GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

DECEMBER 2022

MODULE 3

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)
ICSI House, 22, Institutional Area, Lodi Road, New Delhi 110 003
Phones : 41504444, 45341000; *Fax* : 011-24626727
E-mail : info@icsi.edu; *Website* : www.icsi.edu

These answers have been written by competent persons and the Institute hope that the **GUIDELINE ANSWERS** will assist the students in preparing for the Institute's examinations. It is, however, to be noted that the answers are to be treated as model answers and not as exhaustive and the Institute is not in any way responsible for the correctness or otherwise of the answers compiled and published herein.

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

C O N T E N T S

PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2022

CORPORATE FUNDING & LISTINGS IN STOCK EXCHANGE

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *Answer ALL Questions.*

PART-A

Question 1

(a) Following is the extract from the Balance Sheet of M/s YBL Ltd. as on 31 March, 2022 :

Current Liabilities	*Amount (₹ in lakh)*	*Current Assets*	*Amount (₹ in lakh)*
(1) Bank Borrowings	*820*	*(1) Inventories*	*650*
(2) Trade Payables	*200*	*(2) Financial Assets*	
(3) Other current Liabilities	*180*	*(i) Investments*	*250*
		(ii) Trade Receivables	*75*
		(iii) Cash and Cash Equivalents	*125*
		(iv) Bank Balance other than (iii) above	*150*
		(v) Other Financial Assets	*350*

YBL Limited has bank borrowings of ₹ 820 Lakhs which includes bills discounted with the bank. It wishes to avail loan for its working capital and approaches your bank for financing. While maintaining the minimum current ratio of 1.33, calculate the Maximum Permissible Bank Finance (MPBF) as per methodology suggested by Tondon Committee. Should the bank sanction the loan request or not ?

(5 marks)

(b) There is a proposal with the Board of directors of Sun Ltd. to give loan of ₹ 250 Lakhs to M/s Moon Ltd. Following are the extract of the financial statement of M/s Sun Ltd. Board of directors of M/s Sun Limited seeks your advice with regard to loan limit which the Board of Sun Limited can sanction pursuant to limits for loan under Section 186. Based on your calculation, can the company give loan of ₹ 250 lakhs to Moon Limited ? Suppose if it exceeds the limits, what option is available with M/s Sun Ltd. ?

Liabilities	*Amount (₹ in lakh)*	*Assets*	*Amount (₹ in lakh)*
Paid up Capital	*250*	*Investments in Equities*	50
Securities Premium Account	*200*	*Debentures and Bonds*	15
General Reserve	*150*	*Government* Securities	25
Retained Earnings	*25*	Loans given to other companies	40
Revaluation Reserve	*10*	Inter Corporate Deposits	120
		Guarantees given to other companies	20

(5 marks)

(c) The projected financial information of M/s Bansiwala is as given below :

Projected Annual Sales	₹6,50,000
Percentage of net profit on sales	25%
Average credit period allowed to debtors	10 weeks
Average credit period allowed by creditors	4 weeks
Average stock holding in terms of sales requirement	8 weeks

On the basis of above information, calculate the following :

(i) Current Ratio and

(ii) Working Capital.

(5 marks)

Answer 1(a)

Calculation of Maximum Permissible Bank Finance and decision making

To maintain the minimum current ratio of 1.33, Second method of lending as suggested by Tondon Committee would be used wherein maximum financing by bank can be up to 75% of current assets.

So as per the suggested methodology, Maximum Permissible Bank Finance (MPBF) as per Tondon Committee would be:

MPBF = 75% (Current Assets) - Current Liabilities (excluding Bank Borrowings)

Or

MPBF = [Current Assets – Current Liabilities (excluding Bank Borrowings)] – 25% of Current Assets

MPBF would be

= 75% (₹1600 Lakhs) – ₹380 Lakhs

= ₹1200 Lakhs – ₹380 Lakhs

= ₹820 Lakhs

OR

= [₹1600 Lakhs – ₹380 Lakhs] – 25% of ₹1600 Lakhs

= ₹1220 Lakhs – ₹400 Lakhs = ₹820 Lakhs

Since YBL Ltd. has already availed Maximum Permissible Bank Finance and hence have reached the minimum current ratio of 1.33:1 via borrowings of ₹820 Lakhs, the Bank Manager should not sanction the loan request of YBL Ltd.

Answer 1(b)

Decision Making with regard to Inter Corporate Loans and Deposits

In pursuant to provisions of Section 186(2) of the Companies Act 2013, no company shall directly or indirectly

- give any loan to any person or other body corporate,
- give any guarantee or provide security in connection with a loan to any other body corporate or person**,** and
- acquire by way of subscription, purchase or otherwise**,** the securities of any other body corporate

exceeding 60% of its paid-up share capital plus free reserves plus securities premium account or 100% of its free reserves plus securities premium account, whichever is more.

Further, Section 186 (3) of Companies Act, 2013 empowers a Company to give loan, guarantee or provide any security or acquisition beyond the limit but subject to prior approval of members by a special resolution passed in a general meeting.

In the given case, Limit pursuant to Section 186 for Sun Ltd. is as below:

I) 60% (Paid up capital + Free Reserves + Securities Premium Account) = 60% of ₹625 Lakhs = ₹375 Lakhs

II) 100% of Free Reserve = ₹375 Lakhs

Higher of I & II above = ₹375 Lakhs

As per balance sheet of Sun Ltd., it has already have provided loans and Investment and Guarantee for amount of ₹270 Lakhs. Hence, the Board of Sun Ltd. cannot give loan of additional loan of ₹250 Lakhs which taken with existing loan / investment / guarantee would be ₹270 Lakhs plus ₹250 Lakhs i.e. ₹520 Lakhs.

However, Sun Limited can seek prior approval of members by a special resolution passed in a general meeting and give loan to Moon Ltd.

Answer 1(c)

Calculation of Working capital

Step No		
	Working Notes:	
	Sales - Net Profit = Cost of goods sold	₹6,50,000 - 25% on ₹6,50,000
		= ₹4,87,500
	CURRENT ASSETS (CA)	
Step 1	** Debtors (10 weeks) at cost (4,87,500 x 10 weeks)/ 52 Weeks	₹93,750
Step 2	Stock (8 Weeks) (4,87,500 x 8 Weeks)/ 52 Weeks	₹ 75,000
	Total Current Assets	₹ 1,68,750
	CURRENT LIABILITIES (CL)	
Step 3	Creditors (₹ 4,87,500 x 4 Weeks)/ 52 Weeks	₹ 37,500
Step 4	(i) Current Ratio: CA/CL - (₹ 1,68,750 / ₹37,500)	4.5: 1
Step 5	(ii) Working Capital (CA-CL): (₹1,68,750 - ₹ 37,500)	₹1,31,250

**Some students may calculate the debtor at full value, in such case,the alternative solution would be as under :

	CURRENT ASSETS	*Amount (₹)*
Step 1	*Debtors (10 weeks) at sales price (6,50,000 x 10 weeks)/52 Weeks	1,25,000
Step 2	Stock (8 Weeks) (4,87,500 x 8 Weeks)/ 52 Weeks	75,000
	Total Current Assets	**2,00,000**
	CURRENT LIABILITIES	
Step 3	Creditors (₹4,87,500 x 4 Weeks)/ 52 Weeks	37,500
Step 4	(i) Current Ratio (₹2,00,000/ ₹37,500)	5.33: 1
Step 5	(ii) Working Capital (₹2,00,000 / ₹ 37,500)	1,62,500

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

Question 2

(a) Distinguish between Real Estate Investment Trusts (REITs) and Infrastructure Investment Trust (InvITs) with reference to brief concept, growth prospect, income stability and associated risks.

(b) The provisions relating to "Special Situation Fund (SSF)" has been notified by SEBI vide SEBI (Alternative Investment Funds) (Amendment) Regulations, 2022. Explain the above referred provision in view of requirement with regard to minimum corpus funds for each scheme of SSF and minimum investment required by different types of investors of SSF.

(c) As per framework given by SEBI, which listed entities are considered as "Large Corporates" ? Explain the Stock Exchange disclosure requirements for entities identified as Large Corporates.

(5 marks each)

OR (Alternate question to Q. No. 2)

Question 2A

(i) Explain the difference between Fund based and Non-Fund based credit facilities.

(ii) Which categories of Alternative Investment Funds (AIF) are available for the investors to make investment ? Explain.

(iii) Jupiter Ltd. got its equity shares listed on 1st April, 2020 and the management of the company wishes to issue further shares and raise capital through Fast Track in the Financial Year 2022-23. Can the company issue shares through Fast Track FPO ? Explain the eligibility criteria and conditions for issuing shares under Fast Track FPO process.

(5 marks each)

Answer 2 (a)

Difference between Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs)

Basis of Difference	*REITs*	*InvITs*
Brief Concept	REITs serves as an investment tool that helps own and operate income generating real estate properties. Such properties serve as a stream of annual revenue and mostly include warehouses, healthcare centres, commercial buildings, malls, etc.	InvITs is planned to pool money from investors to invest it in assets generating cash flow. Moreover, they invest in projects like roadways, highways and other high-value infrastructural units.
Growth prospect	The growth prospects of REITs rely on the redevelopment or acquisition of assets, new construction, etc.	Their growth prospect depends mainly on the success of acquisition and concession of assets.

Income Stability	REITs tend to provide a steady flow of income mostly because their income yielding properties come with extensive rental contracts.	The stability of income for InvITs depends mainly on those factors that tend to affect the capacity of usage and also the scalability of tariffs. Hence, in most cases, income is quite uncertain.
Associated risks	REITs are better from insulated regulatory/political risks. REITs tend to hold properties that are either leased or owned on a freehold basis.	The infrastructure sector is prone to react to regulatory policies and political interference. Thus, parking funds in infrastructure investment trusts often prove risky.

Answer 2(b)

Special situation fund means a Category 1 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.

Each scheme of Special Situation Fund (SSF) shall have a corpus of at least 100 crore.

SSF shall accept an investment of value not less than 10 crore from an investor. In case of an accredited investor, the SSF shall accept an investment of value not less than 5 crore. Further, in case of investors who are employees or directors of the SSF or employees or directors of the manager of the SSF, the minimum value of investment shall be 25 lakhs.

Answer 2(c)

Meaning of Large Corporate Entities and disclosure

A Large Corporate means a listed entity (except for scheduled commercial banks):

a) having its specified securities or debt securities or non-convertible redeemable preference shares, listed on a recognised stock exchange(s) in terms of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015; and

b) have an outstanding long term borrowing of 100 crore or above, where outstanding long-term borrowings shall mean any outstanding borrowing with original maturity of more than one year and shall exclude external commercial borrowings and inter-corporate borrowings between a parent and subsidiary(ies); and

c) have a credit rating of "AA and above" where credit rating shall be of the unsupported bank borrowing or plain vanilla bonds of an entity, which have no structuring/ support built in; and in case, where an issuer has multiple ratings from multiple rating agencies, the highest of such ratings shall be considered.

A listed entity, identified as a Large Corporate under the instant framework, shall make the following disclosures to the stock exchanges, where its security(ies) are listed:

a) Within 30 days from the beginning of the financial year, disclose the fact that they are identified as a LC in the format specified by the SEBI.

b) Within 45 days of the end of the financial year, the details of the incremental borrowings done during the financial year in the format specified by the SEBI.

The above disclosures shall be certified both by the Company Secretary and the CFO of the Large Corporates.

Answer 2A(i)

Difference between fund based and non-fund based credit facilities

In Fund based credit facility, there is cash outflow right from the initial stage. The examples of funded facility are term loan, cash credit and bill purchased or bill discounting. When a term loan is disbursed, cash credit facility is sanctioned or a bill is purchased or discounted cash flow takes place. The income earned by the banks when they extend funded facilities to the borrowers, is accounted under income head interest (in case of term loans and cash credits) and discount (in case of bill discounting facility).

In Non-fund based facility, initially there is no cash outflow, later on there may or may not be cash outflow. The examples of non-fun based facility are Bank Guarantees (BGs) including deferred payment guarantees and Letter of Credit (LCs). When BG or LC is issued, there is no cash out flow. However, latter on if the guarantee is invoked by the beneficiary, the bank will have to make the payment under the guarantee at times even if there is no balance in the account of customer. Similarly, when bills negotiated under LC are due for payment the bank may have to honour the same at times by creating forced loan in the account of the buyer on whose behalf Letter of Credit is issued. The income earned by banks while issuing bank guarantees or LCs is accounted under the income head “commission”. Non-Fund based credit facilities to non- borrowers of the bank.

Answer 2A(ii)

Different types of Alternative Investment Funds

There are three categories of Alternative Investments Funds available for investors to make investment and the same are elaborated hereunder:

1. Category I Alternative Investment Fund are those which invest in start-up or early stage ventures or social ventures or SMEs or infrastructure or other sectors or areas which the government or regulators consider as socially or economically desirable and shall include venture capital funds, SME Funds, social venture funds, infrastructure funds, special situation funds and such other Alternative Investment Funds as may be specified.

   Alternative Investment Funds which are generally perceived to have a positive spillover effect on the economy and for which SEBI or Government of India or other regulators in India might consider providing incentives or concessions shall be included and such funds which are formed as trusts or companies shall be construed as ‘venture capital company’ or ‘venture capital fund’ as specified under sub-section (23FB) of Section 10 of the Income Tax Act, 1961.

2. Category II Alternative Investment Fund are those which does not fall in Category I and III and which does not undertake leverage or borrowing other than to meet day-to-day operational requirements and as permitted in the SEBI AIF Regulations. Alternative Investment Funds such as private equity funds or debt

funds for which no specific incentives or concessions are given by the government or any other Regulator shall be included under this category.

3. Category III Alternative Investment Fund which employs diverse or complex trading strategies and may employ leverage including through investment in listed or unlisted derivatives. Alternative Investment Funds such as hedge funds or funds which trade with a view to make short term returns or such other funds which are open ended and for which no specific incentives or concessions are given by the government or any other Regulator shall be included in this category.

Answer 2A(iii)

Eligibility of Fast Track Further Public Offer (FPO)

The equity shares of the issuer have been listed on any stock exchange for a period of at least three years immediately preceding the reference date. Since Jupiter Ltd. got its equity shares listed on 1st April, 2020 and wants to issue further shares during the financial year 2022-23 which is within 3 years of its initial listing and hence, the company is not eligible to issue shares under Fast track FPO process.

Other conditions to be satisfied in order to be eligible for issuing shares under Fast Track FPO are mentioned hereunder:

i) entire shareholding of the promoter group of the issuer is held in dematerialised form on the reference date;

ii) the average market capitalisation of public shareholding of the issuer is at least one thousand crore rupees in case of public issue and two hundred and fifty crore rupees in case of rights issue;

iii) the annualised trading turnover of the equity shares of the issuer during six calendar months immediately preceding the month of the reference date has been at least 2% of the weighted average number of equity shares listed during such six months' period. However, if the public shareholding is less than 15% of its issued equity capital, the annualised trading turnover of its equity shares has been at least 2% of the weighted average number of equity shares available as free float during such six months' period;

iv) annualized delivery-based trading turnover of the equity shares during six calendar months immediately preceding the month of the reference date has been at least 10% of the annualised trading turnover of the equity shares during such six months' period;

v) The issuer has been in compliance with the equity listing agreement or SEBI (LODR) Regulations, 2015, as applicable, for a period of at least three years immediately preceding the reference date. However, if the issuer has not complied with the provisions of the listing agreement or SEBI Listing Regulations, 2015, as applicable, relating to composition of board of directors, for any quarter during the last three years immediately preceding the reference date, but is compliant with such provisions at the time of filing of red herring prospectus with Registrar of Companies, and adequate disclosures are made in the red herring prospectus about such non-compliances during the three years immediately preceding the

reference date, it shall be deemed as compliance with the condition; Further, imposition of monetary fines by stock exchange on the issuer shall not be a ground for ineligibility for undertaking issuances under this regulations.

vi) the issuer has redressed at least 95% of the complaints received from the investors till the end of the quarter immediately preceding the month of the reference date;

vii) that no show-cause notices, excluding proceedings for imposition of penalty, have been issued by the SEBI and pending against the issuer or its promoters or whole time directors as on the reference date:

In cases where against the issuer or its promoters or whole time directors, (i) show-cause notice(s) has been issued by the SEBI or the Adjudicating Officer, in a proceeding for imposition of penalty; or (ii) prosecution proceedings have been initiated by the SEBI; necessary disclosures in respect of such action(s) along with its potential adverse impact on the issuer shall be made in the offer document;

viii) if the issuer or the promoter or the promoter group or the director of the issuer has settled any alleged violations of securities laws through the settlement mechanism of the SEBI in the past three years immediately preceding the reference date, then the disclosure of such compliance of the settlement order, shall be made in the offer document;

ix) equity shares of the issuer have not been suspended from trading as a disciplinary measure during last three years immediately preceding the reference date;

x) There shall be no conflict of interest between the lead merchant banker(s) and the issuer or its group or associate company in accordance with applicable regulations.

xi) For audit qualifications, if any, in respect of any of the financial years for which accounts are disclosed in the offer document, the issuer shall provide the restated financial statements adjusting for the impact of the audit qualifications.

Further, for the qualifications wherein impact on the financials cannot be ascertained, the same shall be disclosed appropriately in the offer document.

Question 3

(a) SEBI issued a circular recently for streamlining the process of "Rights Issue". Explain the need of this circular and the changes made therein for the process of Rights Issue.

(b) A company issued Commercial Paper (CP) having a face value of ₹5 lakhs for 90 days' maturity at the interest rate of 10% p.a. of issue price. Calculate its issue price assuming 365 days in a year.

(c) What are the different categories of projects which can be executed with the funds raised through issue of Green Debt Securities ?

(5 marks each)

Answer 3(a)

SEBI circular streamlining the process of Right issue

SEBI has streamlined the rights issue process and provided that the trading in Right

Entitlements (REs) on the secondary market platform of stock exchanges commence along with the opening of the right issue and has to be closed at least three working days (earlier requirement of four days) prior to the closure of the rights issue. SEBI received representation from the market that in case there are trading holidays between the last date of REs trading date and issue closure, the provision of the minimum gap of four days may not always ensure that there are adequate days for settlement, as minimum 2 working days are required for the settlement of REs traded on last day of REs trading window. REs traded on the exchange platform have a T+2 rolling settlement.

Answer 3(b)

Calculation of Issue Price of Commercial Paper

Face Value (FV) of Commercial Paper : ₹ 5,00,000

Rate of Interest (ROI): 10% p.a.

Period of maturity: 90 Days

Issue Price = Face Value / (1+rate * time)

= ₹ 5,00,000/ (1+10%*90/365)

= ₹ 4,87,967.91 or ₹4,87,968

(There may be little difference in the final answer due to consideration of digits after decimal)

Answer 3(c)

Categorises of projects eligible for issue of Green Debt Securities

Different categories of projects which can be executed with the funds raised through issue of Green Debt includes the following:

a) Renewable and sustainable energy including wind, solar, bioenergy, other sources of energy which use clean technology etc.;

b) Clean transportation including mass/public transportation etc.;

c) Sustainable water management including clean and/or drinking water, water recycling etc.;

d) Climate change adaptation;

e) Energy efficiency including efficient and green buildings etc.;

f) Sustainable waste management including recycling, waste to energy, efficient disposal of wastage etc.;

g) Sustainable land use including sustainable forestry and agriculture, afforestation etc.;

h) Biodiversity conservation;

i) Any other category as may be specified by the SEBI, from time to time.

Question 4

(a) Explain the conditions with regard to Net Tangible Assets, Average Profit and the Net Worth which needs to be complied by an issuer making an Initial public offer.

(b) Explain the different stages of "Venture Capital Financing".

(c) Explain the different parties involved primarily into the securitization process.

(d) Who may act as the trustee of Special Purpose Distinct Entity (SPDE) without obtaining registration with the SEBI under the SEBI (Issue and Listing of Securitized Debt Instruments and Security Receipts) Regulations, 2008 ?

(e) Bell Ltd. wants to list its Non-Convertible Redeemable Preference Shares on private placement basis. Explain the conditions to be fulfilled by Bell Ltd. in this regard.

(3 marks each)

Answer 4(a)

Issuer eligibility for making an IPO

An issuer shall be eligible to make an IPO only if:

a) the issuer has net tangible assets of at least ₹ 3 crores on a restated and consolidated basis, in each of the preceding three full years (of 12 months each) of which not more than 50% is held in monetary assets; However, if more than 50% of the net tangible assets are held in monetary assets, the issuer has utilized or made firm commitments to utilize such excess monetary assets in its business or project. This limit of 50% shall not apply in case of IPO is made entirely through an offer for sale.

b) the issuer has an average operating profit of at least ₹ 15 crores, calculated on a restated and consolidated basis, during the three preceding years (of 12 months each) with operating profit in each of the three preceding years;

c) the issuer has a net worth of at least ₹ 1 crore in each of the preceding three full years, (of 12 months each) calculated on a restated and consolidated basis.

Answer 4(b)

Stages of Venture Capital Financing

Venture capital firms finance both early and later stage investments to maintain a balance between risk and profitability Venture capital firms usually recognise the following two main stages when the investment could be made in a venture namely:

A. Early Stage Financing

(i) Seed Capital & Research and Development Projects.

(ii) Start Ups

(iii) Second Round Finance

B. Later Stage Financing

(i) Development Capital

(ii) Expansion Finance

(iii) Buy Outs

(iv) Replacement Capital

(v) Turn Around

Answer 4(c)

Parties involved in Securitisation primarily, are as under:

1. The Originator (Banks/FIs who has lent loan against properties)
2. SPVs (Securitisation Company or reconstruction Company)
3. Investors (To whom securities are issued, which is a participative interest against the pool of receivables which is bought by the SPVs from the originator

Besides above parties the following are involved in the process of securitizations.

1. The obligator (i.e original borrower of the loan)
2. Rating agency
3. Administrator etc.

Answer 4(d)

Persons not required to register with SEBI for working as the trustee of Special Purpose Distinct Entity (SPDE) under SEBI (Issue and Listing of Securitized Debt Instruments and Security Receipts) Regulations, 2008.

The requirement of obtaining registration is not applicable for the following persons, who may act as trustees of special purpose distinct entities:

(a) any person registered as a debenture trustee with SEBI;

(b) any person registered as a securitization company or a reconstruction company with the RBI under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(c) the National Housing Bank established by the National Housing Bank Act, 1987;

(d) the National Bank for Agriculture and Rural Development established by the National Bank for Agriculture and Rural Development Act, 1981;

Provided that the aforesaid persons and special purpose distinct entities in respect of which they are trustees shall comply with all other provisions of these regulations: Provided further that the provisions of these regulations shall not apply to the National Housing Bank and the National Bank for Agriculture and Rural Development to the extent of inconsistency with the provisions of their respective Acts.

(e) any scheduled commercial bank other than a regional rural bank;

(f) any public financial Institution as defined under clause (72) of section 2 of the Companies Act, 2013; and

(g) any other person as may be specified by SEBI.

However, these persons and special purpose distinct entities of which they are trustees are required to comply with all the other provisions of the SEBI (Public Offer and Listing of Securitized Debt Instruments and Security Receipts) Regulations, 2008.

Answer 4 (e)

Part A of Chapter IV of SEBI (Issue and Listing of Non- Convertible Securities) Regulation 2021 deals with the Conditions for listing of Non-Convertible Redeemable Preference shares on Private placement basis

The issuer shall forward the listing application along with the disclosures as per this regulation to the stock exchange(s) within such days as may be specified by the SEBI from the date of closure of the issue. However, in case of delay in listing of such securities beyond such time period as may be specified by the SEBI from the date of closure of the issue, the issuer shall pay an additional interest/dividend at the rate as may be specified by the SEBI from time to time, over and above the coupon/dividend applicable for such securities.

Regulation 45 of SEBI (Issue and Listing of Non- Convertible Securities) Regulation 2021 states that the issuer making a private placement of debt securities and non-convertible redeemable preference shares and seeking listing thereof on a recognised stock exchange shall make the following disclosures in the placement memorandum:

(a) disclosures specified in Schedule II of these regulations;

(b) disclosures specified in the Companies Act, 2013 (18 of 2013), as applicable;

(c) additional disclosures as may be specified by the SEBI.

