the Corporate Debtor ?

(*c*) Whether Sunrise and XYZ have to be excluded from the CoC ?

(*d*) Section 21(2) of the IBC provides that the Committee of Creditors (CoC) shall comprise of all financial creditors of the corporate debtor. In light of this statutory provision what will be your answer, if there are no financial creditors or all the financial creditors are related party to the Corporate Debtor ?

(*10 marks each*)

2. (*a*) An Application for initiation of Corporate Insolvency Resolution Process (CIRP) was filed against a Corporate Debtor (CD) and the following four Banks submitted their claims as under :

A Bank Limited	₹ 14 crore,
B Bank Limited	₹ 3.26 crore,
C Bank Limited	₹ 18.27 crore, and
D Bank Limited	₹ 8.99 crore.

It was the case of consortium finance.

The Corporate Debtor filed an appeal before National Company Law Appellate Tribunal (NCLAT) challenging the order of admission of CIRP, which was ultimately upheld by Supreme Court. NCLAT in another order, directed the Resolution Professional (RP) to keep the company as a going concern and the bankers were also directed to co-operate with the Resolution Professional in this regard.

The banks allowed continuous operations in the company's account through which the company was also routing all the business cash in the normal course of its business.

In the course of these operations, the Corporate Debtor's outstanding dues under the said accounts got gradually liquidated through its surplus cash flows accruing out of its increasing cash profits. As the Corporate Debtor was making good profit and had accumulated adequate cash balance, the erstwhile RP opted to reduce the utilization of the Fund-based facilities and thus squared off the Cash Credit (CC) facilities with all the banks. In the meantime, in one of the meeting of the Committee of Creditors (CoC), new RP was proposed, which was approved by the Adjudicating Authority.

The new RP asked the banks to reverse the amounts remitted by the previous RP while discharging his duties as per the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC) and its Regulations thereof. The lenders consortium contended that the operation in the accounts was allowed as per the directions of Tribunal and that the credit was received in the normal course of business. Meanwhile the Resolution Plan was also approved by Adjudicating Authority.

In light of the above facts, discuss, whether the contention of lenders consortium is correct ?

(*6 marks*)

(*b*) Solver Ltd., the Operational Creditor (OC), supplied Jute bags to Atren Ltd., the Corporate Debtor (CD) through 12 invoices for ₹ 78.63 lakh during a period of May 2015 to November 2016.

The OC claimed its amount from the date of acknowledgement i.e. 12th December, 2017 with interest. The CD sent a Legal Notice (Notice of Dispute) on 20th September, 2018 after that it was assured that the outstanding amount will be paid within a month, but no outstanding debt was paid. It also mentioned that past payments and return of material were not factored in raising the demand.

The OC raised demand notice under Section 8 of the IBC again on 12th October, 2018 which was delivered on 27th October, 2018. The CD sent a reply on 31st October, 2018 to the aforesaid demand notice wherein it mentioned that the material worth ₹ 10.65 lakh were returned on 23rd June, 2017, owing to the quality issue and the same were duly received and acknowledged by the Operational Creditor, so dispute was raised.

The National Company Law Tribunal (NCLT) rejected the application of OC. The OC referred the matter before the National Company Law Appellate Tribunal (NCLAT). Referring the relevant case, explain whether the OC will succeed before NCLAT ?

(*6 marks*)

3. (*a*) A Bank extended credit facility to M/s. Jaiveer Construction (JC), a proprietary firm of the appellant. The loan amount was disbursed to JC, the Principal Borrower. Gupta Foods Ltd. (GFL), of which the appellant is also a Promoter/Director, had offered guarantee to the loan accounts of JC, the Principal Borrower. The loan accounts of JC were declared NPA on 30th January, 2011.

During the pendency of the stated action initiated by the Financial Creditor (FC), JC the Principal Borrower had repeatedly assured to pay the outstanding amount, but the commitment remained unfulfilled.