The disclosures as mentioned above shall be made on the websites of stock exchange(s) where such securities are proposed to be listed and shall be available for download in PDF or any other format as may be specified by the SEBI.

(3) The issuer shall ensure that the audited financial statements contained in the placement memorandum and tranche placement memorandum shall not be more than six months old from the date of filing placement memorandum or the issue opening date, as applicable:

However, in case of:

a) listed issuers (whose non-convertible securities or specified securities are listed on recognised stock exchange(s)), who are in compliance with the listing regulations;

b) the issuers of non-convertible securities, who are subsidiaries of entities who have listed their specified securities, and are in compliance with the listing regulations,

instead of audited financial statements for the stub period, they may disclose unaudited financial information for such period in the format as prescribed in the listing regulations with limited review report, as filed with the stock exchange(s), subject to necessary disclosures in this regard in the placement memorandum including risk factors.

PART - B

Question 5

(a) Krishna Ltd. is a listed company and it has six directors on its Board, out of which four directors are independent directors. Mr. Raju is the Executive Chairman and Promoter of the Company and Mr. Pawan is the Managing Director of the company. Mr. Pawan wants to become Chairman of Audit Committee. Can he become Chairman of Audit Committee of M/s Krishna Limited ? Discuss the provisions relating to composition of Audit Committee in a listed company.

(b) Logic Ltd. seeks your advice in terms of documents required for seeking in-principle approval for its bonus issue. Explain in brief.

(c) Explain the reasons for wide range of businesses joining Alternative Investment Market (AIM) of London Stock Exchange.

(d) List out the information to be provided by the management of the listed entity to the shareholders for seeking their approval of Related Party Transactions.

(5 marks each)

Answer 5(a)

Provisions related to Chairman of Audit Committee and its Composition

As per Regulation 18 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, the Audit Committee shall comprise of at least three directors. At least Two-thirds of the members of audit committee shall be independent directors. All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise. The chairperson of an Audit Committee shall be an independent director.

In view of the above, since Mr. Pawan is Managing Director of M/s Krishna Limited, therefore, he cannot become the chairman of Audit Committee.

Answer 5(b)

Documents required for seeking in principle approval for issue of Bonus Shares

Following documents are required for seeking in-principle approval under Regulation 28(1) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, for the companies proposing bonus issue:

1. Certified copy of the resolution passed by the Board of Directors of the Company approving the bonus issue.
2. Certified copy of the notice sent to the shareholders of the company for the proposed bonus issue.
3. Certified copy of the resolution passed by the shareholders of the Company approving bonus issue.

4. Copy of the relevant Clause in the Articles of Association granting powers to the Board of Directors to capitalize the profits.
5. Copy of the shareholders' resolution for increase in authorized capital in case the existing authorized share capital is insufficient to accommodate the bonus issue.
6. Document containing Confirmation by the Managing Director/ Company Secretary.
7. Statement of total bonus entitlement as per the existing capital, bonus shares to be allotted and shares kept in abeyance, if any to be given by the Company Secretary.
8. Document establishing the payment of processing fee.
9. Copy of the latest audited annual report.
10. Certified true copy of the amended copy of the Memorandum and Articles of Association of the Company. In case the Memorandum and Articles of Association is not amended, confirmation from the company regarding the same.
11. Name & Designation of the Contact Person of the Company, Telephone Nos. (landline & mobile) and Email address.

Answer 5(c)

Reasons for wide range of businesses joining Alternative Investment Market (AIM) of London Stock Exchange are as under:

AIM is the London Stock Exchange's international market for smaller growing companies. A wide range of businesses including early stage, venture capital backed as well as more established companies join AIM seeking access to growth capital. Reasons for joining AIM are as follows:

i. A diverse and highly knowledgeable investor base keen to provide capital to support growing companies. AIM companies have access to a range of institutional investors, a vibrant cohort of retail investors and, thanks to London's unique status, an unparalleled pool of international capital.

ii. Promotion of the company's image and brand on an international scale.

iii. A network of advisors and liquidity providers who understand the needs of growing companies and are able to support them throughout their journey as a public company.

iv. A regulatory approach that is specifically tailored to the needs of growing companies.

v. A market where companies can use shares as currency, to make acquisitions and grow the business.

vi. The opportunity for companies to improve employee commitment by using shares as an incentive to encourage their long-term motivation.

vii. A market where founders and management can run their business with the support of a wide range of investors.

Answer 5(d)

Information to be provided by the management of the listed entity to the shareholders for seeking their approval of Related Party Transactions (RPT)

The notice being sent to the shareholders seeking approval for any proposed RPT shall, in addition to the requirements under the Companies Act, 2013, include the following information as a part of the explanatory statement:

i. A summary of the information provided by the management of the listed entity to the audit committee

ii. Justification for why the proposed transaction is in the interest of the listed entity;

iii. Where the transaction relates to any loans, inter-corporate deposits, advances or investments made or given by the listed entity or its subsidiary, the details specified under the requirement of disclosing source of funds and cost of funds shall not be applicable to listed banks/NBFCs.

iv. A statement that the valuation or other external report, if any, relied upon by the listed entity in relation to the proposed transaction will be made available through the registered email address of the shareholders;

v. Percentage of the counter-party's annual consolidated turnover that is represented by the value of the proposed RPT, on a voluntary basis;

vi. Any other information that may be relevant.

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

Question 6

(a) Briefly explain the SEBI LODR Regulations, 2015 provisions related to role and responsibilities of Stakeholders Relationship Committee, its chairman, composition and number of meetings to be held in a year. *(5 marks)*

(b) List down the material contracts related to Initial Public Offer (IPO) that should be available for inspection at the registered office of the company from the draft stage till the closure of the IPO ? *(5 marks)*

(c) SEBI (LODR) (Fifth Amendment) Regulations, 2021 has made certain changes in the Regulation 52 of LODR which is related to Financial Results. Explain briefly. *(5 marks)*

(d) Discuss in brief listing of shares on the Euro MTF.

(5 marks)

OR (Alternate question to Q. No. 6)

Question 6A

(i) What are the distinct markets within NASDAQ ? Discuss in brief.

(5 marks)

(ii) Mr. Hulk, the promoter of the company had acquired ₹1000 equity shares of the company on 5th April, 2022, for a market price of ₹750/- and disposed off 500 equity shares on 25th April, 2022 at a price of ₹810/-. He further acquired 1350 shares on 10th May, 2022 at a price of ₹790/-. Explain in brief the provisions of SEBI (Prohibition of Insider Trading) Regulations, 2015 with respect to continual disclosure and the timelines. Further, advise with regard to disclosure by Mr. Hulk to the company and the company to the stock exchange such that they are in compliance with the relevant provisions. (5 marks)

(iii) 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 certificates. Discuss in brief. (5 marks)

(iv) List out the annual compliance calendar for listed entities for Small and Medium Enterprise (SME) as per SEBI Listing Regulations, 2015. (5 marks)

Answer 6(a)

The listed entity shall constitute a Stakeholders Relationship Committee to specifically look into various aspects of interest of shareholders, debenture holders and other security holders. The role of the Stakeholders Relationship Committee shall be as specified in Part D of the Schedule II of SEBI (LODR) Regulations, 2015 which includes:

i. Resolving the grievances of the security holders of the listed entity including complaints related to transfer/transmission of shares, non-receipt of annual report, non-receipt of declared dividends, issue of new/duplicate certificates, general meetings etc.

ii. Review of measures taken for effective exercise of voting rights by shareholders.

iii. Review of adherence to the service standards adopted by the listed entity in respect of various services being rendered by the Registrar & Share Transfer Agent.

iv. Review of the various measures and initiatives taken by the listed entity for reducing the quantum of unclaimed dividends and ensuring timely receipt of dividend warrants/annual reports/statutory notices by the shareholders of the company.

The chairperson of this committee shall be a non-executive director. The Chairperson of the Stakeholders Relationship Committee shall be present at the annual general meetings to answer queries of the security holders. The committee shall comprise of at least three directors. The committee shall have at least one independent director. In case of a listed entity having outstanding SR equity shares, at least two thirds of the Stakeholders Relationship Committee shall comprise of independent directors. The committee shall meet at least once in a year.

Answer 6(b)

Material Contracts to the Issue that should be available for inspection at the registered office of the company from the draft stage till the closure of the IPO are as under:

1. Offer/Issue Agreement between Company, the Merchant Banker and Selling Shareholders (if any).

2. Memorandum of Understanding or Agreement between Company and the Registrar to the Issue.
3. Bankers to the Issue Agreement between Company, Merchant Banker and the Banker to the Issue.
4. Underwriting Agreement between Company, Merchant Banker & other Underwriters (if any).
5. Market Making agreement between Company, the Lead Managers and the Marker Maker to the Issue (If applicable).
6. Syndicate Agreement between Company, Merchant Banker & Syndicate Members.
7. Copy of Tripartite agreement entered into between Company, CDSL and the Registrar to the Issue.
8. Copy of Tripartite agreement entered into between Company, NSDL and the Registrar to the Issue.

Answer 6(c)

Regulation 52 as per SEBI (Listing Obligations and Disclosure Requirements) (Fifth Amendment Regulations, 2021 (September 07, 2021) provides :

a) The listed entity shall prepare and submit un-audited or audited quarterly and year to date standalone financial results on a quarterly basis in the format as specified by the SEBI within forty-five days from the end of the quarter, other than last quarter, to the recognised stock exchange(s).

   However, in case of entities which have listed their debt securities, a copy of the financial results submitted to stock exchanges shall also be provided to Debenture Trustees on the same day the information is submitted to stock exchanges

b) The listed entity shall comply with following requirements with respect to preparation, approval, authentication and publication of annual and quarterly financial results:

   a) Un-audited financial results on quarterly basis shall be accompanied by limited review report prepared by the statutory auditors of the listed entity, in the format as specified by the SEBI. However, in case of issuers whose accounts are audited by the Comptroller and Auditor General of India, the report shall be provided by any practising Chartered Accountant.
   b) The quarterly results shall be taken on record by the board of directors and signed by the managing director / executive director.
   c) The audited results for the year shall be submitted to the recognised stock exchange(s) in the same format as is applicable for quarterly financial results.
   d) The annual audited standalone and consolidated financial results for the financial year shall be submitted to the stock exchange(s) within sixty days from the end of the financial year along with the audit report:

However, the issuers, who are being audited by the Comptroller and Auditor General of India, shall adopt the following two step process for disclosure of the annual audited financial results:

i. The first level audit shall be carried out by theauditor appointed by the Comptroller and Auditor General of India, who shall audit the financials of the listed entity and such financial results shall be submitted to the Stock Exchange(s) within sixty days from the end of the financial year.

ii. After the completion of audit by the Comptroller and Auditor General of India, the financial results shall be submitted to the Stock exchange(s) within nine months from the end of the financial year.

e) Modified opinion(s) in audit reports/limited review reports that have a bearing on the interest payment/ dividend payment pertaining to non-convertible securities/ redemption or principal repayment capacity of the listed entity shall be appropriately and adequately addressed by the board of directors while publishing the accounts for the said period.

f) The listed entity shall also submit as part of its standalone or consolidated financial results for the half year, by way of a note, a statement of assets and liabilities and statement of cash flows as at the end of the half year.

Answer 6(d)

Listing Process on Euro MTF

Listing on the Euro MTF will require submission of a prospectus to LuxSE. Once the prospectus has been reviewed and approved, share or GDR will be listed and admitted to trading.

- Choose a listing agent (optional): It is not mandatory to appoint a listing agent. Either the issuer itself or a company acting on its behalf can submit requests for approval.
- Listing Requirements: In order to list on the Euro MTF, a security must fulfil the following criteria, among other things:
  - o Minimum capital of Euro 1,000,000, or equivalent value in other currencies
  - o Minimum public free float of 25%
  - o Securities should be eligible for clearing and settlement
  - o Securities should be freely negotiable and fungible

Listing Process:

- File a prospectus: To begin the listing process, the following documents to be sent to LuxSE:
  1. A copy of your prospectus;
  2. Application form
  3. Undertaking letter

4. Articles of association
5. Existing agreements/conventions
6. The last three annual financial reports (if published)

- *Prospectus review* : A first set of comments on a complete draft prospectus will be sent within a maximum period of three business days from the date of receipt of the filed application.

  Additional comments following submission of an updated draft prospectus will be provided within a maximum of two business days after submission.

- Final submission: Listing can take place after receipt of the following items:

  1. Final version of the prospectus
  2. First listing price

- *Fees* : All fees are to be paid to LuxSE and are priced in euros. The fee structure will vary depending on whether or not it is a "recently established company", i.e. a company that has not published or registered annual accounts for the three previous financial years.
- *Continuing Obligations* : After listing and admission to trading, issuers must fulfil specific reporting obligations. For example, issuers must file information and scheduled corporate events with LuxSE.
- *LEI Code* : In the context of MiFID II / MiFIR and MAR, the LuxSE is obliged to collect a 'Legal Entity Identifier' or 'LEI' code from any issuer operating on its regulated market (Bourse de Luxembourg) and on its Multilateral Trading Facility (Euro MTF) and communicate it to the relevant supervisory authorities.

Answer 6A(i)

Distinct Markets within NASDAQ

There are three distinct markets within NASDAQ: the NASDAQ Global Market (NGM), the newly created NASDAQ Global Select Market (NGSM) and the NASDAQ Capital Market (NCM). The NGSM mandates the highest initial listing requirements of any market in the world, while its maintenance requirements are identical to those of the NGM. The NGM, in turn, has more stringent quantitative listing and maintenance requirements than does the NCM. The quantitative listing and maintenance criteria applicable to non-Canadian foreign private issuers for the NGM, NGSM and NCM are identical to those of US domestic and Canadian issuers. Foreign Private Issuers (FPI) (including Canadian issuers) may, however, elect to follow home country practice in lieu of compliance with the NASDAQ corporate governance requirements.

1. *Global Select Market (NGSM)* : The NASDAQ Global Select Market has the highest initial listing standards of any exchange in the world. It is a mark of achievement and stature for qualified companies.
2. *Global Market (NGM)*:The NASDAQ Global Market lists companies with an overall global leadership and international reach with their products or services.

3. *Capital Market (NCM)* : The NASDAQ Capital Markets are focused on its core purpose or for those companies that need to raise capital.

Answer 6A (ii)

Provision with regard to compliance of provisions related to continual disclosure for Insider Trading:

Pursuant to Regulation 7(2) of the SEBI (Prohibition of Insider Trading) Regulations, 2015

a) Every promoter, member of promoter group, designated person and director of every company shall disclose to the company the number of such securities acquired or disposed of within two trading days of such transaction if the value of the securities traded, whether in one transaction or a series of transactions over any calendar quarter, aggregates to a traded value in excess of ten lakh rupees or such other value as may be specified;

b) Every company shall notify the particulars of such trading to the stock exchange on which the securities are listed within two trading days of receipt of the disclosure or from becoming aware of such information. (Transaction type include buy/sales/pledge/revoke/Invoke)

It is also clarified for the avoidance of doubts that the disclosure of the incremental transactions after any disclosure under this sub-regulation, shall be made when the transactions effected after the prior disclosure cross the threshold specified in clause (a) of sub-regulation (2).

The above disclosures shall be made in such form and such manner as specified by SEBI from time to time.

Acquisition of share by Mr. Hulk, the promoter of the company is as under :

1) Acquisition date 5th April, 2022: 1000*750 = ₹ 7,50,000
2) Disposal Date 25th April 2022: 500*810 = ₹ 4,05,000
3) Acquisition date 10th May, 2022: 1350 *790 = ₹ 10,66,500

In the instant case, since the aggregate traded value of the securities has exceeded to ₹ 10 Lakh Rupees on April 25, 2022, Mr. Hulk is required to make disclosure within 2 trading days from April 25, 2022.

Further, the incremental transaction on May 10, 2022 crosses the threshold of ₹10 Lakhs, Mr. Hulk is required to make another disclosure within 2 trading days from May 10, 2022.

The company is required to disclose within two trading days of receipt of the disclosure or from becoming aware of such information.

Answer 6A(iii)

Simplification of Procedure with regard to issue of duplicate securities certificates

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.

The requirements are as specified below:

i. 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.

ii. Issuance of advertisement regarding loss of securities in a widely circulated newspaper. However, there shall be no requirement to comply with above mentioned Para 1 and 2, 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 ₹5 Lakhs.

iii. 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.

iv. 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

As mandated vide SEBI circular dated January 25, 2022, duplicate securities shall be issued in dematerialized mode only.

Answer 6A (iv)

Annual Compliance Calendar for listed entities for Small and Medium Enterprise (SMEs)

Sr. No.	*Regulation Reference and Particulars*	*Timelines*
1	**Regulation 7 (3)- Compliance Certificate** The listed entity shall submit a compliance cerificate to the exchange, duly signed by both the compliance officer of the listed entity and the authorised representative of the share transfer agent certifying that all activities in relation to share transfer facility of the listed entity are maintained either in house or by Registrar to an issue and share transfer agent registered with the SEBI	Within 30 days from the end of the financial year
2	**Regulation 34(1) - Annual Report** The listed entity shall submit the annual report along with the Notice of the Annual General Meeting to the stock exchange.	Not later than the day of commencement of dispatch to its shareholders
3	**Regulation 40(10)** – The listed entity shall ensure that the share transfer agent and /or	Within 30 days from the end of Financial Year

	the in-house share transfer facility, as the case may be, produces a certificate from a practicing company secretary, certifying that all certificates have been issued within thirty days of the date of lodgemen t for transfer, sub-division, consolidation, renewal, exchange or endorsement of calls/allotment monies.	
4	Initial Disclosure requirements for large entities	Within 30 days from the beginning of the Financial Year
5	Annual Disclosure requirements for large entities	Within 45 days of the end of Financial Year

MULTIDISCIPLINARY CASE STUDIES

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *Answer ALL Questions.*

Question 1

In 2017, a chain of coffee retailer, closed a decade of astounding financial performance. Sales had increased from $700 million to $8 billion and net profits from $40 million to $600 million. In 2017, the Company' was earning a return on invested capital of 25%, which was impressive by any measure, and the company was forecasted to continue growing earnings and maintain high profits through to the end of the decade. How did this come about ?

Thirty years ago Company was a single store in its local Market selling premium roasted coffee. Today it is a global roaster and retailer of coffee with more than 12,000 retail stores, some 3,000 of which are to be found in 40 countries outside its Home Country. The Company set out on its current course in the 1980s when the company's director of marketing, Srinivas Santharaman, came back from a trip to Italy enchanted with the Italian coffeehouse experience. Srinivas Santharaman, who later became CEO, persuaded the company's owners to experiment with the coffeehouse format – and the Coffee House experience was born.

Santharaman's basic insight was that people lacked a ''third place'' between home and work where they could have their own personal time out, meet with friends, relax, and have a sense of gathering. The business model that evolved out of this was to sell the company'sown premium roasted coffee, along with freshly brewed espressostyle coffee beverages, a variety of pastries, coffee accessories, teas, and other products, in a coffeehouse setting. The company devoted, and continues to devote, considerable attention to the design of its stores, so as to create a relaxed, informal and comfortable atmosphere.

Underlying this approach was a belief that Santharaman was selling far more than coffee— it was selling an experience. The premium price that the Company charged for its coffee reflected this fact.

From the outset, Santharaman also focused on providing superior customer service in stores. Reasoning that motivated employees provide the best customer service, Company executives developed employee hiring and training programs that were the best in the restaurant industry. Today, all Company's employees are required to attend training classes that teach them not only how to make a good cup of coffee, but also the service oriented values of the company. Beyond this, Company provided progressive compensation policies that gave even part-time employees stock option grants and medical benefits – a very innovative approach in an industry where most employees are part time, earn minimum wage, and have no benefits.

Unlike many restaurant chains, which expanded very rapidly through franchising arrangement once they have established a basic formula that appears to work, Santharaman believed that Company needed to own its stores. Although, it has

experimented with franchising arrangements in some countries, and some situations its home country such as at airports, the company still prefers to own its own stores wherever possible. This formula met with spectacular success in the Country, where Company went from obscurity to one of the best known brands in the country in a decade. As it grew, Company found that it was generating an enormous volume of repeat business. Today the average customer comes into a Company' store around 20 times a month. The customers themselves are a fairly well-healed group – their average income is about $85,000. As the company grew, it started to develop a very sophisticated location strategy. Detailed demographic analysis was used to identify the best locations for Company's stores. The company expanded rapidly to capture as many premium locations as possible before imitators. Astounding many observers, Company would even sometimes locate stores on opposite corners of the same busy street – so that it could capture traffic going different directions down the street. By 2005 with almost 700 stores across the Country, Starbucks began exploring foreign opportunities. First stop was Japan, where Starbucks proved that the basic value proposition could be applied to a different cultural setting (there are now 600 stores in Japan). Next, Companys embarked upon a rapid development strategy in Asia and Europe. By 2011, the magazine Bigdemandchannel named Company one of the ten most impactful global brands, a position it has held ever since. But this is only the beginning. In late 2016, with 12,000 stores in operation, the company announced that its long term goal was to have 40,000 stores worldwide. Looking forward, it expects 50% of all new store openings to be outside of its Home Country.

Questions :

(a) What functional strategies help the company to achieve superior financial performance ?

(b) Identify the resources, capabilities, and distinctive competencies of Company ?

(c) How do Company's resources, capabilities, and distinctive competencies translate into superior financial performance ?

(d) Why do you think Company prefers to own its own stores wherever possible ?

Answer 1(a)

The functional strategies that assisted the company to achieve superior financial performance may broadly be categorised into (i) Internal Production Strategy and (ii) Human Resources Strategy. A brief description of the mentioned strategies are as under:

(i) Internal production strategy involved selling of company's own premium roasted coffee, along with freshly brewed espresso style coffee beverages, a variety of coffee pastries, tea and other products in a coffeehouse setting.

(ii) Human resources strategy focused on providing superior customer services in stores which involved teaching employees on the service-oriented values of the company, motivating employees to provide best customer service and development of hiring and training programs by company executives that were best in the restaurant industry. Providing of progressive compensation policies that gave even part-time employees stock option grants and medical benefits which is considered to be an innovative approach in an industry where majority of employees are part time, earn minimum wage, and have no benefits.

Answer 1(b)

The resource and capabilities for creating Starbucks as one of the ten most global brands is the ambience in which it serves. It could be regarded as Starbucks sell experience beside Italian coffee. The main role in convincing a customer is to relate him/ her with cultural value proposition that Starbucks relates to.

Skilled employees drive the revenue by adding customer satisfaction. The company focused on the design of its stores to create a relaxed, informal and comfortable atmosphere. Employee are constantly trained not only how to prepare the best coffee but also to get trained in handling customer satisfaction.

A noteworthy approach of the company is offering employees with compensation policies that give even part-time employees stock option grants and medical benefits. Further, targeting the group of people with average income level of about $85,000 has served the purpose of target marketing also.

Answer 1(c)

Starbuck's resources, capabilities and distinctive competencies translate into superior financial performance by providing them -

a. Great Value Proposition – Customer satisfaction.

b. As a Forum for Gathering – apart from home and office.

c. Premium Roasted Coffee along with freshly Brewed Espresso Style coffee beverages, a variety of pastries, coffee accessories, teas and other products, in a coffeehouse settings.

d. Good Market Segmentation – targeting customers group having average income of $85,000.

e. Placing the retail chains at well-known location. For instance, the company would even sometimes locate stores on opposite corners of the same busy street in order to attract the traffic moving in various directions down the street.

Answer 1(d)

The company believes that by owning and running the stores itself, it can have control on the quality directly, as quality control would be possible only under direct control. Moreover, there will not be any profit sharing. Even if one franchise would perform badly then it could exert a negative impact on the brand value of Starbucks.

Starbucks provides premium quality to customers, which is difficult to learn and explain to clients, requiring a well-trained team. If Starbucks had franchised their business model, it would have been extremely difficult to maintain the same level of consumer attentiveness. Starbucks, a retail corporation that primarily offers coffee-related beverages, operates under the company-owned, chain business model.

Question 2

(a) HOPE Ltd is a manufacturer of cars of various models and is catering to both domestic and export markets. For this purpose, Hope Ltd avails various schemes

such as Export Promotion Capital Goods (EPCG), Target Plus, Focus Product Scheme (FPS), etc., announced by DGFT, Ministry of Commerce, Government of India (GOI). EPCG scheme is an initiative of DGFT to promote exports out of India. PQR Ltd is Competitors of Hope Ltd and informant to the Competition Commission, according to the Informant, Hope Ltd is allegedly misusing the EPCG Policy framed by DGFT for promotion of exports out of India. Hope Ltd is alleged to be importing the Capital Goods for manufacture of different models of cars that are meant for exports but selling them domestically. As the Capital Goods imported under the EPCG scheme are exempted from customs duty, it is alleged that the same are purchased by Hope Ltd at cheaper rates - reducing its cost of production viz-a-viz its competitors. As per the allegations, Hope Ltd is in fact not using the imported Capital Goods to meet even 50% of the Export Obligation, which is mandatory for it to do. Whether the complaint filed to Competition Commission as provided under the Foreign Trade (Development and Regulation) Act, 1992 is correct and it also violation of Competition Act, 2002. Give reasons in support of your answer. (6 marks)

(b) *ABC Limited has five factories in Madhya Pradesh and having a turnover of ` 1,000.00 crore. Sharad Acharya, General Manager, Commercial was appointed as an occupier of all the factories. During the inspection of one of the factories, Factory Inspector has taken objection and raised a show cause notice to the Company for appointment of General Manager as an Occupier of the Factory. The objection taken by Factory Inspector is right in the eyes of the Factories Act, 1948. Explain the position of Factory Inspector. What would be your answer if ABC Limited is Partnership firm ?*

Answer 2(a)

The facts of the given case are similar to Hyundai Motor India Ltd (HMIL) with regard to misuse of an export promotion policy. It was alleged that HMIL had misused the Export Promotion Capital Goods (EPCG) policy, framed by the DGFT, to reduce cost of production compared to its competitors. Dismissing the complaint, the Competition Commission of India (CCI) said the allegations raise issues relating to the Foreign Trade (Development and Regulation) Act, 1992 and the Customs Act, 1962, while noting that no competition issue arises out of the information presented or is otherwise made out.

The Competition Commission of India has perused the information/ additional submissions and the documents filed therewith. The allegations made by the Informant raise issues relating to the Foreign Trade (Development and Regulation) Act, 1992 and the Customs Act, 1962. No competition issue arises out of the information presented or is otherwise made out. The reliefs sought by the Informant do not fall within the ambit of the Competition Commission of India as provided under the Act. In the result, the Commission is of considered opinion that no case of contravention of the provisions of either Section 3 or Section 4 of the Competition Act is made out against OPs in the instant case. The Informant has sought protection from disclosure of his/ her identity in terms of Regulation 35(1) of the General Regulations, 2009. The Commission is of opinion that identity of the Informant may be protected from disclosure, as prayed for. In view of the above, the Competition Commission of India is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Parties and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Competition Act

Answer 2(b)

According to Section 2(n) of the Factories Act, 1948 "occupier" of a factory means the person who has ultimate control over the affairs of the factory"

Provided that-

a. in the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;

b. in the case of a company, any one of the directors shall be deemed to be the occupier

c. in the case of a factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier.

In case of Company, only Director of the Company will be occupier of the Factory.(*J.K. Industries Limited Etc.* vs. *The Chief Inspector of Factories ... on 25 September, 1996*).

Considering the provisions of Factories Act and Relevant case law as stated above the objection raised by factory inspector is right as general manager cannot become occupier of factory in case of company.

In case if ABC limited would be a partnership firm, then also the objection raised by factory inspector is right as in case of partnership firm only individual partner can become occupier of factory.

Question 3

(a) RR Limited has deducted ₹500 from each worker of the Factory for depositing to Prime Minister Relief Fund without authorisation of any worker. The General Manager HR informed that the Board of directors has decided to deduct and deposit the amount. All workers has taken objection. Explain the deduction is justified in the eye of the Payment of Wages Act, 1936.

(b) The Food Company for online orders, is charging prices higher than the prices (menu prices) charged by the respective restaurants for walk-in customers, without the knowledge of the customers. This means that the customers ordering food online via app/website of Food Company end up paying higher prices than they would have paid by walking in or ordering directly through phone from that particular restaurant. Gopal Verma has alleged that Food Company is abusing its dominance by charging unfair price to its customers and acting in contravention of Section 4(2) (a) (ii) of the Competition Act, 2002. Explain whether Food Company is charging prices higher is correct ?

Answer 3(a)

Section 7 of the Payment of Wages Act, 1936 deals with deductions which may be made from wages. According to Section 7(2)(p), deductions 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, namely- deductions, made with the written authorisation of the employed person, for contribution to the Prime Minister's National Relief Fund or

to such other Fund as the Central Government may, by notification in the Official Gazette, specify.

In the above case, there was no written authorisation, therefore, deduction is illegal and mandatory to refund. RR Limited will be subject to Penalty under section 20 of the Act for contravening provisions of section 7.

Answer 3(b)

Allegation against the Food Company charging higher prices is not correct.

Reason :

Before examining the abuse of dominance by an entity generally the first step is to delineate the relevant market in terms of Section 2(r) of the Competition Act, which in turn requires delineation of Relevant Product Market and Relevant Geographic Market in terms of Section 2(t) and 2(s) of the Competition Act, respectively.

The Informant has suggested the relevant product market to be app-based food delivery with restaurant search platform, as iterated in earlier paras. Swiggy does not agree with the relevant market identified by the Informants. As per Swiggy, the distinguishing factor of the food delivery business is the service of receiving a restaurant's food without leaving the comfort of one's home and not the ability to search for restaurants. Swiggy asserted that the consumers can use phone based direct ordering from the restaurants or order directly from the restaurant's website, and merely the search function does not put the platform in a different relevant market as compared to other food delivery options. Thus, the relevant market should be defined as 'market for food delivery'. The Commission notes that the main grievance of the Informants is of charging high prices on the platform by Swiggy. The Commission further notes that Swiggy has denied the said allegation with reference to the contractual arrangement it has entered into with its various Partners (restaurants) seeking them to maintain a uniform price of food items sold by such Partners to customers when dealing with them directly or through the platform of Swiggy. Further, it is evidenced that Swiggy, as and when it has received complaints pertaining to price differentia from its customers, has taken up the matter with the concerned Partner. This indicates, that allegations against Swiggy do not appear to be substantiated in the present case. Further, Swiggy has stated that it only acts as an 'intermediary' as defined under Section 79 of the Information Technology Act, 2000 and its role is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored/hosted.

The Competition Commission of India also notes the contention of Swiggy that it does not select or modify the information contained in the transmission made through the platform, and thus, any discrepancy in the rates, is solely attributable to Partners and not to it. In this regard, the Competition Commission of India observes that it would be apposite for Swiggy to give sufficient disclosures on its platform that it is not involved in fixation of price of the products/menus of the restaurants on its platform, so as to allay misgivings, if any, in the minds of any stakeholders including the consumers.

The Competition Commission of India in the facts and circumstances of the present case observes that it may not be germane to define a precise relevant market and conduct further analysis. Having been satisfied with the averments of Swiggy that it has no role to play in the pricing of the products offered by the Partners on the platform, the Competition

Commission of India finds that no prima facie case of contravention of the provisions of Section 4 of the Competition Act is made out against Swiggy in the instant matter. Accordingly, the matter is closed under the provisions of section 26(2) of the Competition Act.

Question 4

(a) *Plaintiff and Defendant 1 had entered into Shareholders Agreement, Share Purchase Agreement and Memorandum of Understanding, which are to be read together in order to ascertain the aforesaid outstanding consideration. A conjoint reading of thesaid documents clarify the rights and obligations which were to be incurred by both the parties. Disputes arose between the parties and Plaintiff filed the present suit seeking recovery of a total sum of ' 5 crore. In the suit, plaintiff has impleaded defendants No. 2 and 3 also, which are group companies of defendant No. 1 Company. Defendant No. 1 filed the present application under Section 8 of the Arbitration and Conciliation Act, 1996 besides the written statement, praying to refer the suit for arbitration. Explain whether the arbitration application will be allowed.*

(6 marks)

(b) *Rajesh Sharma, son of the petitioner, has executed a Relinquishment Deed dated 1st March, 2020, in favour of the petitioner, with respect to the property bearing No. B-123, Ashok Nagar, Phase-I, Delhi. By the Impugned Order dated 5th March, 2020, the respondent no. 1, however, impounded the said document treating the same to be as a Gift under Article 33 of Schedule IA of the Indian Stamp Act, 1899 as applicable to the Union Territory of Delhi (hereinafter referred to as "Act") and thereafter held the Release Deed to be deficiently stamped and impounded the same. Aggrieved of the said order the present petition has been filed. Explain whether the Impugned Order can be sustained and set aside?*

(6 marks)

Answer 4(a)

The facts of the of the given situation is similar to the case *Magic Eye Developers Pvt. Ltd.* vs. *Green Edge Infra Pvt. Ltd. & Ors.* decided by Delhi High Court on 21st May, 2020. The relevant part of the case is discussed as under:

The two main grounds on which plaintiff contests the present application seeking reference of disputes to arbitration is firstly that in the suit besides the recovery of the acknowledged unsecured liability the plaintiff has also sought a decree of damages, which is not an arbitrable dispute and the suit would be thus maintainable as held by the Supreme Court in the decision *Sukanya Holdings Pvt. Ltd.* v. *Jayesh H. Pandya reported as 2003 (5) SCC 531*. Secondly, it is urged that the defendant Nos. 2 and 3 not being party to the Shareholders Agreement (SHA), Share Purchase Agreement (SPA) and the Memorandum of Understanding (MOU) and thus not party to the clauses agreeing to refer the dispute to the arbitration, the application filed by the defendant No.1 is liable to be dismissed.

The first plea of learned counsel for the plaintiff that since the plaintiff has sought the relief of damages for which there is no arbitration agreement and the reliefs in the present suit cannot be bifurcated, hence the dispute cannot be referred to arbitration deserves to be rejected. A perusal of the claim for damages from the plaint is evidently based on the

failure of defendant No. 1 to perform its contractual obligations as entered into vide the SHA, SPA and MOU is an arbitrable dispute duly governed by the arbitration clauses in the SHA, SPA and MOU. The two reliefs sought in the plaint are not required to be bifurcated as held in Sukanya Holding (Supra) and can be very well decided by arbitration. Plea of the plaintiff that defendant Nos. 2 and 3 are not parties to the SHA, SPA and MOU and thus being third parties to the arbitration agreement, the disputes cannot be referred to arbitration is also liable to be rejected. In the plaint case of the plaintiff itself is that defendant Nos. 1, 2 and 3 companies are the companies of one family and defendant No. 1 company with an authorized share capital of 1,00,000/- has no work and has been incorporated to perpetrate financial jugglery of funds with defendant Nos. 2 and 3 companies with a motive to defraud innocent third parties. The plaintiff itself claims that the corporate veil of the three companies deserves to be pierced in view of the manner of transfer of funds and siphoning thereof. Thus, according to the plaint itself defendant Nos. 1, 2 and 3 are group companies of a single family. Thus Supreme Court in *Cheran Properties Limited* vs. *Kasturi & Sons Limited 2018 (16) SCC 413*, came to the conclusion that even if the third party was not impleaded as a party to the arbitral proceedings, the said party would be bound by the award and the award can be enforced against it, once the tests embodied under Section 35 of the Arbitration and Conciliation Act are fulfilled. Though defendant Nos. 2 and 3 have filed separate written statements claiming mis-joinder of parties and causes of action in the suit by the plaintiff and that the suit was liable to be dismissed against the plaintiff and in favour of defendant Nos. 2 and 3 for the reason there was no privity of contract between the plaintiff and defendant Nos. 2 and 3 since the SHA, SPA and MOU were executed between the plaintiff and defendant No. 1, however, in response to the cause of action paragraph-29 of the plaint wherein it is stated that the subject matter of the suit cannot be referred to arbitration as there is no provision under the Arbitration and Conciliation Act, 1996 for splitting the cause or the parties and referring the subject matter of the suit to the arbitrator, defendant Nos. 2 and 3 in their written statements have simply rebutted the said paragraph as denied for want of knowledge and that it did not pertain to defendant Nos. 2 and 3. It may be also noted that during the course of arguments the defendant Nos. 2 and 3 never opposed the plea of defendant No. 1 that the disputes are liable to be referred to arbitration. Considering the fact that there are valid agreements between the plaintiff and defendant No. 1 containing clauses for reference of disputes to arbitration and defendant Nos. 2 and 3 being group companies of defendant No. 1, from the intent of the parties as noticed from the agreements as also the averments in the plaint it is evident that not only would defendant No. 1 but also the defendant Nos. 2 and 3 companies be amenable to the jurisdiction of the arbitrator as per the arbitration clauses is the SHA, SPA and MOU. Consequently, the present application is disposed of holding that the present suit is not maintainable and the disputes between the parties are required to be referred to the arbitration.

In view of the above mentioned case, it may be said that the arbitration application will be allowed.

Answer 4(b)

The facts of the situation given in the question are similar to a case in *Tripta Kaushik* vs. *Sub Registrar Vi-A, Delhi & Anr on 20 May, 2020*. The relevant part of the case is discussed as under:

Whether the instrument amounts to a release document or not is not a pure question

of law. The test to determine whether an instrument can be considered as a Release/ Relinquishment Deed can be summarized as under:

a. In determining whether the document is a release or Gift/ Conveyance, the nomenclature used to describe the document or the language which the party may choose to employ in framing the document, is not a decisive factor. What is decisive is the actual character of the transaction intended by the executants;

b. Determination of the nature of the document is not a pure question of law;

c. Where a co-owner renounced his right in a property in favour of the other co-owner, mere use of word like, "consideration" and "transfer" would not affect the true character of the transaction;

d. What is intended by a Release Deed is the relinquishment of the right of the co-owner;

e. Co-ownership need not be only through inheritance, but can also be through purchase;

f. Where the relinquishment of the right by the co-owner is only in favour of one of the co-owner and not against all, the document would be one of Gift/Conveyance and not of "release".

Applying the above test to the facts of the present petition, the Relinquishment Deed dated 01.03.2019 has been executed by a co-owner in favour of the only other co-owner. This would truly be a Release Deed and falls within the ambit of Article 55 of the Act (Indian Stamp Act, 1899). The Impugned Order, therefore, cannot be sustained and is accordingly set aside. The petition succeeds.

In view of the above of the abovementioned case, it may be said that impugned cannot be sustained and should be set aside.

Question 5

(a) Smt Sheela Devi's husband Mr Shyam had joined the service of the ABC Ltd on 15th March, 1979. The application seeking voluntary retirement was submitted on 28th July, 2005. The Company rejected the application. In that circumstance the husband of the Sheela submitted his resignation on 3rd May, 2006 which was accepted bythe Company and was relieved on 31st May, 2006 and all the service benefits payable in respect of an employee who had resigned from service was paid, which was accepted by the Sheela's husband. The Sheela's husband subsequently died on 14th April, 2011. Subsequent to the death of the husband, Sheela had filed the writ petition before the High Court, contending that immediately thereafter an application was made indicating that the word 'resignation' was inadvertently mentioned and the intention of the Sheela's husband was to renew his request for voluntary retirement. Explain whether Sheela will retrial benefits from the date of voluntary retirement or not and whether appeal will be allowed ?

(b) ABCD Ltd was struck off by the Registrar of Companies (ROC) during the month of July, 2021 as the company had not been carrying on business or nor in operations for two immediately preceding financial years and the company had

not obtained the status of dormant company under Section 455 of the Companies Act, 2013. The ABCD Ltd filed an appeal before NCLT claiming that it had not been served with Notice under Section 248(1) of the Act and the Registrar of Companies (ROC) had proceeded to issue notice under Section 248(5) of the Act and the name of the ABCD Ltd was then struck off. The appellant claimed that the company had been doing business and was in operation and audited financial statements for the year financial year 2012-13 to FY 2016-17 were filed. Whether the claim of the Company is justified and action of the ROC is correct ? Give reasons in support of your answer.

Answer 5(a)

The short question that arises for consideration herein is as to whether the husband of the respondent had acquired an indefeasible right to seek for voluntary retirement from service and in that light whether the High Court was justified in arriving at the conclusion that the subsequent resignation dated 03.05.2006 submitted by the husband of the respondent be considered as an application for voluntary retirement and treat the cessation of the jural relationship of employer/ employee under the provision for Voluntary Retirement.

Having heard the learned counsel for the parties, Apex Court find that the factual aspects which were relevant for decision making in the instant case has not been referred by the High Court during the course of its order but has merely assumed that the voluntary retirement application should be deemed to have been accepted when there was no rejection. During his lifetime up to 14.04.2011 the husband did not raise any issue with regard to the same. It is only thereafter the respondent has filed the writ petition before the High Court. Primarily it is to be noticed that when the application for voluntary retirement was filed on 28.07.2005 and had not been favourably considered by the employer, instead of submitting the resignation on 03.05.2006, if any legal right was available the appropriate course ought to have been to seek for acceptance of the application by initiating appropriate legal proceedings. Instead the respondent's husband had yielded to the position of non-acceptance of the application for voluntary retirement and has thereafter submitted his resignation. The acceptance of the resignation was acted upon by receiving the terminal benefits. If that be the position, when the writ petition was filed belatedly in the year 2012 and that too after the death of the employee who had not raised any grievance during his life time, consideration of the prayer made by the respondent was not justified. The High Court has, therefore, committed an error in passing the concurrent orders. In the result, the appeal is allowed.

Answer 5(b)

The facts of the present case are similar to facts of *Kanodia Knits Pvt. Ltd* vs. *Registrar Of Companies, Delhi. 28 January, 2019*. Wherein the name of the appellant company was struck off by the Registrar of Companies, after STK 5 Notice as the company had not been carrying on business or nor in operations for two immediately preceding financial years and the company had not obtained the status of dormant company under Section 455 of the Companies Act, 2013.

The appellant before NCLT claimed that the appellant had not been served with Notice under Section 248(1) of the Act and the Registrar of Companies (ROC) had proceeded to issue notice under Section 248(5) of the Act and the name of the appellant company was then struck off. The appellant claimed that the company had been doing

business and was in operation and audited financial statements for the year financial year 2012-13 to FY 2016-17 were filed.

ROC claims that the appellant company had not filed financial statements from the financial year ending 31.3.2004 till 31.3.2011. The balance sheet and annual return was filed for the year ending 31.3.2012 and thereafter again there was no filing and according to ROC, STK-1 notice was duly issued to company and the copy of the same has been filed. According to the ROC the appellant did not respond to the notice and further steps to strike off the company were taken. According to ROC, later on public notice as per Section 248(5) was issued.

Having heard the learned counsel for the appellant, and seeing the documents when we have considered the above findings and observations of the Learned NCLT, we do not find any reason to differ from NCLT. There is no substance in this appeal. The appeal is rejected. No order as to costs.

Considering the facts of above case it can be said that claim of company is not justified and action taken by ROC is correct. Hence the application filed by Applicant Company is rejected.

Question 6

(a) SSB Ltd has accepted ` 15.00 lakh as an advance against supply of goods. As per supply agreement, the company will supply the goods after three years from the date of deposit. Later on, Secretarial Auditors has taken objection in their report that the Company has contravened the provisions the Companies Act, 2013. The Directors have explained that this is required to complete the order. Whether the explanation of directors are justified for accepting the deposit in the Companies Act, 2013.

(b) PQR Ltd has decided not to preserve the books of accounts and other related records of accounts, more than three years immediately preceding the relevant financial year of 2020-21. Action decided by PQR Ltd is justified in your view. Comment.

Answer 6(a)

This shall be treated as deposit. According to the Section 2(31) of the Companies Act read with Rule 2(c) of Companies (Acceptance of Deposits) Rules, 2014, "deposit" includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include-

(xii) any amount received in the course of or for the purposes of the business of the company:

(a) as an advance for the supply of goods or provision of services provided that such advance is appropriated against supply of goods or provision of services within a period of three hundred and sixty five days from acceptance of such advance.

In case of any advance which is subject matter of any legal proceedings before any court of law, the said time limit of three hundred and sixty five days shall not apply.

SSB LTD has to comply the provisions of the Act regarding deposit and contention of the Secretarial auditors is correct.

Answer 6(b)

The books of accounts, together with vouchers relevant to any entry in such books, are required to be preserved in good order by the company for a period of not less than eight years immediately preceding the relevant financial year. In case of a company incorporated less than eight years before the financial year, the books of accounts for the entire period preceding the financial year together with the vouchers shall be so preserved. The provisions of Income Tax Act shall also be complied with in this regard. As per proviso to sub-section 5, where an investigation has been ordered in respect of a company under Chapter XIV of the Act related to inspection, inquiry or investigation, the Central Government may direct that the books of account may be kept for such period longer than 8 years, as it may deem fit and give directions to that effect.

The decision taken by PQR Ltd is not in accordance with the law and the company cannot do so.

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BANKING – LAW & PRACTICE

(Elective Paper 9.1)

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *1. Answer ALL Questions.*

2. Working notes should form part of the answer.

Question 1

Case Study:

The liberalization process initiated by the Government of India, during the early 1990's witnessed the entry of several private players in the Indian banking sector. ABC Bank (ABCB) was one of the earliest private sector banks promoted by three former bank executives and was incorporated on October 30, 2004 in Hyderabad. Apart from these three promoters, the Gem Finance Corporation (GFC) and the Gem Bank for Development (GBD) were other major shareholders. ABCB was granted license to operate as a bank by RBI in December, 2004 and the bank offered an array of products and services in retail, wholesale, corporate, treasury and investment banking apart from depository and advisory services. The bank specialized in lending to the engineering, software, energy, telecom, textiles, pharmaceuticals and jewellery sectors. In a short span of five years of operations, the total business of the bank in the year 2009 exceeded Rs. 4 bn making it one of the fastest growing private banks in India. It was also the first among the Indian banks to raise Tier II capital from multilateral institutions. In five years, ABCB's deposits were worth Rs. 3 bn out of which 70 per cent were from retail domestic investors. Its presence in the States of Maharashtra, Andhra Pradesh, Karnataka and Tamil Nadu was significant with more than 70 percent of its branches in seven major cities and four metros.

Bank had grown tremendously by July, 2015 by having 450 branches in major 234 cities of the country, 875 ATMs, 5800 employees, more than seven millions of depositors with deposits worth Rs. 65 bn and the amount of loans disbursed to different sectors of Rs. 52 bn. Despite all the sound state of affairs, the ABCB started collapsing in the year 2016-17 and its financial health started deteriorating. The reasons identified responsible for the deterioration of bank financial position are many but some important are related with the mistakes committed by the bank's management in advances portfolio, lack of financial control over deposit interest rates, weak credit supervision, negligible corporate governance, indulgence of promoters and the top management in the financing by having collusion with the borrowers. RBI's probe into ABCB's accounts revealed a significant erosion of the bank's net worth and huge number of concealed NPAs accounts. ABCB's attempt to strengthen its capital base from overseas failed due to regulatory problems, resulting into the total collapse of bank by the end of year 2019. The major factors that led to the fall of ABCB included disbursed loans of Rs. 1.5 bn to a leading stockbroker at the Bombay Stock Exchange (BSE) who used the money to purchase ABCB shares from the BSE and the National Stock Exchange (NSE). Trading volume of ABCB shares increased during July, 2015 and onwards to millions which was usually in the thousands after the entry of this leading stockbroker resulting into

shooting up the price of ABCB's share continuously from Rs. 65 to Rs. 225 between October 2015 and June 2016 and thereafter started falling down regularly. The Securities and Exchange Board of India (SEBI) later confirmed that ABCB's stock price increased because of price manipulation and the stockbroker had insider information. SEBI imposed a ban in March, 2017 on the promoters, the stockbroker and their associates for dealing in the ABCB shares till completion of the investigation of bank's capital market activities.