The FC eventually wrote to GFL in December, 2018 in the form of a purported notice of payment. The GFL replied to the said notice of demand vide letter dated 8th January, 2019, *inter alia*, clarifying that it was not the Principal Borrower, nor owed any financial debt to the financial creditor and had not committed any default in repayment of the stated outstanding amount.

The FC then proceeded to file an application on 23rd March, 2019 under Section 7 of the Code for initiating Corporate Insolvency Resolution Proceeding (CIRP) against the GFL, before the National Company Law Tribunal (NCLT). This application came to be resisted on diverse counts and in particular, on the preliminary ground that it was not maintainable because the Principal Borrower was not a "Corporate Person"; and further, it was barred by limitation, as the date of default was 30th January, 2011, whereas, the application had been filed on 23rd March, 2019 i.e., beyond the period of three years.

Examine in light of decided case, whether two objections made by GFL were sustainable or not ?

(*6 marks*)

(*b*) Operational Creditor (OC) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiation of Corporate Insolvency Resolution Process (CIRP) against Corporate Debtor (CD). The Adjudicating Authority (AA) admitted the application.

The CD challenged the order on the ground that the application under Section 9 of IBC was filed fraudulently with malicious intent for the purpose, other than for the resolution of insolvency or liquidation and attracts penal amount in terms of Section 65(1) of the IBC.

The OC is claiming the amount, on the basis of two Memorandum of Understanding(s), (MOUs), first one is for claim against invoices raised and the second one is for reimbursement of custom duty, paid to the relevant authorities.

As per CD, he offered 100% of the amount actually payable in terms of the first MOU on account of the invoices raised by the OC, but the OC declined to settle the amount and asked for more.

Further, the OC also demands for customs duty paid to the relevant authorities. However, no such arrangement has been made as per the MOU terms.

CD appealed to, the National Company Law Appellate Tribunal (NCLAT). During the proceedings, NCLAT, on request of CD, allowed CD to pay entire amount as mentioned in 1st MOU, and also to pay certain additional amount. However, the OC refused to accept the same and asked for more interest.

Discuss, whether the appeal filed by the CD at NCLAT, will be maintainable ?

(*6 marks*)

4. (*a*) An Appeal is filed by the Appellant-Anil Sharma, Resolution Professional (RP) of S. K. Oils Ltd. under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC) against the impugned order passed by the Adjudicating Authority (AA).

The grievance of the Appellant-RP is that, despite lapse of 985 days from the date of filing of the Application seeking broadly to consider passing orders for liquidation of the Corporate Debtor (CD) i.e. S. K. Oils Ltd., as no Resolution Plan has been approved by the Committee of Creditors (CoC) before the maximum period permitted for the Corporate Insolvency Resolution Process ('CIRP') under Section 12 of the IBC, instead the AA has dismissed the Application as not maintainable and being infructuous.

The Appellant-RP has sought the following reliefs :

(*i*) Allow the instant appeal and set aside/quash the impugned order passed by the AA.

(*ii*) Pass an order initiating liquidation of the Corporate Debtor M/s. S. K. Oils Ltd., under Section 33(1) of IBC.

Discuss based on decided case law, whether Appellant-RP will succeed in getting relief ? (*6 marks*)

(*b*) M/s ABC through Ankit, the proprietor, approached you as professional, to seek direction about its business. He says, that the business is in distress and there are heavy debts, thus unable to run the business. He wants to find solution to the debts, so that he can run the business smoothly. He shares following details about his business :

(*i*)	Gross annual turnover	₹ 50,000
(*ii*)	Aggregate Value of Assets	₹ 20,000
(*iii*)	Value of Debts incurred in last two months	₹ 32,000

(*iv*) There is no dwelling unit owned by him

(*v*) There is no insolvency resolution process, bankruptcy process or fresh start process subsisting against him.

Based on above details, advise him to get rid of his debts and to re-start his business smoothly.