RBI charged ABCB with several financial irregularities and lack of transparency in its banking operations. It had not followed SEBI guidelines, which capped a bank's direct exposure to capital markets at ten per cent of total advances of the bank. Since 2014, ABCB had given loans worth Rs. 17 bn to many stock brokers against shares as security. When the stock market witnessed a major fall in the aftermath of the securities scam loans given by ABCB against the security of shares turned into bad debts, taking a toll on the bank's financial position. ABCB's exposure to the capital market in the fiscal ending 2013-14 was around 24 per cent of total advances; which came down to 14 per cent by March 2016 and around five per cent for the fiscal ending March 2017. Though the exposure to capital markets had been brought down gradually by ABCB, the damage had already been done as most advances given till fiscal ending 2013-14 turned into NPAs due to the down trend of the stock market after the Securities Scam. In late 2012 and early 2013, ABCB gave loans of over Rs. 18 bn to corporate and jewellery trade related entities. ABCB for the fiscal 2017-18 had a total of 35 NPA accounts of corporates; 15 NPA accounts in trading; 15 NPA accounts in broking business and 55 NPA accounts relating to jewellery, food processing, textiles, petrochemicals, agriculture and media companies. ABCB reported a fall of 175% in its profits before tax (PBT) in the last quarter of fiscal 2017-18 because of provision for NPAs of Rs. 2.5 bn. RBI annual financial inspection (AFI) showed that the net worth had been totally eroded and capital adequacy ratio (CAR) had turned out negative. ABCB for the financial year 2017-18 recorded loss of Rs. 3.7 bn with gross NPAs at Rs. 19 bn accounting for 35% of the bank's total advances. High NPAs was a primary reason for ABCB's poor performance as it had lent indiscriminately without following RBI norms, to stockbrokers, diamond traders, exporters, corporates and others.

In the wake of these financial irregularities, RBI placed ABCB under monthly monitoring and its operations relating to advances, premature withdrawal of deposits, declaration of dividend and capital market exposure were restricted. The statutory auditors of the bank were also asked to be changed. The central bank further advised ABCB to infuse fresh capital to prevent the net worth from remaining negative and restore its CAR to a minimum of nine per cent. The bank was advised to explore all possible options for infusion of capital through domestic sources or through merger with another bank. All these factors resulted in the imposition of moratorium by RBI and on July 24, 2018, the Government of India imposed a moratorium on the bank, on the grounds of 'wrong financial disclosures.' The moratorium was for three months from close of business on July 24, 2018 till October 23, 2018. RBI said the moratorium was imposed in public interest and to protect the interests of depositors. All operations of ABCB were frozen and it was ordered not to give loans without RBI permission. It was allowed only to make payments for day-to-day operations or for meeting obligations entered into before the order. On July 26, 2018, RBI announced that ABCB would be merged with the Northern Bank of Commerce (NBC). As per the

scheme, NBC took over all the assets and liabilities of ABCB on its books. It acquired all branches, ATMs, employees and customers of ABCB at an estimated merger cost of Rs. 8 bn. All corporate accounts including salary accounts were transferred to NBC. The entire amount of paid-up equity capital of ABCB of Rs. 1 bn was adjusted towards its liabilities. There was no share swap between ABCB and NBC resulting into that the shareholders of ABCB did not get any shares of NBC. However, the interest of ABCB's depositors was protected, but its shareholders had lost their total investments in the bank overnight. In the backdrop of the facts and information given in the case, you are required to answer the following questions in the context of provisions contained under the RBI Act, 1934 and the Banking Regulation Act, 1949:-

(a) Examine critically keeping in view the various facts given in the case as to incorporation, evolution and disaster whether the license granted by the RBI to ABC Bank in the month of December, 2004 to operate as a private bank was justified and issued correctly. (8 marks)

(b) Evaluate critically the major factors/issues which led to collapse of ABC Bank despite having tremendous growth in the business in a short span and substantial increase in the share price. State also who were the most sufferers and whose interest were got protected because of the disaster of ABC Bank. (10 marks)

(c) Justify by critical examination of the facts given relating to ABC Bank the importance and need of corporate governance considering that the banking system is the back bone of the economy failure of which gives dent not on the national economy but on the minds of public by referring security scam cases taken place in past and recent scams committed by economic offenders ? Also explain in brief what should be included in a robust corporate governance policy in a banking company. (12 marks)

(d) Examine the objectives and the role of RBI and SEBI as a regulator in context of monetary policy, economic development, banking industry and the stock market. Also comment on the justifiability of their actions in the ABC Bank fiasco. (10 marks)

Answer 1(a)

An entity intending to commence and operate the banking business in India requires a banking license to be issued by the Regulatory Authority being Reserve Bank of India.

ABC Bank after incorporation in Hyderabad on 30th October, 2004 moved application for banking license through its three promoters having knowledge of banking since worked for several years in the banking industry on very high positions with two other stake holders Gem Finance Corporation (GFC) and Gem Bank for Development (GBD) having sound financial standing and the same was granted to ABC Bank by RBI in December, 2004 to operate as a bank.

The RBI grants license to the banking company to operate in the country after satisfying that the applicant complies with the various parameters as specified in section 22 of the Banking Regulation Act, 1949. RBI thus examines as to fulfilling of the following conditions:-

(i) Whether the company is or will be able to pay its present and future depositors in full as and when their claims accrue?

(ii) Whether the affairs of the company are being conducted or likely to be conducted in a manner detrimental to the interests of its present and future depositors?

(iii) Whether the company has an adequate capital structure and earning prospects?

(iv) Whether public interest will be served by grant of license to the company?

(v) Other issues relating to branch expansion, unbanked area and other aspect.

The RBI accordingly prior to grant of banking license was required to satisfy in respect of the aforesaid conditions and as per facts given in the case all such conditions as to capital structure, earning prospects, business in India, expansion, catering the needs of the society stands fulfilled as is evident from the following:-

a. The bank carried out the banking activities by providing services in retail, wholesale, corporate, treasury and investment banking apart from depository and advisory services. The bank specialized in lending to the engineering, software, energy, telecom, textiles, pharmaceuticals and jewellery sectors.

b. In a short span of five years of operations, the total business of the bank in the year 2009 exceeded Rs. 4 billion making it one of the fastest growing private banks and also the first among the Indian banks to raise Tier- II capital from multilateral institutions. The bank had grown substantially by July, 2015 when it was having 450 branches in major 234 cities of the country, 875 ATMs, 5800 employees, more than seven million of depositors with deposits worth Rs. 65 billion and the amount of loans disbursed to different sectors of Rs. 52 billion.

The promoters of ABC bank have fulfilled all these criteria by having adequate capital base participated by the promoters and by GFC and GBD which ensures the protection of interest of the depositors and were having the objective to serve the public. Their intention get further strengthened when the bank was first to comply with the norms of Tier - II capital.

Therefore, RBI was justified, correct and had not committed any mistake or error while granting the license to ABC Bank in December, 2004 to operate as a private bank.

Answer 1(b)

The ABC Bank incorporated on 30th October, 2004 was granted the Banking License in December, 2004 which offered array of the services as a banking company and was performing perfectly as is evident from the growth of total business of bank over a period of 5 years to Rs. 4 billion, compliance with all the regulatory norms of RBI and raising of its Tier-II capital. Tremendous growth is foreseen that by July 2015 the bank was having 450 branches, 875 ATMs, 5800 Employees, more than 7 million depositors with the deposit of Rs. 65 billion and the amount of loan disbursed to the extent of Rs.52 billion. Price of the bank share was increasing continuously from Rs. 65 to Rs. 225 between October 2015 and June 2016 but thereafter started falling down.

All these parameters indicate that the bank was working in perfect manner and there was no reason of its failure, but as indicated in the case the factors responsible for the disaster and failure of the bank are so many out of which important areas are as under:

a) Negligible and poor corporate governance and supervisory control within the bank,

b) Indulgence of the top management and promoters in advancing having collusion with the borrowers,

c) Advances given to certain sectors beyond the permissible norms in discriminatory such as to stock brokers, jewelers, petro-chemicals, beverages companies and to others by showing standard assets and concealing the NPAs,

d) In discriminate high interest rate given on the deposits,

e) Trading in the shares of bank by the promoters through the leading the stock broker by giving huge advance and insider information which boosted the price of the bank's shares and thereafter fall down dramatically after reaping huge profits,

f) Creation of provision relating to number of borrower accounts which were in the nature of NPAs resulting into huge loss to the bank in the financial year 2017 - 18 of an amount of Rs. 3.7 billion with gross NPA of Rs.19 billion.

The regulator RBI considering the bad shape of the bank announced its merger in July, 2018 with NBC but considering the huge losses, NPAs and liabilities the shareholders of the bank were not given any swap on their shares in the shares of NBC. Thus the shareholders who made the investment in the shares of bank for the paid-up capital of Rs. 1 billion were the prominent sufferers and sustained the total loss of the investment because of scandals and scam committed by the promoters by taking out their investment many fold in connivance with the stock broker. Poor public had put to loss which was substantial and their investment in the ABC Bank become 'Zero' in overnight because of merger of the bank into NBC.

Interest of the depositors though got protected by the RBI while merging the bank with NBC but it is very important to specify that the depositors might have also lost their money as they have invested in the bank for earning more interest on the deposits which was not being offered by any other banks. Had NBC not agreed at the time of merger to make the payment of principal amount of deposits/FDRs to the investors then more than 7 million depositors having deposit of Rs.65 billion in the bank would have also be put to substantial loss but the interest of depositors got protected by the RBI.

Answer 1(c)

Corporate Governance, all over the world, is aimed at making activities of the corporations visible, transparent and honest and the practices around corporate governance are designed in such a way that they facilitate consistent monitoring of top manager's strategic decisions".

Banking system termed as the back bone of the economy plays a vital role in the development of economy and failure in the banking sector impacts for deep reaction on other sectors of the economy since it is not only related with the Industry but also for deposit of the public and therefore good governance is necessary in the banking system. In the case of ABC Bank, it is being noted that the poor governance in the system couple with other factors lead for collapse of the bank.

The corporate governance in the context of banking sector means managing affairs of the banking company by adopting the global best practices so as to protect the interest of Depositors, Investors, Customers, Employees, Stake Holders and the Society at large.

The reasons for need of corporate governance in the banking are as under:

1) Financial institutions play a pivotal role in an economy and any mishap therein will be detrimental and may consume long time to get back to normalcy, thereby, impeding implementation of growth plans.

2) Financial institutions, especially banks are highly leveraged and this makes them vulnerable to any adverse developments in the economy. Therefore, in order to ensure economic stability, good governance of these institutions is a must desired factor.

3) Among financial institutions, banks are highly trusted organizations that deal with funds of the public at large. Anything and miss in its functions will result in loss of trust, leading eventually to the collapse of such institutions and also will have its contagion effect on the economy. Therefore, good corporate governance is essential for building of trust among all stake holders in these institutions.

4) Banks act as agents for transmission of monetary policies to the public and play main role in payment and settlement system and beneficial role in an economy.

The failure of ABC Bank is for the reason of lack of adherence of Corporate Governance which is evident from the indulgence of the top management and the promoters having collusion with the borrowers and giving of advances against the prescribed norms to the Stock Broker who was dealing with this loan in the shares of bank which resulted into sharp increase in the share prices and when the price of the share was maximum the promoters have taken out their stakes by reaping huge profits and thereafter the prices of the shares started falling down. The general public invested in the shares of the bank lost their investment which reminds the securities scam committed in 1992 by Harshad Mehta and in 1997 by Khetan Pareekh.

The advances given to the different sectors without scrutiny in collusion though were NPAs but were concealed in the balance sheet are also indicative of no corporate governance and recalls the scam committed by Satyam Computers which resulted into collapse of Global Trust Bank.

Robust Corporate Governance standards include the following:

(i) Establishing code of conduct and ethical behavior from the board level to all employees including accountability aspects thereof.

(ii) Constant review and evaluation of role, responsibilities as well as accountability of the Board of Directors.

(iii) Evaluating the effectiveness managing the operations of the bank by senior management.

(iv) Supervising strategic management and oversee risk management by establishing appropriate procedures for managing risks.

Answer 1(d)

The banking institutions of the country are being regulated by the Government as well as by Reserve Bank of India whereas all the transactions in the share markets and stock exchanges are being regulated and governed by SEBI.

The Reserve Bank of India formulates, monitors and implements India's monetary policy with the objective to maintain value of currency, preserve the external value of rupee, ensure prices stability, promote economic growth, financial institutions and functions as Bankers of the banks, Controller of Credit and Lender of Last Resort.

Onset of the process of economic reforms including liberalization and globalization of the economy, the role of the RBI as the Regulator of the financial sector has grown and diversified since entire institutional function of finance comes under the regulatory oversight of the RBI.

RBI as contained in Banking Regulation Act, 1949 in respect of banks as a regulator enjoys the following powers:

a) Control advances by formulating policy and directing the banking company to follow the same. Furnishing of such statements, information relating to business and affairs of bank regarding investments made, classification of advances in different sector like Industry, Commerce, Agriculture, Property, Stock Market etc.,

b) To conduct inspection of the banking company and to order for special audit in the public interest of the banking company or its depositors or for any other matters.

c) To appoint Chairman of the Board of Directors of the Banking Company and direct the Banking Company to call for meeting of board of directors, discuss the matter with the officers of RBI depute to attend the Board Meeting and to carry out if required changes in the management.

RBI in case of ABC Bank was derelict in its handling especially when given that the RBI first detected in March, 2017 significant erosion of the bank's net worth, turning of capital adequacy ratio (CAR) as negative, huge number of concealed NPAs to the tune of 35% of the total bank advances and failure of the bank to strengthen its capital base despite that the Annual Financial Inspection (AFI) of the bank was carried out by their officers every year since 2005. Various lapses which would have been noted earlier by RBI from the facts given are: -

a) Collusion of the top management in giving advances, concealing of NPAs and advances to different sectors beyond the permissible limits as set by RBI.

b) Advance given in the financial year 2012-13 to corporate, jewellery trade entities and other sectors become NPAs for which a provision of Rs. 2.5 billion was created in the year 2017-18.

In the wake of these irregularities, RBI placed ABC Bank under monthly monitoring and its operations relating to advances, premature withdrawal of deposits and declaration of dividend and capital market exposure were restricted. The statutory auditors of the bank were also asked to be changed but no complaint about them was made to the Institute of Chartered Accountants of India for taking action. Imposition of moratorium on ABC Bank also seems like a belated action.

The SEBI despite knowing that the trading in the bank shares was artificial boost-up by stock broker have not put restrictions on the activities of the dealing in the shares of

bank and had also not taken any action against the promoters, top management officers, stock brokers and others despite knowing that the stock broker were having insider information.

The failure of ABC Bank can be concluded of not taking of the timely action despite having of powers by the Regulators being RBI and SEBI, which resulted into the loss of investment of general public.

Question 2

(a) "Banking system in India is almost two centuries old which during this period has undergone tremendous changes from initially being confined with the money lending at a very small level to now being spread over globally by having a separate Act, control of Government and a regulatory authority for supervision".

In the back-drop of the aforesaid, answer the following questions:-

(i) Which was the first Indian commercial bank, who established the same, what was the purpose and for which period the same remained in operation? Also state in brief how the banking system got evolved in India since its beginning till early of the 20th century. (3 marks)

(ii) Who recommended for setting up of a central bank to control the currency, credit from the Government and to spread the banking network across the country? Also state when the recommendation was implemented, what was the initial constitution, since when the Reserve Bank of India is in existence and when it had started its statutory role? (3 marks)

(b) "Reserve Bank of India (RBI) for the development of economic activities in the local areas grants license to Small Finance Banks and Payment Banks". State the purpose and the need being foreseen by RBI to have small finance banks, who can start such bank, number of the entities who applied for grant of license to operate such bank, how many licenses were granted to operate such bank and also state in brief the regulatory requirements to be complied with for getting license for such bank. (6 marks)

Answer 2(a)(i)

The first commercial bank in India was established in the year 1776 in the name Bank of Hindustan at Calcutta by the British Agency House of Alexander and Company for catering to the financial needs of British Merchants Operating in India and the bank got liquidated in 1832.

Indian banking system since its beginning till early of the 20th century comprises of Agency House Banks, Presidency Banks, Imperial Bank of India, Reserve Bank of India, Private/Joint Stock (old generation) Banks, State Bank of India, Associate Banks, Nationalized Banks, Private Sector Banks (new generation), Foreign Banks, Co-operative Banks, Regional Rural Banks, Small Banks, Payment Banks and Financial Institution known as Development Banks and Non-Banking Financial Companies.

Period between 1906 and 1920 being inspired by the "Swadeshi" movement number of banks were established by the native Indians to serve the Indian community at large as joint stock banks such as Bank of Baroda, Central Bank of India, Catholic Syrian

Bank, South Indian Bank, Bank of India, Corporation Bank, Indian Bank, Indian Overseas Bank, Syndicate Bank, Canara Bank, Vijaya Bank and Vysya Bank.

Answer 2(a)(ii)

Royal Commission on Indian currency and finance under the leadership of Hilton Young was appointed by the British Government in 1927 which recommended for setting-up of a Central Bank in India to be known as Reserve Bank. The proposal with modification was accepted in 1934 and Reserve Bank of India (RBI) came into existence in 1935 as a banker to the central government.

The bank was started in 1935 as a private owned entity with the share capital of Rs.5 crores having its head office located at Calcutta (now Kolkata) which was shifted to Bombay in the year 1937.

The bank was taken over under the Reserve Bank (Transfer to Public Ownership) Act, 1948 by the Central Government by paying compensation to the private shareholders and thus the RBI under this Act become the bank of Government of India which started its statutory role on 01.01.1949 having its head office located at Bombay (now Mumbai).

Answer 2(b)

The Reserve Bank of India with the aim of strengthening financial inclusion by covering the section of the economy comprising of small business units, small and marginal farmers and unorganized sector entities not being served by other banks for promoting rural and semi urban savings and extending credit for viable economic activities in the local areas decided to establish Small Finance Banks and called for applications.

Small Finance Banks can be promoted by individuals, corporate houses, trusts or societies. However, joint ventures are not permitted. Existing Non-Banking Finance Companies (NBFCs), Micro Finance Institutions (MFI) and Local Area Banks (LAB) may convert themselves to become small finance banks by making application.

In the light of the aforesaid fact applications were received from total 72 entities for Small Finance Bank, the Provisional license was granted to 10 entities with a direction to convert themselves in Small Finance Bank within one year.

Salient regulatory requirements of the Small Finance Banks are as under:-

a. Promoters should have experience of 10 years in banking and finance and have a capital stake of 40% of equity which must be brought down to 26% over a period of 12 years. Foreign shareholding will be allowed in these banks as per the Foreign Direct Investment rules in private banks in India.

b. These Small Finance Banks need to be registered as Public Limited Companies under The Companies Act, 2013 and Reserve Bank of India Act, 1934, Banking Regulation Act, 1949 and other relevant statutes are applicable to them.

c. The bank will not be restricted to any region. 75% of its Net Credit should be lent to Priority Sector and 50% of its loans should be in the range of up to Rs. 25 lakhs.

d. At net worth of Rs.500 crore, listing will be mandatory within three years. Those small finance banks having net worth of below Rs.500 crore could also get their shares listed voluntarily.

Question 3

(a) Despite that the banking system in India is governed by Banking Regulation Act, 1949 and works under the regulatory authority of Reserve Bank of India, the Government of India had nationalized the banks in the year 1970 and thereafter again decided to consolidate them in the year 2018 in phases. Name all those banks which got merged in the second phase of consolidation of PSU banks and when the names of such merged banks were struck off from the second schedule of RBI. *(4 marks)*

(b) Banks are required to freeze the accounts of the customers on getting the orders of the Government/Enforcement Authorities. What procedure should be followed by the bank in case a freeze term deposit gets matured during the currency of such order ? *(4 marks)*

(c) ABC is a scheduled commercial bank and as per balance sheet dated 31.03.2020 showing net demand and time liabilities (NDTL) of Rs. 25,000 crores and investment in the SLR securities at Rs. 5,000 crores. The total NDTL outstanding on the 2nd preceding fortnight of July, 2020 of the bank was of Rs. 27,000 crores and on the same date the SLR securities were of Rs. 5,100 crores. The bank has requested RBI to borrow funds as per their scheme of marginal standing facility (MSF) in July, 2020 for short period till September 30, 2020. Work out the amount by giving in brief the provisions/notification under which loan is to be given and also specify the rate of interest to be charged on such loan amount by the RBI.

(4 marks)

Answer 3(a)

All the banks working in the Indian Banking System till 1968 were under Private Ownership and working as per provisions of Banking Regulation Act, 1949 under the Regulatory body being RBI. All such banks since were catering to the needs of urban India and therefore the Government of India when noted that the Indian Banking System is not providing ownership and not catering for the economic uplift at the rural area, mobilization of deposits from public at large and to have a social control of banks so that the banks contribute to the economic regeneration of rural and semi-urban areas of the country decided to nationalize 14 banks in July, 1969 through the ordinance Banking Company (Acquisition and Transfer of undertaking) Ordinance which was made into law in 1970.

In view of stringent capital adequacy norms as well as mounting NPA amongst the PSU Banks and to arrest sliding performance in their contribution to the economic development of the country Government of India decided in 2018 to consolidate the PSU Banks for the better contribution of the banks in the economic development of the country and therefore all the associate banks of the State Bank of India and Bharatiya Nahila Bank were merged in State Bank of India and thereafter in April, 2019 Vijaya Bank and Dena Bank were merged with Bank of Baroda and in April, 2020 other PSU Banks were also merged so that now having limited number of banks.

Oriental Bank of Commerce and United Bank of India were merged with Punjab National Bank, Syndicate Bank was merged with Central Bank, Andhra Bank and

Corporation Bank were merged with Union Bank of India and Allahabad Bank was merged with Indian Bank in the Second Phase in August, 2019 and the names of all these merged bank were excluded from the 2nd schedule of the Reserve Bank of India Act, 1934 from 01.04.2020 and these banks have ceased to carry bank business after 31.03.2020.

Answer 3(b)

The issue of such frozen accounts was examined in consultation with Indian Bank's Association (IBA) and banks were advised to follow the procedure detailed below in the case where during the currency of the orders of the Government/Enforcement Authorities the freeze term deposit gets matured:-

i. A request letter to be obtained from the customer for renewal of the deposit on maturity requiring him to indicate in such letter the term or the period for which the deposit is to be renewed. In case the depositor does not exercise his option of choosing the term for renewal, banks may renew the same for a term equal to the original term/period of the deposit;

ii. No new receipt is required to be issued. However, suitable note may be made regarding renewal in the deposit ledger;

iii. Renewal of deposit may be advised by registered letter/speed post/courier service to the concerned Government Department under advice to the depositor. In the advice to the depositor, the rate of interest at which the deposit is renewed should also be mentioned;

iv. Where the overdue period does not exceed 14 days on the date of receipt of the request letter, renewal may be done from the date of maturity. If it exceeds 14 days, banks may pay interest for the overdue period as per the policy adopted by them, and keep it in a separate interest free sub-account which should be released when the original fixed deposit is released.

Answer 3(c)

Reserve Bank of India since May 9, 2011 has allowed an additional facility in the nature of short term Marginal Standing Facility (MSF) for the scheduled commercial banks to borrow funds up to 1% of their Net Demand and Time Liabilities (NDTL) against their SLR securities. Subsequently it was raised to 2% and from 27th March, 2020 it has been raised from Schedule Banks (excluding Regional Rural Banks) under the MSF to 3% up to 30th June, 2020 of their NDTL outstanding at the end of the second preceding fortnight. In terms of RBI notification RBI/2019-20/259 DOR.NO.Ret.BC.77/12.02.2001/ 2019-20 the same raised borrowing limit is allowed to continue till September 30, 2020. The rate of interest applicable on such advances is fixed at a higher rate than the Repo Rate which as at July 2020 was 4.25% p.a.

Accordingly, the ABC Bank which is a scheduled Commercial Bank can take the amount under MSF from RBI for the period from the date of demand in July, 2020 to 30th Sept. 2020 @ 3% of its NDTL. The NDTL outstanding on the 2nd preceding fortnight of July, 2020 as given was of Rs.27,000 crores equal to 3% thereof works out at Rs.810 crores which the ABC Bank can take from RBI against its SLR Securities of Rs.5100 crores. Rate of interest on the amount of 810 cores so taken under this scheme by the ABC Bank shall be charged at 4.25% per annum.

Question 4

(a) "RBI on 1st July, 2015 had liberalized and rationalized for Financially Sound and Well Managed (FSWM) Urban Co-operative Banks to open their Branches in different States where such Co-operative Bank is registered under Multi-State Co-operative Societies Act, 2002". Do you agree with this statement ? If yes, specify all those criteria or the conditions when an Urban Co-operative Bank is treated as Financially Sound and Well Managed.

(b) "Reserve Bank of India may give directions to banking companies either generally or to any banking company or group of banking company to decide the policy and control advances." Explain in the context of provisions of Banking Regulation Act, 1949 by stating whether the banking company shall be bound to comply with any such directions given to it by the RBI.

(6 marks each)

Answer 4(a)

The Financially Sound and Well Managed (FSWM) Urban Co-operative Bank as per the guidelines of RBI is that such bank which satisfied or fulfilled the following criteria:-

a. Capital to Risk Assets Ratio (CRAR) is not less than 10 per cent.

b. Gross NPAs of less than 7% and Net NPAs of not more than 3%.

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

g. Regulatory Comfort.

Answer 4(b)

Section 21 of the Banking Regulation Act, 1949 gives RBI the power to decide policy in relation to advances to be followed by banking companies so that it may control facilities, and check any speculative activities and to give directions in this regard to the banking company/companies. Every banking company shall be bound to comply with any directions given to it under this section by the RBI.

RBI may give following directions in this regard to the banking company/companies:-

a. the purpose for which advances may or may not be made;

b. the margins to be maintained in respect of secured advances;

c. the maximum amount of advances or other financial accommodation which, having regard to the paid-up capital, reserves and deposits of a banking company and other relevant considerations, may be made by that banking company to any one company, firm, association of persons or individual;

d. the maximum amount up to which having regard to the considerations referred to in clause (c), guarantees may be given by a banking company, on behalf of any one company, firm, association of persons or individual; and

e. rate of interest and terms and conditions on which advances or other financial accommodation may be made or guarantees may be given.

Question 5

(a) You are working as Company Secretary in XYZ Ltd. The company is in the process of expansion of its activities and a new manufacturing unit is to be established in Nagpur for which a loan proposal is to be prepared. Management requires you to prepare the loan proposal. What elements will you keep in mind and consider while drafting the loan proposal? (8 marks)

(b) "SBI opened for its employees who have completed service of 15 years or more Voluntary Retirement Scheme (VRS) option. The option was being exercised by various officers and they were paid the compensation as per scheme announced. However, the employees who opted for VRS and were paid compensation asked the bank to give them pension as per SBI Pension Fund Rules at par as is being given to the employees on superannuation with the contention that opting under VRS and taking of compensation under the scheme does not debar them to claim pension from the bank". State in brief whether the contention of the employees opted for VRS under the scheme to get pension as per pension rules of bank is correct. Support your answer by the decided case laws, if any. (4 marks)

Answer 5(a)

XYZ Ltd. already engaged in the business and for the purpose of expansion to establish a manufacturing unit in Nagpur a loan proposal is to be prepared for availing the bank finance. Bank always made available the finance after assessing the proposal; the purpose, amount of loan facilities and the repayment plan with capacity of the borrower. The loan proposal must be drafted by giving the following details:

1. *Executive Summary*:

   This should be clear, concise and accurate summarizing how the proposed loan will be used, repaid and will benefit the business. Keeping that the company is competing with many others, point out some of the distinguishing features of the business as well as its market potential which can be explained by way of graphs, charts and the tables.

2. *Top Management Profile* :

   Incorporate resumes as well as a summary of experience, qualifications and credentials for all owners and key members of the management team. This will help the financial institutions to understand about the promoters & management team and to assess the viability of the proposal by having an assurance as to execution.

3. *Business description* :

   Present a sound description of the existing and proposed business by including a brief overview of the history of the business, a summary of current activities

clearly demonstrating the markets and industry current trends and risks. Include in it the literature showing about the products and services provided by the company and also to include letters from suppliers, customers and other business references.

4. *Projections of the business with expansion:*

   It include projected income statements and cash flow statements for two to three years. Assumptions made for such statements should be clearly stated and be realistic. No need to show "best case" and "worst case" unless the bank asks to do so, but remain to be prepared to answer questions (in quantifiable terms) about what happens if some of the assumptions do not come true. For example, anticipating obtaining a major new customer as a result of new expansion what will be the impact on the estimates if that customer decides to take the business elsewhere?

5. *Financial Statements:*

   The loan proposal must include financial statements of business and of the key promoters. Make sure that the financial statements are revealing and that the bank will fully analyze all the historical financial statements and calculate the ratios. So, prepare in advance and point out any significant trends in an introductory paragraph. This can be provided by way of tables, charts and workings.

6. *Purpose of the loan:*

   Present a detailed statement of how the loan proceeds will be used. Do include the proceeds of the loan in the cash flow projections and the interest in the projected income statement.

7. *Amount required and the nature of facilities:*

   Always keep in mind, that you are offering the bank a deal by way of a proposal which will make them to give money as an advance and not as an "allowance". The attitude be applied is to ascertain "how much money we need, and how much will the bank be lending?" If the approach is negative like whether "will bank lend?" than the financial institutions will not be providing adequate assistance which will result in to ill financing and at a later stage complications.

8. *Repayment plans:*

   Make some assumptions about the terms of the loan in the proposal as this is necessary to prepare the initial financial projections. In the first stage, propose the terms that you want, but ultimately this will be a point that will be negotiated with the bank. The bank will consider a number of factors as they assess the overall risk of the loan and this will impact the repayment terms they are willing to give.

Answer 5(b)

The employees who have opted for VRS have made claim to get pension as per rules of bank since they have also completed the services with the bank of 15 years or more. The stand taken is that the VRS so taken by them is nothing but like a person being superannuated from the services. However, the bank did not agree to the contention of the employees and refused to pay pension to such employees who have opted for VRS.

Supreme Court on 2nd March, 2022 in the case of Assistant General Manager, State Bank of India and Others vs. Radhey Shyam Pandey has held that the employees who completed 15 years of service or more as on cutoff date were entitled to proportionate pension under SBI VRS to be computed as per SBI Pension Fund Rules.

Let the benefits be extended to all such similar employees retired under VRS on completion of 15 years of service without requiring them to rush to the court. However, considering the facts and circumstances, it would not be appropriate to burden the bank with interest. Let order be complied with and arrears be paid within three months, failing which amount to carry interest at the rate of 6 per cent per annum from the date of this order. The appeals are accordingly disposed.

The contention of the employees opted for VRS under the scheme to get pension as per pension rules of bank is correct.

Question 6

(a) Prime Minister, India on 12-11-2021 by integrating the existing three Ombudsman schemes of RBI namely Banking Ombudsman Scheme, 2006, Ombudsman Scheme for NBFC, 2018 and Ombudsman Scheme for Digital Transaction, 2019 had launched a new scheme having consolidated features of all the three schemes for effective working of the Ombudsman Scheme of RBI for the consumers".

In this context explain the purpose of integrating the three ombudsman schemes and state briefly the salient features of the 'Reserve Bank Integrated Ombudsman Scheme'.

(b) RBI in the year 2001 had issued guidelines on the recommendation of Working Group on Inter-net Banking covering the area of Information Technology, Security Standard, Legal Issue, Regulatory and Supervisory matters, the Technology to be used and how to deal with the Legal Issues and Supervisory Issues." Explain in brief such instructions which are being required to be followed by all the banks offering Net Banking.

(6 marks each)

Answer 6(a)

The purpose of integrating all the three schemes i.e. Banking Ombudsman Scheme, 2006, Ombudsman Scheme for NBFC, 2018 and ombudsman Scheme for Digital Transaction, 2019 for working of Ombudsman Scheme at RBI level in the vision of India's Prime Minister was the protection of consumers. The integrated scheme will provide cost free redress of the customer complaints involving deficiency in services rendered by entities regulated by RBI, if not resolved to the satisfaction of the customers or not replied within a period of 30 days by the regulated entity.

The salient features of the scheme in brief are as under: -

a) The theme of the scheme is based on 'One Nation – One Ombudsman'.

b) It will no longer be necessary for a complainant to identify under which scheme he/she should file complaint with the Ombudsman.

c) The scheme defines 'deficiency in service' as the ground for filing a complaint, with a specified list of exclusions. Therefore, the complaints would no longer be rejected simply on account of "not covered under the grounds listed in the scheme".

d) To handle the customer complaint a Centralized Receipt and Processing Centre (CRPC) has been set up for centralized handling of all complaint receipts and initialing processing.

e) Centralised Receipt and Processing Centre (CRPC) has been set up at RBI at Chandigarh for receipt and initial processing of physical and email complains in any language.

f) Customer have now single point reference to file complaints, submit documents, track the status of the complaints and receive feedback. It will have one portal, one email, and one address for the customers to lodge their complaints.

g) The responsibility of representing the Regulated Entity and furnishing information in respect of complaints filed by customers against the Regulated Entity would be that of the Principal Nodal Officer in the rank of a General Manager in a Public Sector Bank or equivalent.

h) The Regulated Entity will not have the right to appeal in cases where an award is issued by the ombudsman against it for not furnishing satisfactory and timely information/documents.

Answer 6(b)

The RBI as per regulation of banking business under its regulatory approach had advised the banks to follow the following instructions and the guidelines for having Internet Banking: -

a) All banks are to take prior approval from RBI to offer internet banking services.

b) Applications should be supported by business plan, cost benefit analysis, operational aspects and arrangements like technology adopted, business partners, service providers and systems and control procedures the bank proposes to adopt for managing risks along with their security policy duly certified by an independent Auditor certifying the compliance of meeting minimum requirements need to be submitted.

c) After the initial approval, if there are any material changes then the banks will be required to inform RBI and will also need to inform every breach or failure of security systems and procedure. If necessary RBI would conduct a special audit/inspection.

d) RBI guidelines on Risks and Controls in Computers and Telecommunications, will equally apply to internet banking.

e) Wherever services are outsourced, banks would develop guidelines to manage risks arising out of such service providers, such as, disruption/ defective services, personnel of service providers gaining intimate knowledge of banks systems and mis-utilizing the same etc., effectively.

f) In case of e-commerce transactions, they should follow guidelines regarding protocols for transactions between the customer, the bank and the portal and the framework for setting up of payment gateways.

Further guidelines regarding Inter-bank payment gateways, connectivity security, contractual aspects between payee ad payee's banks, mandatory disclosures, hyperlink – security and other aspects are also covered as a part of internet guidelines of banks.

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INSURANCE – LAW & PRACTICE

(Elective Paper 9.2)

Time allowed : 3 hours *Maximum marks : 100*

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

Anand has taken a Health Insurance Policy from XYZ Insurance Company. The Policy also covers critical illness. He paid premiums continuously without any break and without any claim for 10 years. Unfortunately, he was detected with a disease which is not in the classification of diseases or fall under the definition of critical illness cover of that insurance company. Anand made a claim with the insurance company after his discharge from the hospital, after treatment of the unknown disease. XYZ Insurance Company denied the claim. Anand with much disappointment due to denial of the claim sued the web aggregator who had recommended and issued the insurance policy with critical illness cover to him.

(a) Is the Insurer allowed to contest the claim ? Justify the answer.

(b) Are there any guidelines on standardization of General Terms and Clauses in Health Insurance Policy contracts ? Explain.

(c) Can the corporate agents and web aggregators be sued by their clients for errors or negligence during the course of their professional duties ? What are the guidelines and its scope imposed by IRDAI to protect the professional interests of the corporate agents, brokers and web aggregators ?

(d) What are the limitations of the guidelines which are issued by IRDAI to protect the interests of the corporate agents, brokers and web aggregators ?

(e) How does the consumer get benefit with the policy ?

(8 marks each)

Answer 1(a)

No, as per the amendment issued by IRDA on 11th June, 2020 (Guidelines on Standardization of General Terms and Clauses in Health Insurance Policy Contracts), health insurers will not be allowed to contest claims once the premium has been paid for a continuous period of eight years (moratorium period).

As per the amendment, after completion of eight continuous years under the policy no look back can be applied. This period of eight years is called as moratorium period. The moratorium would be applicable for the sum insured of the first policy and subsequently completion of 8 continuous years would be applicable from date of enhancement of sum insured only on the enhanced limits. After the expiry of Moratorium Period no health insurance claim shall be contestable except for proven fraud and permanent exclusions

specified in the policy contract. The policies would however be subject to all limits, sub limits, co-payments, deductibles as per the policy contract.

Answer 1(b)

Yes, there are guidelines on standardization of General Terms and Clauses in Health insurance policy contract.

IRDAI's New Rules: Standardization Guidelines for Health Insurance Policy:

IRDA guidelines for health insurance 2020 focus on aspects related to claim settlement, use of multiple policies, etc. as follow:

1. *Claim Rejection* : A health insurance company cannot reject a claim if the policy is renewed without a break for 8 years by the policyholder. The 8-year period will be called the moratorium period. The insurance company cannot appeal to the IRDA against the settlement of such claim except for fraud and/or a claim raised against the exclusion of the policy after the moratorium period. The insurance company cannot reject a claim on the basis of misrepresentation or non-disclosure. IRDAI has given a period of 8 years to the insurance company for verifying the information provided by the policyholder and thus, a claim cannot be rejected on those grounds.
2. *Inclusion of Telemedicine under Health Insurance* : The COVID-19 pandemic has forced both healthcare providers and patients to provide and avail remote consultations. The fee for such online consultations can amount to a large sum that would prove to be a financial loss to the insured person. Thus, IRDA has decided to ask health insurance companies to include telemedicine in the coverage where applicable. This move has allowed medical practitioners and patients to freely avail medical opinions.
3. *Claim Settlement* : In case of a delay in claim settlement from the insurer's end, the insurance company is liable to pay the interest on the claim amount at the rate of 2% more than the bank rate. The claim should be settled within 30 to 45 days from the date of communicating the last required document to the policyholder. The time duration will be dependent upon the nature of the claim and investigation required.

The above guidelines will be applicable to health insurance products filed from October 01, 2020. As far as existing products are concerned, the terms and conditions will be modified to comply with the rules upon renewal after April 01, 2021, and onwards.

Answer 1(c)

Yes, the corporate agents and web aggregators can be sued by their clients for errors or negligence rendered during the course of their professional duties.

The insurance intermediaries engaged in solicitation and distribution of insurance products, viz., Insurance Brokers, Corporate Agents, Insurance Web Aggregators, Insurance Marketing Firms are required to take Professional Indemnity Insurance Policies to get themselves indemnified from the claims lodged against them, arising out of the contingencies mentioned in the regulations governing them. There have been numerous instances where the policy taken by the intermediary do not comply with the Regulatory provisions.

A professional indemnity policy is a liability insurance product that protects individuals giving professional advice and professional entities against negligence claims by their clients for errors and omissions. It covers financial loss suffered by the clients resulting from breach of professional duty. As per the guidelines on standard professional indemnity policy issued by Regulator IRDAI effective from July 1, 2021, every general insurer should endeavour to offer the standard professional indemnity policy for insurance intermediaries, including brokers, corporate agents, web aggregators and insurance marketing firms.

Standard Proposal Form - The guideline specifies the proposal form that may be used by the insurers for underwriting the risk.

Standard Policy Form - All Policies, fresh and renewals, issued in the specified professional indemnity will meet the regulatory requirements of various insurance intermediary regulations.

Liabilities Covered - Policies issued shall cover all damages resulting from any claim for breach of duty of the insured, fraud and dishonesty of any employee which the Insured becomes legally liable to pay arising out of claims first made in writing against the Insured during the policy period including legal costs and expenses incurred with prior consent of Insurers, subject always to the limits of indemnity and other terms, conditions and exceptions of the policy. The ratio of limit of indemnity any one accident to any one year shall not exceed 1:1.

Policy Period - An insurer shall issue an annual policy to the insurance intermediary. The insurer shall endeavour to issue long term policy valid for the period of certificate of registration of the insurance intermediary.

Answer 1(d)

The limitations of the guidelines issued by IRDAI to protect the interests of corporate agents, brokers and web aggregators are "Policies issued will cover all damages resulting from any claim for breach of duty of the insured, fraud and dishonesty of any employee which the insured becomes legally liable to pay arising out of claims first made in writing against the insured during the policy period including legal costs and expenses incurred with prior consent of Insurers, subject always to the limits of indemnity and other terms, conditions and exceptions of the policy. The ratio of the limit of indemnity for any one accident to any one year will not exceed 1:1," according to the guidelines.

Answer 1(e)

With this standard professional indemnity policy, the consumers will have a direct benefit as they can be assured that in case there is a breach of contract, then they will surely get their money back and brokers, aggregators and the intermediaries will be able to successfully handle such complaints without leaving the customers in dilemma.

Rights and Protections

- No insurance plan can reject, charge more, or refuse to pay for essential health benefits for any condition had before coverage started.
- Once enrolled, the plan can't deny coverage or raise rates based only on your health.
- Medicaid and the Children's Health Insurance Program (CHIP) also can't refuse to cover or charge more because of pre-existing condition.

- Health plans must cover certain types of care to adults and children without charging a copayment or coinsurance.
- Preventive care includes blood pressure screening, colorectal cancer screening, immunizations, and other types of preventive care.
- Right to stay on parent's health plan if under 26 years old.

Insurance companies can't limit yearly or lifetime coverage of essential benefits. Under this right, insurance companies can't set a limit on the money spent on essential benefits the entire time enrolled in the plan.

Essential health benefits are 10 types of services that health insurance plans must cover. Some plans cover more services, others may vary a bit by state.Essential health benefits include:

- Outpatient care
- Emergency services
- Hospitalization
- Pregnancy, maternity and newborn care
- Mental health and substance use disorder services
- Prescription drugs
- Rehabilitative services and devices
- Management of chronic disease
- Laboratory services
- Preventive care
- Disease management
- Dental and vision care for children (adult vision and dental care are not included)

Question 2

(a) Balaram purchased a Unit Linked Insurance Policy on 1st March, 2015 from ABC Insurance Company. The policy includes both term insurance coverage and estimated investment returns. He took the policy for tax deduction purpose under Sec. 80C of the Income Tax Act, 1961. In January, 2017, his financial advisor suggested him an annuity plan which comes under Sec. 80CCC of the Income Tax Act, 1961. Balaram is totally convinced with the annuity plan and wants to discontinue the Unit Linked Insurance Policy as paying premiums for both the plans is difficult for him. He approached the insurance company to claim the fund value from the premiums he had paid from March, 2015 to January, 2017.

(i) Can he get the fund value immediately ? Justify the answer with the latest ULIP regulations of IRDA.

(ii) If he revives the policy within two years, can he get the fund value ?

(6 marks)

(b) As a Financial Planner of a client, how do you suggest to ideally allocate client's income of ₹1,00,000 for the saving goals, retirement or put off the debt, Housing EMI or rent and on everything else. Justify your answer with percentage of allocation of his total income. (6 marks)

Answer 2(a)

i. No, Mr. Balaram cannot get the fund value immediately because there is a lock in period of 5 years under a ULIP Policy from the commencement of the policy, during which the investments cannot be withdrawn.

Mr. Balaram has taken the ULIP policy on 1st March, 2015 and wants to discontinue the ULIP policy in January, 2017 i.e. before 5 years from the commencement of the policy, he will not be entitled for fund value.

ii. No, he cannot get the fund value even if he revives the policy within 2 years. As per IRDA Regulations, the funds are moved from active ULIP fund to Discontinuance fund and remains the discontinuance fund till the completion of the 2 year period given for the customer for exercising the option of revival. In short, no benefit can be paid to the policy holder under ULIPs till completion of 5 years.

Answer 2(b)

Ideal allocation of income for personal financial planning

20% of income towards savings goals, retirement and/or put towards payoff the debt.

30% of income allocated towards housing.

Remaining 50% should be allocated to spend on everything else.

In this case, allocation of clients income of Rs.1,00,000 for the saving goals are as under:

To pay off debt and saving towards retirement	Rs.20,000
To pay Housing EMI and /or rent	Rs.30,000
On everything else	Rs.50,000

Question 3

(a) Devender having a textile business maintains stocks to operate his business. He took a declaration fire insurance policy with the following details :

Sum insured : ₹1,00,00,000

Rate per thousand : ₹1.00

Premium paid in advance : ₹10,000

His monthly declaration of stock values is as under :

Month	***Amount of stock in ₹***
January	*5800000*
February	*5600000*
March	*4600000*

April	*3000000*
May	*3000000*
June	*3000000*
July	*3000000*
August	*4000000*
September	*4000000*
October	*4000000*
November	*4000000*
December	*4000000*

Calculate :

- *average sum insured*
- *premium on average sum insured*
- *amount of refund of the premium.* *(6 marks)*

(b) Financial risks for both the insurer and insured are classified as :

- *Capital risk*
- *Asset Liability management risk*
- *Insurance risk*
- *Credit risk*

Discuss each risk separately with their sub-categories of risks. *(6 marks)*

Answer 3(a)

Calculation of average sum insured

Month	*Amount of Stock in Rs.*
January	58,00,000
February	56,00,000
March	46,00,000
April	30,00,000
May	30,00,000
June	30,00,000
July	30,00,000
August	40,00,000
September	40,00,000
October	40,00,000
November	40,00,000
December	40,00,000
Total	4,80,00,000

- Average sum insured = 4,80,00,000/12 = Rs. 40,00,000
- Premium on average sum insured at Rs.1 per 1000 will be Rs. 4000 i.e. 40,00,000/ 1000
- Amount of refund of premium

  Premium Received in Advance Rs. 10,000

  Excess Premium paid = 10,000 – 4,000 = Rs. 6000

According to rule of refund = excess premium paid or 50% of advance premium whichever is less (6000 or 5000 whichever is less) i.e. Rs. 5000

Answer 3(b)

Capital risk is the potential of loss of part or all of an investment. It applies to the whole gamut of assets that are not subject to a guarantee of full return of original capital. Capital risk includes capital structure risk and capital (in) adequacy risk.

Asset and liability management gets used by financial institutions to help mitigate potential financial risks. These risks are usually the result of a discrepancy between current assets and liabilities. Asset liability management risk includes exchange risk, interest rate risk and investment risk.

Risk in insurance can be referred to as the possibility or chance that any unexpected event or events will occur leading to the loss of life or loss or damage to any property of the person who takes insurance by paying the insurance premium calculated by the insurers based on the probability of an event and its impact. Insurance risk includes underwriting risk, catastrophe risk, reserve risk and claims management risks.

Credit risk is the possibility of a loss resulting from a borrower's failure to repay a loan or meet contractual obligations. Credit risk includes reinsurance risk, policyholders and brokers' risks and claims recovery risks and other debtor's risks.

Question 4

(a) Emmanuel sent one consignment to Ireland on 5th May, 2021. The consignment was lost in sea and did not reach the destination. Explain him the procedure for making marine insurance claim.

(b) Explain benefits of Aviation insurance.

(6 marks each)

Answer 4(a)

Procedure for making Marine Insurance Claim

1. *Intimation to Insurance Company* : The insured must give immediate intimation to the insurance company regarding the loss. The necessary details like the day, date, time of ship and voyage taken should be mentioned.
2. *Reasonable Care* : In a marine Insurance, it is a condition of the policy that the insured and his agents should act as if the goods are uninsured and should take all such measures and actions as may be reasonable and necessary to minimize

the loss or damage. They must also ensure that all the rights against carriers, baileys or third parties are protected. So Reasonable care is one of the measures to be taken in to consideration under the procedures of claiming Marine Insurance against loss or damage of export import goods of international trade.