(*6 marks*)

5. (*a*) XYZ Bank has given loan of ₹ 20 crore to AB Ltd. The loan is duly guaranteed by personal guarantee of two relatives of directors. The loan went in to default and the Bank decided to file application against personal guarantors u/s 95 of Insolvency and Bankruptcy Code, 2016 (IBC), to initiate insolvency resolution process.

The Resolution Professional (RP) has filed a report under Section 99 of the IBC recommending approval of application filed u/s 95 of the IBC by the Bank against personal guarantors to the Corporate Debtors (CD).

The CD says that the Debt Recovery Tribunal (DRT) have no right to entertain the present petition as the guarantors are resident, which falls within territorial jurisdiction of other DRT, and also the RP had not complied with the procedure as envisaged in Section 99(2) which mandates the RP to require debtor to prove repayment of

the debt claimed as unpaid by the creditor by furnishing the proof of the same. Hence the RP has not followed the mandate of Section 99(2) of the IBC.

Based on the above facts answer the following questions :

(*a*) Whether issue of territorial jurisdiction was appropriate ?

(*b*) Whether objection about RP, not complying with mandate of Section 99(2) of IBC was sustainable ?

(*6 marks*)

(*b*) A Ltd. and the B Ltd. had jointly submitted the Resolution Plan for taking over the Company. The same was approved unanimously by the Committee of Creditors (CoC), and after that, the Resolution Plan was further approved by the Adjudicating Authority (AA).

The approved Resolution Plan got executed, and the shares were allotted as per the terms of the approved Plan. All money in respect of 34% shares were paid by the A Ltd. and B Ltd. got 51% paid-up equity shares.

Later, after 13 months of completion of Corporate Insolvency Resolution Plan (CIRP), the AA, on an application of B Ltd. made changes in Plan, thus increasing its shareholding to 75% and reducing the shareholding of A Ltd. to 10%. This was done as typographical/ clerical error brought to notice of AA.

Discuss, based on case laws, whether A Ltd. will succeed in Appeal ?

(*6 marks*)

6. (*a*) The Insolvency and Bankruptcy Board of India (IBBI) had issued 'Show Cause Notice' (SCN) to Suresh Kumar, Insolvency Professional (IP) under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 for accepting the assignment as Resolution Professional (RP) in the Corporate Insolvency Resolution Process (CIRP) of Crane India Ltd, a Corporate Debtor (CD) after 31st December, 2019, without holding a valid Authorisation for Assignment (AFA) issued to him by his Insolvency Professional Agency (IPA).

In this case Suresh Kumar was ratified to act as RP in the meeting of Committee of Creditors (CoC) held on 19th January, 2020. However, consent for CIRP assignment by RP was given in June, 2018 and CIRP commenced in November, 2019.

The IBBI alleged that, Suresh Kumar had accepted assignment as the RP in CIRP of the CD after 31st December, 2019 without having valid AFA which is in the contravention of Section 208 of IBC.

However, the RP replied to the SCN that the assignment was accepted to act as RP before 31st December, 2019 by him and the same was admitted by Hon'ble National Company Law Tribunal (NCLT). He further stated that he did not have any malafide intention for not obtaining the AFA and apologized for the same.

But it was referred to Disciplinary Committee (DC) by the IBBI for disposal of the SCN in accordance with the Code and Regulations made thereunder.

Whether the RP is liable on the basis of above facts ?

(*6 marks*)

(*b*) UN Commission on International Trade Law on cross-border insolvency, was adopted in 1997. Since then the subject was deliberated in various statutes in India and abroad and finally as per the Banking Law Reforms Committee (BLRC) Report, the Insolvency and Bankruptcy Code, 2016 (IBC) was enacted which contains the provisions relating to the question of cross-border insolvency. In this context describe the provisions of cross-border insolvency as contained in the IBC.

(*6 marks*)

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