3. *Initial Assessment of the loss* – The insured makes an initial assessment of the loss, which is required to be filled in the claim form in respect of the loss of goods or property incurred.
4. *Outward Condition* : When the outward condition of the packages is apparent, the insured takes delivery unsuspectingly. After reaching warehouse, one opening the packages, they find damages to goods. In such an event, the insured and or agent should immediately inform the insurance company and call for the ship surveyor for detailed survey. They should not make any delivery of goods. They should not disturb the packing materials or the contents in packages. This is important in claiming Marine Insurance under export and import trade.
5. *Missing Packages* : In case any package is found missing, the insured must lodge the monetary claim with the insurance company and its baileys (shipping company) and obtain a proper acknowledgement from them. This is one of the formalities to claim Insurance under import export of international trade.
6. *Submission of the claim form* : the insured must fill all possible details in the claim form. He must lodge the claim form with the following documents:
   - Original Insurance Policy,
   - Copy of Bill of Lading,
   - A copy of commercial Invoice,
   - A copy of packing list,
   - Survey report,
   - Claim Bill.
7. *Evidence of Claim* : Along with the claim form, the insured must send certain proof and other records in justification of the claim made. The evidence should enable the insurance company to determine the amount of loss.
8. *Verification of Claim Form* : The claim form along with the supporting evidence is verified by the insurance company.
9. *Survey* : After the receipt of the claim form, and necessary verification, the insurance company appoints the surveyors to assess the actual loss. The surveyors conduct the necessary investigations. They investigate into the cause, the actual amount of property lost and other relevant details. The surveyors then make the report of their findings and assessment of the loss.
10. *Landing Remarks* : The insured should obtain landing remarks, from the port authorities, if survey report is not obtained.
11. *Settlement of Claims* : If there is no dispute between the two parties, as to the amount of loss, the insurance company then makes necessary payment to the insured. The amount of money is paid to India Exporter in Indian rupees. If the claimant is not a resident of India, payment maybe made in foreign currency.

12. *Appointment of the arbitrator* : There may be a dispute regarding the amount of claim. In such a case, an arbitrator is appointed, acceptable to both the parties, to settle the amount of the loss.

Answer 4(b)

Benefits of Aviation Insurance

Comprehensive aviation insurance policy covers all the life-threatening risks like turbulent weather, terrorist activities leading to hijacks, mysterious disappearance of flights, auto/ technical failure, or a plane crash. In flight insurance provides coverage against damages that can happen to the aircraft while it is mid-air (in motion). Natural weather turbulences and manmade calamities etc. are duly compensated for any damages after the passenger boarded a flight.

Question 5

(a) In 2011, Sony's play Station Network was breached by hackers, exposing personally identifiable information (PII) of 77 million Play Station user accounts. The breach prevented users of Play Station consoles from accessing the service, an outage that lasted for 23 days. Sony incurred $171 million in costs related to the breach. Portions of the costs could have been covered by a cyber-insurance policy but Sony did not have one in place. A court case ruled that Sony's insurance policy covered damage to physical property only, leaving Sony to incur the full amount of costs related to cyber damage.

India's Cyber Security industry nearly doubled in size amid the pandemic with rapid digitalization. After keeping in mind the rising incidences of cyber-attacks along with a growing number of high profile data breaches, the online exposures for individuals, business organizations, offices and other establishments, the Insurance Regulatory and Development Authority of India (IRDAI) on 8th September, 2021 has issued guidance document on product structure for Cyber Insurance.

Discuss the main objectives of the guidance document on product structure for Cyber Insurance.

(6 marks)

(b) Explain provisions under the Companies Act, 2013 and IRDAI regulations for control of conflict of interest of the Directors and employees.

(6 marks)

Answer 5(a)

The main objectives of the guidance document on product structure for Cyber Insurance are:

- to enable insurers to evaluate new technologies posing heightened cyber risk, identify protection gaps in the existing products and address the changing needs of market.
- to facilitate insurers in developing stand-alone cyber insurance products, specifically designed to address the evolving cyber risks.
- to provide a set of recommendations on maximum possible coverages that could be included in the cyber insurance products.

- to encourage insurers to adopt best practices and provide additional covers in response to customer needs.
- to improve the development of the cyber insurance market with new products and enhance benefits for policyholders.

General insurers who have already developed some cyber insurance products with exclusive coverage for individuals to protect against cyber perils and currently offering the products that mainly focused on commercial business, may review the product structure based on the coverages advocated in the guidance document.

Answer 5(b)

IRDA's Corporate Governance guidelines are applicable to insurance companies in addition to the applicable provisions of the Companies Act, 2013 and norms as applicable to listed companies. Some of the important requirements under the corporate governance guidelines are:

1. In order to promote diversity and inclusion, as per section 149 every company with a capital of 100 crores or Turnover of at least Rs. 300 Crores, to have at least 1 Woman Director.
2. Having in place, sub committees of the Board, other than those mandatory as per Companies Act 2013, for investment, risk management, policyholder's protection, etc., for better compliance and monitoring.
3. Compliance with the regulations or guidelines for reinsurance arrangements or investment transactions or outsourcing to related parties.
4. Auditors, directors, Actuaries and other key management personnel are prohibited from holding positions which are conflicting with each other. Eg. Appointed actuary cannot take responsibilities of claims functions.
5. Section 48A of the Insurance Act, 1938 prohibits interlocking directorships between an insurance company and insurance intermediary without prior approval of IRDAI.
6. Section 48B of the Insurance Act, 1938 provides that a Director of a life Insurance company shall not be a Director of another life insurance company.
7. Reporting requirements / submission of certifications to Authority ensuring that all compliances are adhered to.

Question 6

There are different types of treaty reinsurance. The arrangement between insurer and reinsurer for some types of treaty reinsurance agreements are as follows :

(i) Quota Share Arrangement :

- *Risk assumed is ₹20,00,000*
- *Direct insurer bears 10%*
- *All reinsurers bear 90%*

(ii) Surplus Treaty Reinsurance Arrangement :

- *A 9 Line Surplus Treaty*

- *Risk Assumed is ₹2,00,00,000*
- *Direct insurer retention is ₹20,00,000*

(iii) Excess of Loss Treaty Reinsurance Arrangement :

- *Direct insurer decision to loss bearing is up to ₹1,00,000 in each and every loss*
- *The arrangement with the insurer is the loss amount beyond ₹1,00,000 with an upper limit of ₹80,000*
- *The actual loss is ₹2,00,000*

(iv) Excess of loss ratio Treaty Reinsurance Arrangement :

- *Direct insurer bears not exceeding 70% of the gross premium of the class.*
- *Reinsurer bears any balance, the ceding company's gross loss ratio is maintained at 70% but not exceeding 90% of the balance*
- *The ceding company's premium income is ₹1,00,00,000 and the total loss over the year is ₹80,00,000.*

Calculate the appropriate amount of loss bearing for direct insurer and reinsurer for all the above treaty arrangements and fill the following table with the amounts shared by the direct insurer and the reinsurer.

Table Showing the Share of Insurers and Reinsurers

	Shares of	***Amount in ₹***
1. Quota Share Treaty Reinsurance	*Direct insurer*	
	Reinsurer	
	Total Loss	
2. Surplus Treaty Reinsurance Arrangement	*Direct Insurer retention*	
	Treaty	
	Total loss	
3. Excess of Loss Treaty Reinsurance Arrangement	*Direct Insurer* *Upper limit*	
	Reinsurer	
	Total Loss	
4. Excess of Loss Ratio Treaty Reinsurance Arrangement	*Direct Insurer*	
	Reinsurer bears	
	Total loss	

(3 marks each = 12 marks)

Answer 6

Calculation of appropriate amount of loss bearing for direct insurer and reinsurer for the below treaty arrangements			*Amount in Rs.*
1.	Quota Share Treaty Reinsurance	Direct insurer@ 10%	2,00,000
		All reinsurer @ 90%	18,00,000
		Total loss	20,00,000
2.	Surplus Treaty Reinsurance Arrangement	Direct insurer retention	20,00,000
		Treaty (9* 20 lakh)	1,80,00,000
		Total	2,00,00,000
3.	Excess of loss Treaty Reinsurance Arrangement	Direct insurer bears	1,00,000
		Upper limit	80,000
		Reinsurer bears	80,000
		Actual loss of Rs. 2 lakh - upper limit Rs. 80,000 – Direct insurance bears	20,000
		Total amount for direct insurer is Rs. 1,00,000 plus (+) residue loss of Rs. 20,000 which is not borne by reinsurer	120,000
		Total Rs. 1,20,000 by direct insurer plus (+) Rs. 80,000 by reinsurer	2,00,000
4.	Excess of loss ratio Treaty Reinsurance Arrangement	Direct insurer bears 70% of the premium Rs. 1,00,00,000	70,00,000
		Reinsurer bears 90% of loss of Rs. 10,00,000 (Total loss 80,00,000 – Rs. 70,00,000 bears by direct reinsurer)	9,00,000
		Total amount for direct insurer is Rs. 70,00,000 plus (+) residue loss of Rs. 1,00,000 which is not borne by reinsurer	71,00,000
		Total Loss	80,00,000

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INTELLECTUAL PROPERTY RIGHTS – LAWS AND PRACTICES
(Elective Paper 9.3)

Time allowed : 3 hours *Maximum marks : 100*

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

Question 1

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

A patent (IN 161) was granted to AA, the plaintiff in October, 2015.

The invention patented was titled "3-[(2Z)-[1- (3, 4 -Dimethylphenyl) -1, 5 - Dihydro-3-Methyl-5-Oxo-4H-Pyrazol-4- Ylidene] Hydrazino]-2'-Hydroxy- [1,1'-Biphenyl]-3-Carboxylic Acid Bis-(Monoethanolamine)". Reckoned from 21 May, 2003, being the International Filing Date of the patent, the patent would remain alive till 21 May, 2023, by virtue of section 53(1) of the Patents Act, 1970 (Patents Act, for brief), read with the Explanation thereto. The invention was granted the non-proprietary name "Eltrombopag Olamine" (abbreviated, for the sake of convenience, as "EO"). The Complete Specifications of the patent, as filed with the Indian Patent Office (IPO) for grant of the patent declares that Eltrombopag "is a compound which is disclosed and claimed, along with pharmaceutically acceptable salts, hydrates, solvates and esters thereof. EO is used for the treatment of thrombocytopenia, denoting insufficiency of platelets in the body and is marketed, by AA, the plaintiff, under the tradename "REVOLADE".

BB, the defendant in this case launched its branded EO in the market. This, alleges the plaintiff, infringes the patent (which is still alive) as the defendant had not obtained any licence from the plaintiff. Ergo, the plaintiff through a suit filed by it seeks an injunction against the defendant from infringing the patent. The plaintiff emphatically averred that, it was disentitled to seek to contend that IN 176 did not claim EO.

The defendant BB contests the suit by questioning the validity of the patent IN 161, invoking, for the purpose, section 107(1), read with clauses (a), (d), (e), (f), (j), (k) and (m) of section 64 of the Patents Act. The challenge is predicated on treating IN 213176 (in short, 'IN 176'), also held by the plaintiff, as prior art.

The title of IN 176 is "a compound and a pharmaceutical composition for use in enhancing platelet production". The International Filing date of IN 176 was 24th May, 2001; ergo, the patent expired on 24 May, 2021. EO was, according to the defendant, the subject matter covered by IN 176; hence, it was not entitled to any protection after 24 May, 202l, by virtue of section 53(4) of the Patents Act.

However, the plaintiff emphatically averred that IN 176 did not claim EO. The defendant submitted its contentions questioning the entitlement of AA, the plaintiff to an injunction, a summary of which runs as follows :

The Active Pharmaceutical Ingredient (API), which provides therapeutic activity against thrombocytopenia, is Eltrombopag, and not EO. EO functions only as a pro-drug, which enables delivery of Eltrombopag to the target site. EO does not have any inherent therapeutic activity. Reliance was placed, in this regard, on the leaflet prescribing information for REVOLADE, which indicated that EO was present, in the tablets, in a quantity which was sufficient to enable providing of equivalent specified, amounts/dosages of Eltrombopag to the patient.

The defendant further submitted that the patent was invalid on the ground of anticipation by prior claiming, under section 64(1)(a) of the Patents Act. BB's counsel exhorted the Court to read section 64(1)(a) in conjunction with section 13(1) (b). IN 176 being a patent granted in India, with priority dates (25 February, 2000 and 30 August, 2000) earlier than the priority date of the patent IN 161 (22 May, 2002), the coverage of the subject matter of the claims in the patent by the claims in IN 176, disentitles the claims of AA to any protection after 24 May, 2021.

Counsel of BB further submitted that the plaintiff AA cannot, seek to ''evergreen" IN 176 beyond the life of the latter patent. As, according to him, IN 161 is invalid on the various grounds urged by him, Manufacture and marketing of EO, by his client, cannot be alleged to amount to infringement.

AA had, while applying for grant of patent CA 2486697 ('CA 697' in short) in respect of the compound claimed in the suit patent IN 161, before the Canadian Intellectual Property Office (IPO), admitted, in its response to objections raised by the Examiner in the Canadian IPO, that a salt form of some of the final compounds was inevitably formed during the reaction towards the final step. The following recital, as contained in the said response of AA to the objections of the Examiner in the Canadian IPO, was emphasised by BB's counsel :

''{i] it is noted that the reaction conditions for the final step in certain Examples (e.g. 64 and 85) involve a solution that contains a strong acid, such as trifluoroaceticacid. Even though none of the final compounds in International Application No. PCT/ US01/ 16863 specifically disclose a salt form, a salt form of some of the final compounds appears to have inevitably formed."

The sum and substance of BB's counsel was that AA having made the aforesaid admissions, before foreign jurisdictions, in respect of patents corresponding to IN 176, it was disentitled to seek to contend that IN 176 did not claim EO.

Referring to section 3 (d) of the Patents Act, BB's counsel submitted that the subject matter of IN 161 was not patentable, in view of the said express provision. Eltrombopag being a ''known substance" by virtue of IN 176, he contended that in order for any new form of Eltrombopag to be eligible for a patent, the complete specifications had to disclose the existence of additional efficacy. The only assertions of the plaintiff, regarding the advantages of EO over Eltrombopag per se, were that EO had better solubility and bioavailability and, therefore, better pharmacodynamic factors. Therapeutic effect, even to EO, was owing toEltrombopag. He added that the Supreme Court in the Novartis case, had clearly held that enhanced bioavailability was insufficient to indicate enhanced therapeutic efficacy, for the purposes of the Explanation to section 3(d). IN 161 was, therefore invalid on this ground as well.

It has also been sought to be contended by BB that its price was lower than that of the plaintiff's product and that public interest justified the refusal of the plaintiff's prayer for interlocutory injunction. BB's counsel repeatedly emphasised the fact that, at the interlocutory stage, the defendant was only required to make out a case of a credible challenge regarding the vulnerability of the suit patent to revocation. This standard, he submitted, had amply been met by the grounds raised by him.

Responding to the submissions of BB, the counsel for the plaintiff submitted that EO was a novel and inventive compound. EO, he submitted, was a salt which did not form part of any approved drug prior to the suit patent IN 161. It was a technical advancement over Eltrombopag per se, which was claimed and disclosed in prior art. EO, was, therefore, a new and inventive product.

Comparing IN 176 with the suit patent IN 161, counsel for AA submitted that the subject matter of IN 176 was Eltrombopag per se.

EO, the subject matter of the suit patent IN 161, was the outcome of protracted research and development undertaken on Eltrombopag. EO was a breakthrough drug used for treatment of chronic idiopathic thrombocytopenia, and had been marketed, in India, since 2011 under the brand name "REVOLADE". EO itself had been granted patent protection in over 60 jurisdictions. The therapeutic efficacy of EO stood recognised in over 90 countries, in which patent protection had been granted to it. EO was, therefore, a novel, inventive and technical advancement over IN 176.

The subject matter of the invention claimed in the suit patent IN 16l was, therefore, distinct and different from the entity IN claimed in Claim of IN 176. AA's counsel contended that there could be no question of any claim, or disclosure, of EO in IN 176, as EO was not a pharmaceutically acceptable salt of Eltrombopag prior to the priority date of IN l61.

Acceptance of the submissions canvassed by BB, submitted the counsel for AA, would render incremental inventions, resulting in technical advancements over the known prior art, nonpatentable, as all derivatives would be covered by the prior art. Section 3(d) would, thereby, be rendered otiose.

Thereafter, the counsel for AA addressed section 3(d) of the Patents Act. This provision, he submitted, was ex facie inapplicable, as no drug came out of IN 176 and no drug, containing Eltrombopag, was ever approved prior to IN 161. The subject matter of IN l6l, i.e. Eltrombopag Olamine, he submitted, was not a ''known substance" within the meaning of section 3(d), but was a "new compound" altogether.

Even if, it were to be assumed that EO was a new form of a known substance, within the meaning of section 3(d), he submitted that it would, nonetheless, be patentable, as it had enhanced therapeutic efficacy over the claims in IN 176. IN 176, he submitted, claimed the free acid Eltrombopag, which had no known efficacy. He relied on the decision in BristolMyers Squibb Holding Ireland Unlimited Co. v. B.D.R. Pharmaceuticals International Pvt. Ltd. to contend that the very fact that the marketable drug had first emerged from the suit patent IN 161 was itself an indicator of its enhanced efficacy over the claims in IN 176.

As EO had higher yield of Eltrombopag, as well as enhanced solubility and bioavailability as compared to the free acid form, counsel for AA submitted that the

therapeutic efficacy of EO was greater than Eltrombopag in the free acid form. He also submitted that the maximum plasma concentration of EO was thrice the plasma concentration of Eltrombopag in free acid form. This indicated that the bioavailability of EO was thrice the bioavailability of Eltrombopag in free acid form. This enhanced solubility and bioavailability, he submitted, had led to drug development and consequently, enhanced therapeutic efficacy of the compound claimed in the suit patent IN 161. It needs to be mentioned that BB acknowledged before the Court that the fact that it is manufacturing and dealing in Eltrombopag Olamine. Furthermore, BB contended that the plaintiff may have itself applied for grant of patent in respect of the allegedly infringing product but it did not.

The defendant, in the present case, neither launched any pre-grant nor any post-grant, opposition to IN 161. It has not initiated any proceeding before IPAB or any other authority, for revocation, cancellation or removal of the suit patent from the register of patents.

Counsel for AA further observed that, in the present case, EO was an unknown substance prior to IN 161. As such, the suit patent IN 161 could not be regarded as vulnerable to invalidity on the ground of section 3(d) of the Patents Act. He pointed out that the grounds of challenge, raised by BB to the validity of the suit patent IN 161 were, thus, without substance. Infringement of the suit patent having been admitted by the defendant, AA would be entitled to injunction and that the defendant should not be entitled to manufacture and market EO, during the subsistence of the suit patent IN 161.

Both the parties relied on the judgements of the Indian Courts and Foreign Courts. After going through the narrative above, answer the following questions with supporting legal principles and case law if any.

Questions :

(a) What are the principles of patentability under the Indian Patents Act, 1970 ? *(10 marks)*

(b) What should be the guiding principles in relying on the judgements of Indian Courts and Foreign Courts ? *(10 marks)*

(c) Explain the concept of ever-greening in section 3 (d) of the Patents Act bringing out the scope and meaning of 'efficacy' and 'efficiency'. *(10 marks)*

(d) What do you understand by 'credible challenge' and 'vulnerability' in the context of the case narrative ? *(10 marks)*

Answer 1(a)

An invention must (i) be new, i.e. not anticipated, (ii) involve an inventive step, (iii) be capable of industrial application, i.e. of being made or used in the industry and (iv) entail technical advance over existing knowledge, or have economic significance, rendering the invention not obvious to a person skilled in the art.

"Patentability" requires that the product must be an invention within the meaning of section 2(1) (j) and must not fall within the exceptions in section 3 of the Patents Act.

I. While assessing patentability of a claim for grant of patent, it had to be examined, in the first instance, whether the product was disentitled to patent on any of the grounds envisaged by section 3(d). The patentability of products would then have to be assessed, for determination of their patentability on the basis of section 2(1)(j) read with section 2(1)(ja).

II. A mere claim, without enabling disclosure, as would enable a person skilled in the art to work the invention, is not patentable.

III. The role of the complete specification accompanying a patent application is to teach what the invention was, how it was to be made, and how it was to be used. One invention is entitled only to one patent.

IV. One patent may, however, cover more than one invention, provided all inventions involved the same inventive steps.

V. Grant of repeated patents for the same invention results in the malaise of evergreening of a patent beyond its life, which is impermissible.

VI. Mere grant of a patent is not necessarily a *prima facie* indicator of its validity.

The object of patent law is to encourage scientific research, new technology and industrial progress. The price of the grant of monopoly is the disclosure of the invention at the Patent Office, which after the expiry of the fixed period of monopoly, passes into the public domain. The fundamental principle of patent law is that a patent is granted only for an invention which must have novelty and utility. It is essential for the validity of a patent that it must be the inventor's own discovery as opposed to mere verification of what was, already known before the date of the patent.

In order to be patentable, an improvement on something known before or a combination of different matters already known, should be something more than mere workshop improvement, and must independently satisfy the test of invention or inventive step. It must produce a new result, or a new article or better or cheaper article than before. The new subject matter must involve "invention" over what is old. Mere collection of more than one, integers or things, not involving the exercise of any inventive faculty does not qualify for the grant of a patent.

To decide whether an alleged invention involves novelty and an inventive step, certain broad criteria can be indicated. Firstly, if the "manner of manufacture patented, was publicly known, used or practiced in the before or at the date of patent, it will negate novelty or "subject matter". Prior public knowledge of the alleged invention can be by word of mouth or by publication through books or other media. Secondly, of the alleged invention discovery must not be the obvious or natural suggestion of what was previously known.

Novelty and anticipation are determined by reference to the language of the claim of the patent application. The grounds for opposition of a patent grant are almost the same as the tests for revocation of a patent once granted. Under s 64 of the Patents Act a patent will be revoked "where it is not novel". Under s 25 of the Act, the grant of a patent may be opposed on the ground of a lack of novelty after an application for a patent has been published and before the grant of a patent.

Answer 1(b)

Courts perhaps have the tendency to rely on judgements of foreign Courts in Intellectual Property, especially patent matters. Patent law is, unquestionably, still in an adolescent, even if not infantile stage, and much of the territory remains, even as on date, unexplored. It remains, nonetheless, an area of law governed by statute, and, therefore, one has, in the first instance, to be guided by decisions of Indian Courts, rendered in the light of the Patents Act applicable to this country, before seeking sustenance from decisions rendered abroad. Of course, this would apply only where the field is occupied by decisions of Indian Courts, and not where the Court finds itself invirgin territory. Where there are binding precedents of Indian Courts, resort to foreign decisions needs to be avoided, especially when they are cited with no attempt at comparing and contrasting the statutory interdicts, applicable in the country. A Constitution Bench of the Supreme Court cautioned, over half a century ago in *State of West Bengal* v. *B.K. Mondal,* thus, albeit in the context of section 70 of the Indian Contract Act, 1872:

"The question which the appellant has raised for our decision falls to be considered in the light of the provisions of section 70 and has to be answered on a fair and reasonable construction of the relevant terms of the said section. In such a case, where we are dealing with the problem of construing a specific statutory provision it would be unreasonable to invoke the assistance of English decisions dealing with the *statutory provisions contained in English law".*

Unfortunately, when citing authorities, rendered abroad in Intellectual Property matters, no attempt is made to compare, far less parallelize, the statutory provisions applicable in India with those applying in the jurisdiction where the decision has been rendered. Observations in foreign decisions are cited as authoritative propositions, without drawing the attention of the Court to the applicable statutory position in that jurisdiction. This should be avoided.

It is always a healthy practice to support the view taken on the basis of the Indian Patents Act, and the law as it has developed in this country.

The understanding of the law has, therefore, to be guided by the judgement of the Supreme Court as well as authoritative pronouncements of Division Benches of the High Courts.

In the case of *Bishwanath Prasad RadheyShyam* v. *Hindustan Metal Industries (1979) 2 SCC 511* is the first substantive decision on patents in India by the Supreme Court, which ruled upon three crucial propositions. Firstly, though pre-existing law did not require industrial application for patentability, the Court held that this has always been considered to be necessary by courts. "The foundation for this judicial interpretation is to be found in the fact that Section 26(1)(f) of the 1911 Act recognizes lack of utility as one of the grounds on which a patent can be revoked." Secondly, the Court clarified that "Prior public knowledge of the alleged invention which would disqualify the grant of a patent can be by word of mouth or by publication through books or other media". Lastly, it was ruled that the appropriate test for determining "inventive step" was laid down by *Salkond L.J. in Rado* v. *John Tye& Son Ltd. (1967) R.P.C. 297* as: "Whether the alleged discovery lies so much out of the Track of what was known before as not naturally to suggest itself to a person thinking on the subject, it must not be the obvious or natural suggestion of what was previously known".

In the case of *Monsanto Company* v. *Coramandal Indag Products (P) Ltd. (1986) 1 SCC 642*, the Supreme Court dealt with what is prior art and ruled that "to satisfy the requirement of being publicly known as used in clauses (e) and (f) of Sec. 64(1), it is not necessary that it should be widely used to the knowledge of the consumer public. It is sufficient if it is known to the persons who are engaged in the pursuit of knowledge of the patented product or process either as men of science or men of commerce or consumers.

In the case of *F. Hoffmann-La Roche* v. *Cipla, 2008 (37) PTC 71* a single judge of the Delhi High Court held that publicity of the material is not the sole test to determine obviousness, and also recognized the distinction between "obviousness" and "anticipation". The court ruled that:

"…The test of obviousness cannot be that the material or formula was published, but that having regard to the existing state of prior art or the published material, was it possible to a normal but unimaginative person skilled in the art to discern the step on the basis of the general common knowledge of the art at the priority date. The other deciding factor is whether the differences between the prior art would, without knowledge of the alleged invention, constitute steps which could have been obvious to the skilled man or whether they required any degree of invention."

In the case of *TVS Motor Co.* v. *Bajaj Auto Ltd., 2009 (40) PTC 689 (Mad—DB)*. It decided an important issue of patent construction. The Court stated that the general rule in regard to the construction of the validity of a patent is, that construction, which makes it valid should be preferred rather than the construction, which rendered it invalid. It was further held by the court that patent specification should intend to be read by a person skilled in the relevant art but their construction is for the Court and to do so it is necessary for the Court to be informed as to the meaning of the technical words and phrases and what was the common general knowledge, i.e., the knowledge that the notional skilled man would have.

Answer 1(c)

Evergreen- as the word suggests is something that is made to live forever. Now, evergreening of patents is a process whereby the time of the rights in patent is extended without any enhancement in the therapeutic efficacy of the Drug. With that I mean, the patents are given an extension period of another twenty years without any augmentation in the ability of the drug to treat a disease. An economy like India definitely cannot call this a welcome move as we have more mouths to feed than the hands to earn and more diseases to cure than the inventors of such cure.

"Efficacy" means the ability to produce a desired or intended result. Hence, the test of efficacy in the context of section 3(d) would be different, depending upon the result the product under consideration is desired or intended to produce. In other words, the test of efficacy would depend upon the function, utility or the purpose of the product under consideration. Therefore, for instance, in the case of a medicine that claims to cure a disease, the test of efficacy can only be "therapeutic efficacy". The question then arises: what would be the parameter of therapeutic efficacy and what are the advantages and benefits that may be taken into account for determining the enhancement of therapeutic efficacy? With regard to the genesis and the circumstances in which section 3(d) was amended there is no doubt that the "therapeutic efficacy" of a medicine must be judged strictly and narrowly. This provides an inference that the test of enhanced efficacy in

case of chemical substances, especially medicine, should receive a narrow and strict interpretation. It merits to be noted that the text added to section 3(d) by the 2005 Amendment lays down the condition of "enhancement of the known efficacy". Further, the Explanation requires the derivative to "differ significantly in properties with regard to efficacy". What is evident, therefore, is that not all advantageous or beneficial properties are relevant, but only such properties that directly relate to efficacy, is its therapeutic efficacy. Clearly, therefore, enhanced efficacy, within the meaning of Section 3 (d), is tounderstood as enhanced therapeutic efficacy.

In the case of *Novartis AG v.. Union of India*, Novartis filed for the patent application for grant of a patent over an anti-cancer drug called as GLIVEC which is used to treat Leukemia and Gastrointestinal Tumours and was built from BETA CRYSTALLINE form of "IMATINIB MESYLATE" and has patent in more than 35 Countries. The Controller of Patents at Chennai refused the application stating that this applied patent is slightly different version of already existing patent ZIMMERMANN PATENT and thus the applied Patent failed to satisfy the requirement of novelty and non-obviousness, as well as stated that the Patent is non-patentable under section 3(d) of Patents Act, 1970.

Affected by the Decision of the Controller, Novartis filed a writ petition before the Madras High Court stating that Section 3(d) of the Act is unconstitutional because it is not in compliance with TRIPS agreement and also violates Article-14 of Constitution of India and another against the order passed by the Controller of Patents at Chennai Office. The Madras High Court transferred the case to Intellectual Property Appellate Board in 2007 which held that though the invention satisfies the criteria of novelty and non-obviousness but is hit by Section 3(d) of the Patents Act, 1970 which was added to the Act to prevent the ever-greening of Patents. A Special Leave Petition was also filed by Novartis under Article 136 of Constitution of India where the two judge bench of SCI rejected the appeal and held that there was no newness proved by Novartis after a thorough comparison of both patents and thus no new patent can be granted over the similar patents as that will result in the abuse of idea behind the Patent Law of 1970 and thereby result in ever-greening of the pre-existing patent.

The judgment given by the Hon'ble Supreme Court is to prevent the ever-greening of existing patents and is a relief to those who can't afford the lifesaving drug as these pharmaceutical business hubs sell such lifesaving drugs at whooping prices making those unaffordable for the common man. As any would-be inventor knows, coming up with something the world has never seen before can be tough. Tweaking something old and calling it new, on the other hand, is considerably easier and thus the claims made by the Existing Patent holders that they are doing this on purpose- being to further invest in R&D (Research and Development), which ultimately is done when the patent expiry is near and the existing monopoly in the market is about to be lost.

Apex Court in its judgement made clear that India is a developing country and the availability of medicines at a cheaper rate is necessary for the lives of people. Section-3(d) of Patent Act, 1970 prevents from obtaining secondary patent by introducing minor changes in existing technology from these big pharmaceutical companies.

The Ever-greening of Patents is a step strongly opposed by the Patents Act and the judgments by the Indian Courts favors the same. The judgment in the Novartis case is a true example that the monopolistic practices of the biggest market players are under the

eyes of the Court and the Courts will always keep the people first and at priority over anything and everything. The Ever-greening of Patents, when they near expiry, is a hidden enemy in the pharmaceutical market and is unfair in many ways.

Answer 1(d)

A patentee enjoys the rights to his patent but mere grant of a patent does not mean that the patent is valid. A patent is valid as long as it is not challenged. Revocation proceedings against a granted patent under section 64 of the Indian Patents Act 1970 can be initiated any time after the grant of a patent. However, it is necessary that a credible challenge to the validity of a patent has to be raised. The moot point is when one can say that a credible challenge has been raised against a granted patent? The answer lies in convincing a court that a triable question arises with respect to the validity of a patent. If the court is convinced that a triable question to validity has been raised, interim injunction can be granted. However, other factors also need to be kept in mind before granting interim injunction. The question of deciding whether the patent is valid can only be decided during a trial. In other words, it is the question of vulnerability of a patent to invalidation which needs to be decided when preliminary injunction is sought while actual validity of a patent is the issue to be decided at trial. A defendant should, therefore, raise a substantial question regarding the invalidity and such a question does not require as hard evidence as is required at the trial stage. Thus, a credible challenge can be said to have been raised only when a substantial question regarding invalidity has been raised and that the claims at issue are vulnerable. For supporting its averments, the Court referred to judgements of other jurisdictions like *Abbot Laboratories v. Andrx Pharmaceuticals Inc. and Helifix North America Corporation v., Blok-Lok, Ltd.*

There appears to be a fundamental misconception relating to the concepts of "credible challenge" and of "vulnerability", if one were to read the narrative and in particular the contentions of both AA and BB. The submissions advanced by BB seem to have been predicated on the premise that the slightest shadow of doubt, which could be cast on the suit patent, was sufficient to constitute a credible challenge, exposing its vulnerability to revocation. This proposition, appears to be misconceived. During the examination of a patent application, a thorough study is normally undertaken by the Patent Office, regarding the validity of the patent assought. When an infringer seeks to defend infringement on the ground that the patent that he infringes is invalid, the onus, to prove such invalidity heavily lies on him. This standard has to be met, when applying the principle of "credibility". Repeated attempts were made to the Court that any and every ground that BB sought to raise, and for which a cast iron response from AA was not immediately forthcoming, was sufficient to establish vulnerability of the suit patent to revocation. Revocation is a drastic act, and a patent, once granted, cannot be treated as easily vulnerable to revocation. Even if, *prima facie,* a ground for revocation is made out, revocation is not automatic, but remains a matter of discretion, for the patent authority. The grant of such discretion is itself a pointer to the legislative intent that, before revoking a patent, the authority is required to satisfy itself, that, all considerations having been borne in mind, revocation is absolutely necessary. Vulnerability to revocation has also to be judged on the same standard. It is only when, judged on that standard, a credible challenge to the validity of the patent as vulnerable to revocation is made out and that an infringer can escape the consequences of infringement. The standard is, therefore, high, rather than low.

In the comprehensive judgment of *FMC Corporation & Anr. vs Natco Pharma Limited* with respect to grant of interim injunctions involving a patent relating to "Chlorantraniliprole"

(also known as CTPR), the Delhi High Court rejected a valiant effort by the defendant based on several grounds under the patent law. The Court refused to grant permission to the defendant to manufacture and sell the insecticide during the pendency of the suit. While coming to its conclusion, the Court pointed out that the defendant failed to make a credible challenge with respect to vulnerability of patent validity.The Court stated that the Supreme Court's judgment in Novartis does not state that disclosure is equal to claim coverage, but simply points out that there cannot be a large gap between the two. The Court also observed that disclosure of a compound in a markush claim does not necessarily make the species patent susceptible to anticipation, prior claiming, obviousness or Section 3d challenge. It then went on to cite some principles pertaining to analyzing patentability of selection patents by equating selection patents to species patents in this case.

Question 2

XX is a renowned company manufacturing different kinds of soft drinks. The company got registered a Trademark SOFTA for its soft drinks. The soft drinks became very popular with customers and the company registered a good turnover and enviable profit. Its balance sheet and Profit and Loss accounts were very appreciative with its shareholders satisfied.

XX came across a general advertisement of a Trademark SIFTA which was deceptively and confusingly similar to its own Trademark SOFTA. The said advertisement was by a competitor YY in soft drinks. XX filed a notice of opposition and a plaint before the Registrar of Trademarks. It is the case of XX that the adoption of the Trademark SOFTA by YY was a deliberate attempt by it to ride piggy back on the reputation and goodwill of XX. XX sought a decree of permanent and mandatory injunction against YY from continuing with the aforesaid advertisement. The company also claimed damages against YY.

Initially YY appeared before the Registrar on receiving a notice from him and put in its appearance through its representative. But subsequently, it chose to absent itself from the proceedings before the Registrar. But, YY in its only appearance orally defended its Trademark SIFTA contending that SOFTA and SIFTA were clearly distinguishable and would not result in confusion or deception in the soft drink consumers. It did not submit to the Registrar any written reply to the plaint of XX or evidence. In order to establish its case, XX through its senior official who was formally authorised by its Board of directors to appear in courts and legal proceedings on behalf of the company adduced its evidence. The official was produced as a witness who deposed in favour of the company XX.

Study the narrative above and answer the following questions, quoting the relevant legal provisions and case laws, if any.

(a) In the case above, is there any infringement of the registered Trademark 'SOFTA' by the company YY ? Give reasons.

(b) What would be your decision regarding the claim for damages made by XX against YY ? Justify your decision citing some relevant case laws.

(6 marks each)

Answer 2(a)

XX adduced evidence through its official, duly authorised by its Board of Directors to represent the company XX. The official deposed to the facts set out in the plaint and proved that SOFTA was the company's registered Trademark. The defendant YY did not adduce any evidence at all but merely contended through its representative official that its Trademark was distinct from XX's Trademark.

The Trademark SOFTA and Trademark SIFTA are liable to cause deception in view of their similarity. It cannot be lost sight of that the soft drinks are purchased by the public at large including children, who may not be well educated and thus, the chances of deception are even higher. In view of the aforesaid, the adoption of the Trademark SIFTA, which appears to have no meaning, when there is an existing Trademark SOFTA of XX, is not bonafide and the object appears to be to deceive the public into purchasing the product of YY misleading them to assume that the product (soft drink) emanated from XX. The object is thus to ride piggy back on the reputation of XX. This is a clear case of infringement. The concept of deceptive similarity has been discussed under Section 2(h) of the Trade Marks Act, 1999 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." The criteria for the determination of the deceptive similarity of marks had been decided in the case of Cadilia Healthcare Limited v. Cadilia Pharmaceutical Limited, where the Hon'ble Supreme Court set out specific rules for deciding the nature of similar or misleading marks.

The nature of the marks, whether the marks are words, labels, or composite marks.

The degree of resemblance between the marks, phonetic or visual, or similarity in the idea.

The nature of goods or services in respect of which they are used as trademarks.

The similarity in the nature, character, and performance of the goods/services of the rival traders/service providers.

The class of purchasers/customers who are likely to buy the goods or avail the services, 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 in the trading channels that the goods/services traverse in the course of business or placing an order for the good.

In the case of *SM Dyechem Ltd.* v. *Cadbury (India) Ltd.* : , the plaintiff established a chip and wafers business under the trademark "PIKNIK." Later, the defendant established a chocolate business under the name "PICNIC." Following that, a trademark infringement suit was filed. The Court determined that the trademarks did not fall into the category of deceptive similarity because they differ in appearance and word composition."

In the case of *M/S Allied Blenders and Distillers Pvt. Ltd.* v. *Govind Yadav & Anr.* :, the plaintiff claimed that the defendant's trademark "Fauji" is defectively similar to that of the plaintiff's, i.e., "Officer's Choice". The claim was made based on similarity of concept in the creation of the trademarks, as "Fauji" is a Hindi translation of a military officer. "Furthermore, both parties are in the alcoholic beverage business. Furthermore, the packaging of both bottles is similar.

Answer 2(b)

It is generally accepted by Courts that a party which absents itself from the Court proceedings should not be able to avoid the rigours of damages as that would amount to giving an escape route to such absent parties from the proceedings. The Courts in their judgments in *Hindustan Machines* Vs *Royal Electrical Appliances case* and in *Relaxo Rubber limited and another* Vs. *Selection Foot Wear and another* awarded damages in cases of abstention by a party without adequate reason. Damages are awarded to discourage and dishearten law breakers who indulge in violation with impunity. The rationale for this is that the defendant YY chose to stay away from Court to escape damages. So, the damages can be awarded to XX as against YY. The following case decision also substantiate the same point in this regard:-

- *SM Dyechem Ltd.* v. *Cadbury (India) Ltd.*: In this case, the plaintiff established a chip and wafers business under the trademark "PIKNIK." Later, the defendant established a chocolate business under the name "PICNIC." Following that, a trademark infringement suit was filed. The Court determined that the trademarks did not fall into the category of deceptive similarity because they differ in appearance and word composition."
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- Though trade dress plays a significant role in deciding the cases of trademark infringement, in this case, the court held that there is no deceptive similarity between the trademarks "Officer's Choice" and "Fauji" and hence, dismissed the trademark infringement suit.
- *Parle Products (P) Ltd.* v. *J. P. & Co. Mysore* : The Supreme Court stated that to conclude whether a mark is deceptively similar to another, the comprehensive and vital features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to avoid one design from being mistaken for the other. It would be enough if the questionable mark bears such an overall resemblance to the registered mark as would be likely to deceive a person usually dealing with one to accept the other if offered to him.
- *M/S Mahashian Di Hatti Ltd.* v. *Mr. Raj Niwas*: In this case, the plaintiff used the registered logo, MDH inside three hexagon devices on red color background, in its business activity of manufacturing and selling spices & condiments. The aforementioned logo has been in use since 1949 in respect of numerous products. The plaintiff contended that the logo used by the defendant, MHS within a hexagon device with a red color background was similar to its logo. The plaintiff, therefore, pursued an injunction restraining the defendant who was also involved in the same business activity from using the infringing logo MHS or any other trademark identical or deceptively similar to its MDH logo. The defendant inter alia tried to weaken these arguments by contending the phonetic dissimilarity between MDH and MHS.

The Court compared the logos of both the plaintiff and the defendant and inter alia determined the following similarities:

1. as in the logo used by the plaintiff, the defendant made use of three hexagons for structuring its logo;
2. the letters of both MDH and MHS were in white and
3. Similar to MDH, the background color in MHS was red.

In light of the above resemblances, the Court decided the presence of strong visual resemblance despite weak phonetic resemblance. Further, it was also noted that both the parties were involved in the same business activity of manufacturing and selling spices. Thus, the registered trademark of the plaintiff was held to be infringed by the defendant.

Question 3

(a) Is IPR recognised in Competition Law ? Discuss the need for relationship between Competition Law and IP Law.

(b) What are the benefits of Registration under Geographical Indications of Goods (Registration and Protection) Act, 1999 ? Certain Geographical Indications are prohibited. What are they ?

(6 marks each)

Answer 3(a)

The Competition Act, 2002 in India recognizes the importance of IPRs such as Patents, Copyrights, Trademarks, Geographical Indications, Industrial Designs and Integrated Circuit Designs. Also, section 3 of the Competition Act prohibits anti-competitive agreements. Section 3(5) lays down that this prohibition shall not restrict "the right of any person to restrain any infringement of or to impose reasonable conditions, as may be necessary for protecting any of his rights" enjoyed under the statutes relating to the above mentioned IPRs. Hence, this clearly implies that unreasonable conditions imposed by an IPR holder while licensing his Intellectual Property Rights would be prohibited under the Competition Act.

Competition Law maximizes social welfare by condemning monopolies while Intellectual Property Law somehow also does the same by granting only temporary monopolies (restricted to pre-decided time frames). And after completion of such time frame, competition replaces temporary monopolies. The rationale behind this approach is that the Intellectual Property Law should provide economically meaningful monopolies. Otherwise, Competition Law which by itself does not condemn the mere possession of monopoly power, but rather certain exercises of or efforts to obtain it, might be allowed to interfere with the monopoly. Hence, there should be reasonable exercise of the monopoly power in order to protect the consumer's interest. Intellectual property rights grant the owners exclusive legal rights, limiting others' access to the same, and thus reducing market competition. Competition law/anti-trust law, on the other hand, seeks to promote competition and increase market access. As a result, we can see that these two topics are diametrically opposed. However, another school of thought holds that the two realms can not only coexist but also complement each other.

It has been observed that IPR and competition law are incompatible. It is because IPR grants the innovators of a new product a monopoly that others do not have access to, or it simply protects those owners from commercial exploitation of their products by granting them exclusive legal rights. Competition law, on the other hand, is opposed to static market access and competition rules, specifically the abuse of monopoly position. As a result, it should be noted that the term "competition" is used differently by IPR and Competition Law.

The main goal of granting licences in IPR is to encourage competition among prospective innovators while simultaneously restricting competition in various ways. After a specified period, the rights revert to the public domain, effectively ending the competition. The primary goal of competition law is to prevent abusive market practices, stimulate and encourage market competition, and ensure that customers receive high-quality goods and services at a reasonable price. Thus, we can say that IPR is about individual rights that provide monopoly only to the owner of the innovated product in order to protect his invention from commercial exploitation, whereas Commercial Law protects the interests of the market and the broader community, rather than an individual, by limiting private rights that may harm the community's wellbeing and thus encourages market competitiveness. Despite the fact that they are diametrically opposed, their ultimate goal is consumer welfare.

IPR protection is a tool for encouraging innovation, which benefits consumers by allowing for the development of new and improved goods and services, as well as promoting economic growth. It grants innovators the right to legitimately bar other parties from commercializing innovative products and processes based on that new knowledge for a limited time. In other words, the law provides innovators or IPR holders with a temporary monopoly to recover costs incurred during the research and innovation process. As a result, they earn just and reasonable profits, giving them an incentive to innovate.

Competition law, on the other hand, is critical in closing market gaps, disciplining anticompetitive practices, preventing monopoly abuse, inducing optimal resource allocation, and benefiting consumers with fair prices, a wider selection, and higher quality. As a result, it ensures that the dominant power associated with IPRs is not overcomplicated, leveraged, or extended to the detriment of competition. Furthermore, while competition law seeks to protect competition and the competitive process, which in turn encourages innovators to be the first in the market with a new product or service at a price and quality that consumers want, it also emphasizes the importance of stimulating innovation as competitive inputs, and thus works to improve consumer welfare.

Answer 3(b)

Geographical Indications registration gives to the registered proprietor and its authorised users, the legal rights to the exclusive use of the GI and also the right to obtain relief in case of its infringement. Exclusion of unauthorized persons from misusing GI would ensure that genuine products of the rightful producers are marketed.

For registrability, the GI must fall within the scope of the definition of the expression: Geographical Indication" as given under section 2 (1) (e) of the GI Act. In addition, such a GI should not fall within the purview of prohibitions contained in section 9 which are as follows:

a. The use of which would be likely to deceive or cause confusion; or

b. The use of which would be contrary to any law for the time being in force; or

c. Which comprises or contains scandalous or obscene matter; or

d. Which comprises or contains any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India; or

e. Which would otherwise be disentitled to protection in a Court; or

f. Which are determined to be generic names or indications of goods and are, therefore, not or ceased to be protected in their country of origin, or which have fallen into disuse in that country; or

g. Which, although literally true as to the territory, region or locality in which the goods originate, but falsely represent to the persons that the goods originate in another territory, region or locality, as the case may be,

The Geographical Indicators Goods (Registration and Protection) Act, 1999 has penal provisions for violation of various provisions related to Geographical indications which are discussed below:

- Falsifying and incorrectly applying geographical indications to the goods.
- Selling goods to which false geographical indications apply.
- Misrepresentation of a geographical indication in registered form.
- Improperly describes a place of geographically connected business indication Registry.
- Falsification of entries in the register.

Every region has something unique and exclusive to offer and the G.I. tag honours and recognises these distinctive identity markers of these products and methods of production. There are plenty good reasons to opt for one such as maximization of the export value and safeguarding cultural heritage, amongst others:

- *Branding* : The regional specificity becomes a brand in itself acting as a marketing tactic. It also helps in the elimination of intermediaries leading to higher profits for the producers of the heritage art and goods.
- *Proof of quality* : A GI tag is a guarantee of premium quality of the product coming from its association to a certain region and the history of that product in that territory, especially as it is recognized by the national government of the country of origin (and in some cases, multiple governments all over the world). This in turn increases the possible income in the market both from the premium quality and the heritage attached to it.
- *Authenticity* : A similar superior quality can be imitated by the means of the power loom and other industrial methods, which acts as a threat to the uniqueness of the handcrafted material but the presence of a GI tag preserves the essence derived from centuries of practice and honing the craft by giving the product a market edge over the imitations.
- *Cultural protection* : The products that receive a GI tag are rooted in the heritage

of the place whether they are natural or manufactured goods, and the tag helps preserve the traditional methods of production helping protect the local culture and heritage. Many crafts that had been dying from the lack of patronage have been revived post being awarded the tag from the awareness and publicity created resultantly.

- *Increase in tourism* : There's a direct connection between the global reputation gained from the protection of the GI tag and the increase in tourism based on the global demand for these products.
- *Economic boost* : The economic value of a product with a GI tag attached is higher than a regular product due to the promise of quality attached to it and it also helps boost the demand of the product in the market.

Question 4

(a) List the criteria for Registration of Plant Variety. Who can apply for Registration of Plant Variety ?

(b) The registration of layout design which has been commercially exploited anywhere in India or a Convention country has been Prohibited. Explain this with the SICLD Act, 2000. *(6 marks each)*

Answer 4(a)

Plant variety protection provides legal protection of a plant variety to a breeder in the form of Plant Breeder's Rights (PBRs). PBRs are intellectual property rights that provide exclusive rights to a breeder of the registered variety. In India, the Plant Variety Protection and Farmers Rights (PPVFR) Act, 2001 is a sui generis system that aims to provide for the establishment of an effective system for protection of plant varieties and the rights of plant breeders and farmers.

The following types of plant varieties can be registered under PPVFR Act, 2001:

- New varieties
- Extant variety
- Farmers' variety
- Essentially derived variety

A new variety shall be registered under PPVFR Act, 2001 if it conforms to the criteria of novelty, distinctiveness, uniformity and stability.

Novel : if at the date of filing an application for registration for protection, the propagating or harvested material of such variety has not been sold or otherwise disposed of in India earlier than one year or outside India, in the case of trees or vines earlier than six years, or in any other case earlier than four years, before the date of filing such application.

Distinct : A variety is said to be distinct, if it is clearly distinguishable by at least one essential characteristic from any other variety whose existence is a matter of common knowledge in any country at the time of filing an application.

Uniform : A variety is said to be uniform, if subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its essential characteristics.

Stable : A variety is said to be stable if its essential characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

- Any person claiming to be the breeder of the variety;
- Any successor of the breeder of the variety;
- Any person being the assignee or the breeder of the variety in respect of the right to make such application;
- Any farmer or group of farmers or community of farmers claiming to be breeder of the variety;
- Any person authorized to make application on behalf of farmers and
- Any University or publicly funded agricultural institution claiming to be breeder of the variety.
- Any University or publicity funded agricultural institution claiming to be breeder of the variety.

Answer 4(b)

The Purpose of obtaining the design registration under the Designs Act is to safeguard a novel or an innovative design so created which is to be applied to a specific article under manufacturing process through an Industrial Process or mode. At times, we see that the buying behaviour of the customers towards some articles for consumption is inclined not only by their actual product quality but also by the design of their appearance, e.g., a mobile phone or goggles. The main objective of obtaining a design Registration is to make sure that the particular artisan, creator, craftsman, engineer or the designer of that design having unique appearance is not deprived and deceived of his bonafide reward by some copycats, who might tend to use his design to their goods. The SICLD Act, 2000 prohibits the registration of certain Layout designs. Layout design which is not original is prohibited. Similarly, the registration of layout design which has been commercially exploited anywhere in India or a convention country has been prohibited. Layout design which is not inherently distinctive or which is not inherently capable of being distinguishable from any other registered layout-design also cannot be registered. The Act, however, provides that a layout-design which has been commercially exploited for not more than two years from the date on which an application for its registration has been filed either in India or a convention country shall be considered as not having been commercially exploited.

According to SICLD Act, 2000, layout-design is to be considered as original if it is the result of its creator's intellectual efforts and is not commonly known to the creators of layout-designs and manufacturers of semiconductor integrated circuits at the time of its creation. The Act further provides that a layout-design consisting of such combination of elements and interconnections that are commonly known among creators of layout-designs and manufacturers of semiconductor integrated circuits shall be considered as

original if such combination taken as a whole is the result of its creator's intellectual efforts. Furthermore, this Act provides that where an original layout-design has been created in execution of a commission or a contract of employment, the right of registration to such layout-design shall belong, in the absence of any contractual provision to the contrary, to the person who commissioned the work or to the employer. Thus, the Act does not require 'novelty' (as in patents) but 'distinctiveness' for the purpose of registration. The need to show 'intellectual effort' might be difficult given the use of layout-design, and the fact that the principles of assembling the elements of a layout-design are fairly well established, though the effort involved in doing so might be substantial. Therefore, this originality requirement is stronger than the originality required under the Copyright Act, but weaker than the novelty requirement under the Patents Act.

Question 5

(a) Section 13 of the Copyright Act provides that copyright shall subsist throughout India in certain classes of works. Enumerate this section with examples.

(b) What kind of Trade Secrets Protection is promised in Brazil and Japan and how it is different from India ?

(6 marks each)

Answer 5(a)

Copyright is a legal right which provides protection to the original creations of human mind and intellect. Artistic work is a form of work over which copyright is available. The word "artistic" is commonly thought of pertaining to a painting or a sculpture, however, there are various other forms which are recognized by the Copyright Act, 1957.

Section 2(c) of the copyright act defines "artistic work" as,

- a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
- a work of architecture; and"
- any other work of artistic craftsmanship;

Therefore, to qualify as an artistic work, the work need not possess high quality of art. A work can be artistic even with de minimus artistic quality. However, the work must be an original expression of thought i.e. the work must have "originality" to qualify as an artistic work under the Copyright Act. The expression in the work should be the result of application of skill and judgement on the part of the artist creating the work, that is, the artist must have applied more than some mere mechanical exercise in order to create the work.

Delhi High Court in the case of, *Marico Ltd* vs. *Mrs. Jagit Kaur*, has allowed the rectification application of Marico Ltd (hereinafter referred to as the "Appellant") holding that the artistic work for the label of Mrs. Jagit Kaur (hereinafter referred to as the "Respondent") "NIHAL UTTAM" is not an original work under section 13 of The Copyrights Act, 1957. It was held that the Respondent's said label is a substantial reproduction and a colorable imitation of the Appellant's "NIHAR COCONUT OIL".

The Court observed that a perusal of the labels clearly shows that the Respondent's artistic work "NIHAL UTTAM" is not an original artistic work but an imitation of the Appellant's label. The Respondent's label is a substantial reproduction and a colorable imitation of the Appellant's "NIHAR COCONUT OIL". The Appellant is thus a person aggrieved and is entitled to maintain the petition under Section 50 of the Copyright Act 1957.

The Court in the order stated that the colour scheme between the two is same, further the manner in which the coconut tree and the broken coconuts are placed is the same.

The documents submitted by the Appellant sufficiently show that the label was available earlier in the market. The Appellant's products were openly advertised and have substantial sale in the market. Clearly the Respondent is in a position to know about its existence and copy the same.

It further held, that the Copyright Board was concerned with the artistic features in the label and not the trademark, hence, the rejection of the rectification application on the ground that the words are from different origin is contrary to law.

Section 13 of the Copyright Act provides that copyright shall subsist throughout India in certain classes of works which are enumerated in the section. Copyright subsists throughout India in the following classes of works:

– Original literary, dramatic, musical and artistic works;

– Cinematograph films;and

– Sound recordings.

In *Macmillan and Company Limited* v. *K. and J. Cooper, AIR 1924 PC 75*, it was held that the word 'original' does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of 'literary work, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought; but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author. What is the precise amount of the knowledge, labour, judgement or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree.

In *Camlin Private Limited* v. *National Pencil Industries, (2002)* Del, Delhi High Court held that copyright subsists only in an original literary work. But it is not necessary that the work should be the expression of the original or inventive thought, for Copyright Act are not concerned with the originality of ideas, but with the expression of thought, and in the case of a literary work, with the expression of thought in print or writing. Originality for thepurpose of copyright law relates to the expression of thought, but such expression need not be original or novel. The essential requirement is that the work must not be copied from another work but must originate from the author. An artistic work means-

- a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;

- a work of architecture;and
- any other work of artistic craftsmanship.

Word "artistic" is merely used as a generic term to include the different processes of creating works set out in the definition section and that provides that a work produced by one such processes, and that its creation involved some skill or labour on the part of the artist, it is protected [*Associated Publishers (Madras) Ltd.* v. *K. Bashyam alias 'Arya' & Another AIR 1961 Mad. 114 (1962) 1 Mad LJ 258*].

What is required for copyright protection in an artistic work is 'originality'. It is not originality of idea or the theme behind the work but the expression of the work which requires to be original. The originality required as per the Act is a minimum amount of originality. What is prevented under the Copyright Act is making of copies without permission of the author. A copy is one which is either a reproduction of the original or a work which closely resembles the original [*Challenger Knitting Mills* v. *Kothari Hosery Factory 2002 PTC (24) 756 Del.(Reg.)*].

"Musical work" means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music. A musical work need not be written down to enjoy copyright protection.

"Sound recording" means a recording of sounds from which sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. A phonogram and a CDROM are sound recordings.

"Cinematograph film" means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films.

The expression "cinematograph film" in Section 2(f) of the Copyright Act, 1957 includes video film also which has been recorded in VCR. *Entertaining Enterprises & Others* v. *State of Tamil Nadu & another AIR 1984 Mad. 278*.

The Bombay High Court in *Fortune Films International* v. *Dev Anand & Another AIR 1979 Bom.17*, has held that in view of the definitions of "artistic work", "dramatic work" and cinematograph film", it would appear that the Copyright Act, 1957 does not recognize the performance of an actor as 'work' which is protected by the Copyright Act.

The Court, in this case, has reiterated the qualification for a work to be artistic i.e. original thought. This is one of the aspects of copyright in the absence of which the same may not be registered. The case thus provides that lack of originality is the touchstone of rectification petition. The Court held that "any entry made of a work which is not an original work would be an entry wrongly made in the Register". This implies that similarity with an already existing trademark, provides an important basis for rectification of copyright register thereby cancelling the registration of the said artistic work.

Answer 5(b)

Trade secret law safeguards technological and commercial information that is not commonly recognized in the trade and prevents others from commercially exploiting it

without authorization. The purpose of trade secrets protection is to promote research and development by protecting the source of business information and to uphold proper business ethics. A trade secret, or confidential information in the trade, must contain secret information that no one else knows about, it must have commercial value, and reasonable measures must be taken to safeguard the secret. A formula, pattern, compilation programme device, method, or technique that derives independent economic value from not being known can be recognised as a trade secret. Hence, trade secrets can be understood as Intellectual Property rights on confidential information which may be sold or licensed.

Brazil

In 1996, Brazil revamped its intellectual property laws. Trade secrets are protected under the rubric of "unfair competition." Borrowing from U.S. law, a variant of the Section 757 (6-factor) test is used to determine whether a particular piece of information qualifies as a trade secret, Common knowledge, knowledge in the public domain, or knowledge that is apparent to an expert in the field cannot qualify for protection as trade secrets. The trade secret owner must take positive steps to safeguard the secrecy of the information.

The full panoply of relief is available—compensatory damages, punitive damages and injunctions. There are also criminal sanctions available against anyone who releases, exploits, or uses without authorization a trade secret to which he or she had access by virtue of a contractual or employment relationship.

Japan

Effective June 15, 1991, Japan enacted a national trade secrets law. Trade secrets include any "technical or business" information that has commercial value, is not in the public domain, and which has been "administered" as a trade secret. Infringement occurs when a person procures a trade secret, by theft, fraud, or extortion or when there is an unauthorized use or disclosure of a lawfully acquired trade secret for unfair competition. An injured party may obtain injunctive relief and damages. The trade secret holder may also request destruction of any articles that have been manufactured as a result of the illegally obtained trade secret. The statute has similarities to the Uniform Trade Secrets Act. For sample, there is a 3-year statute of limitations after discovery of the trade secret violation. There are no criminal penalties in the statute.

'Non-Disclosure Agreement (NDA)' or 'Confidentiality Agreement (CA)'. Usually such agreement precedes any other commercial agreement between two business entities entering into business for the first time as both are suspicious about each other as they are not aware of business ethics of each other. Such agreements are signed first before signing of any commercial agreement of substance involving critical business relation - be it for 'development of dies or moulds' or 'for sharing commercial designs' or for development of design of products or 'for mass production on contract basis' or assignment of patents / trade marks / other trade secrets under franchise agreements' or 'acquisition of any business' or 'technology transfer agreements'. These basic agreements for protection of trade secrets are covered under Indian Contract Act and Indian Penal Code. You also might have read about 'Confidentiality Clause'. This confidentiality clause is essential clause in almost every agreement signed by business entity with other

stakeholders (including employees, vendors, distribution channels, professionals and others).

As mentioned above, in India, no substantive authoritative separate statute to deal with trade secrets. Even very few case laws are available to determine the nature or ambit of trade secrets. Some such decisions dissecting the trade secrets of various businesses are mentioned herein.

1. *American Express Bank Ltd.* v. *Ms. PriyaPuri (2006)III LLJ 540(Del) Delhi High Court*, in this case defined trade secrets as "… formulae, technical know-how or a peculiar mode or method of business adopted by an employer which is unknown to others."
2. *Michael Heath Nathan Johnson* v. *Subhash Chandra AndOrs (60(1995) DLT 757) and John Richard Brady And Ors* v. *Chemical Process Equipments P. Ltd. And Anr (AIR 1987 Delhi 37*2) took note of the contentions of the counsels who referred to English decisions to define trade secrets
3. *Mr. Anil Gupta and Anr.* v. *Mr. KunalDasgupta and Ors (97 (2002) DLT 257)* the Delhi High Court held that the concept developed and evolved by the plaintiff is the result of the work done by the plaintiff upon material which may be available for the use of anybody, but what makes it confidential is the fact that the plaintiff has used his brain and thus produced a result in the shape of a concept.

The legislations which are having a connection with the trade secrets can be summed up as

1. Copyright Act, 1957[Section 51,55 and 63]
2. The Designs Act, 2000
3. The Information Technology Act, 2000[Section 65, 72]
4. Indian Penal Code [Section 408, 415]
5. The Indian Contract Act [Section 27]
6. The Competition Act, 2002 [Section 3]
7. Civil Procedure Code
8. Criminal Procedure Code

In the case of *Richard Brady v. Chemical Process Equipment Pvt. Ltd* . , the Delhi High Court went farther by invoking a broader equitable jurisdiction and awarding an injunction in the absence of a contract. Non-compete covenants, non-solicitation covenants, non-poaching covenants, and confidentiality covenants are all examples of restrictive covenants. The courts have recognized client information kept in databases as copyrightable material under the Copyright Act, 1957, implying indirectly to protection of trade secrets and confidential information from disclosure/infringement.

Question 6

(a) If any person working for the benefit of person with disability on a profit basis or for business can apply Copyright Board for a compulsory licence to publish any work in which copyright subsists for the benefit of such person. Comment.

(b) What are the grounds and procedure to register a 'Patent' under the law relating to Patents in India ? Once a patent is granted can it be challenged further ? State your answer with reasons and relevant provisions.

(6 marks each)

Answer 6(a)

Section 31B(1) of the Copyright Act, 1957 provides that any person working for the benefit of persons with disability on a profit basis or for business may apply to the Copyright Board in prescribed manner for a compulsory licence to publish any work in which copyright subsists for the benefit of such persons, in a case to which clause (zb) of sub-section (1) of Section 52 does not apply and the Copyright Board shall dispose of such application as expeditiously as possible and endeavour shall be made to dispose of such application within a period of two months from the date of receipt of the application.

The Copyright Board may on receipt of an application inquire, or direct such inquiry as it considers necessary to establish the credentials of the applicant and satisfy itself that the application has been made in good faith and a compulsory licence needs to be issued to make the work available to the disabled, it may direct the Registrar of Copyrights to grant to the applicant such a licence to publish the work.

It may be noted that clause (zb) of sub-section (1) of Section 52 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.

However, 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 and the organization 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.

Subsequent to providing for the proprietors of rights in the work a sensible chance of being heard and in the wake of holding essential request, if the copyright board is fulfilled that a necessary permit should be issued to make the work accessible to the debilitated, it might guide the register of copyrights to give to the candidate such a permit to distribute the work.

The obligatory permit is to determine the methods and organization of production, the period amid which the mandatory permit might be practiced and on account of issues of duplicates, the quantity of duplicates that might be issued including the rate or sovereignty

It may be noted that "any organization" includes organization registered under Section 12A of the Incometax Act, 1961 and working for the benefit of persons with disability or recognized 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 recognized by the Government."

Section 31B has been acquainted with give mandatory permit in attempts to the banquet of incapacitated. Any individual for the advantage of persons with inability on a benefit premise or for business might apply to copyright board for an obligatory permit to distribute any work in which copyright subsists for the advantage of such individual Further the section clarifies that the license is available only in a case to which clause (zb) of subsection 1 of section 52 does not apply and the copyright board shall dispose of such application within a period of two months from the date of receipt of application. Each mandatory permit issued under this area might determine the methods and organization of distribution, the period amid which the obligatory permit might be practiced and duplicates that might be issued including the rate or sovereignty.

A new clause (zb) has been added to section 52(1) providing for fair use of the work for the benefit of disabled. The statement accommodates the adjustment, generation, issue of duplicates or correspondence to people in general of any work in any open organization, to encourage persons with handicap to get to works incorporating imparting to any individual with incapacity, for private or individual use, instructive reason or research. These rights are accessible to any individual or association working for the advantage of the persons with incapacity. The provisio to the proviso orders that the duplicates of the works in such open configuration are made accessible to the persons with handicap on a non-benefit premise and just the expense of generation could be recouped from them. Such association might guarantee that the duplicates of works in such open organization are utilized just by persons with handicap and ought to find a way to keep their entrance into common channels of business.

Answer 6(b)

The conditions of Patentability are:

- Novelty
- Inventive step (non-obviousness) and
- Industrial applicability (utility)

Novelty.- A novel invention is one which has not been disclosed in the prior art where 'prior art' means everything that has been published, presented or otherwise disclosed to the public on the date of Patent (The 'Prior Art' includes documents in foreign languages disclosed in any format in any country of the world). For an invention to be judged as novel, the disclosed information should not be available in the 'Prior Art'. This means that there should not be any prior disclosure of any information contained in the application for Patent (anywhere in the public domain, either written or in any other form, or in any language) before the date on which the application is first filed i.e. the 'priority date'.

Therefore, an invention shall be considered to be new, if it does not form part of the prior art. Although the term 'Prior art' has not been defined under the Patents Act, 1970 it shall be determined by the provisions of Section 13 read with the provisions of Sections 29 to 34.

(a) An invention shall not be considered to be novel if it has been anticipated by

publication before the date of filing of the application in any of the specification filed in pursuance of application for Patent in India on or after the 1st day of January 1912.

(b) An invention shall not be considered to be novel if it has been anticipated by publication made before the date of filing of the application in any of the documents in any country.

(c) An invention shall not be considered to be novel if it has been claimed in any claim of any other complete specification filed in India which is filed before the application but published after said application.

(d) An invention shall not be considered to be novel if it has been anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

In the case of *Ganendro Nath Banerji* v. *Dhanpal Das Gupta, AIR 1945 Oudh 6*, it was held that no general rule can be laid down as to what does or does not constitute an invention. The general criterion seems to be whether that which is claimed lies within the limits of development of some existing trade, in the sense that it is such a development as an ordinary person skilled in that trade could, if he wishes so to do, naturally, make without any inventive step. But novelty need only be established in the process of manufacturing, not in the article produced. Novel combination of two known ideas may be sufficient to establish novelty of subject matter in this respect.

The Supreme Court in *M/s. Bishwanath Prasad Radhey Shyam v. M/s. Hindustan Metal Industries,* (1978) coined the phrase, "As per the criteria, the patent for a created invention would only be granted when the invention is of such new use in relation to technological advancement and said that some problem related to a particular field is solved because of the said creation. Moreover, it is provided that the invention must not be a mere workshop improvement, what has to be looked at is whether the technique is new or unique, which is producing new articles or new aids in the relative industry."

Further, in the case of *Ram Narain Kher* v. M*/s Ambassador Industries, AIR 1976 Del 87*, the Delhi High Court held that at the time the Patent is granted to a party it is essential that the party claiming Patent should specify what particular features of his device distinguish it from those which had gone before and show the nature of the improvement which is said to constitute the invention. A person claiming a Patent has not only to allege the improvement in art in the form but also that the improvement effected a new and very useful addition to the existing state of knowledge. The novelty or the invention has to be succinctly stated in the claim.

Inventive Step (Non-obviousness).- 'Inventive step' is a feature of an invention that involves technical advancement as compared to existing knowledge or having economic significance or both, making the invention non-obvious to a person skilled in that art. Here definition of 'inventive step' has been enlarged to include economic significance of the invention apart from already existing criteria for determining the inventive step.

An invention shall not be considered as involving an inventive step, if, having regard to the state of the art, it is obvious to a person skilled in the art. The term 'obvious' means that something which does not go beyond the normal progress of technology but merely follows plainly or logically from the prior art, i.e., something which does not involve the

exercise of any skill or ability beyond that to be expected of the person skilled in the art. In *Rado* v. *John Tye Son Ltd. (2013)*, it was held that "a non-obvious invention is that which is beyond the thinking of a mere person working in the field." What is to be noted is that the invention should be something that sets the standard and technology apart from existing technical trends that are not natural and usual.

Further, in *Graham* v. *John Deere Co. (1966)*, the U.S. Supreme Court provided criteria to ascertain whether something was obvious or not. Providing, the court should consider:

The scope and content of prior art.

The difference between the prior art and the claim of the new invention.

The level of skill in the pertinent art.

The failure of others to solve the problem.

Long unsolved problems related to the related field.

For this purpose a 'person skilled in the art' should be presumed to be an ordinary practitioner aware of what was general common knowledge in the relevant art at the relevant date. In some cases the person skilled in the art may be thought of as a group or team of persons rather than as a single person.

Industrial Applicability. - An invention is capable of industrial application if it satisfies following three conditions, cumulatively:-

- can be made;
- can be used in at least one field of activity;
- can be reproduced with the same characteristics as many times as necessary.

An invention to be Patentable must be useful. If the subject matter is devoid of utility it does not satisfy the requirement of invention. For the purpose of utility, the element of commercial or pecuniary success has no relation to the question of utility in Patent law. The usefulness of an alleged invention depends not on whether by following the directions in the complete specification all the results not necessary for commercial success can be obtained, but on whether by such directions the effects that the application/patentee professed to produce could be obtained. The meaning of usefulness is therefore useful for the purpose indicated by the applicant or patentee whether a non-commercial utility is involved. The usefulness of the invention is to be judged, by the reference to the state of things at the date of filing of the patent application, if the invention was then useful, the fact that subsequent improvement have replaced the patented invention render it obsolete and commercially of no value, does not invalidate the patent. Speculation or imaginary industrial uses are not considered to satisfy the industrial application requirement.

Patent Registration provides a statutory right to the inventor by the government for his/her invention which is either a new process or product. The Registered patent helps the inventor to prevent the third party without authorization of making or manufacturing, using, offering for sale, selling, importing, distributing, and licensing.

Procedure to Register a Patent

1. Drafting Patent Application

2. Filling the Patent Application
3. Publication of Patent Application
4. Examination of Patent Application: Process of Examination (Objections by examiner & responding to objections)
5. Grant of Patent: The order of grant is given when all the requirements of Patent Act are compiled and it will be published in Patent Journal.

The grant of a patent can be challenged either via a patent office or in a court of law. A court may invalidate or revoke a patent upon a successful challenge by a third party. In addition, many patent office's provide administrative procedures that allow third parties to oppose to the grant of a patent (including so-called "opposition systems"), for example, on the basis that the claimed invention is not new or does not involve an inventive step.

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LABOUR LAWS & PRACTICE

(Elective Paper 9.4)

Time allowed : 3 hours *Maximum marks : 100*

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

Question 1

Case Study :

VBDL Ltd., (the Builder) is a company engaged in the business of construction of multistorey flats in Mumbai. It started working on a project named as 'Sare Jahan Complex' in Panvel, Navi Mumbai. At the site, the builder opened its office and employed two persons named as Sonali and Kamal, to book flats, receive money from the prospective buyers through cheques, and to do all other managerial, supervisory and administrative work. Besides Sonali and Kamal, one peon was also appointed for their office purposes. While Sonali was taking care of the in-office work, whereas Kamal was overseeing the field duty, like inspection of the work done by the labours, purchase of building raw materials etc. The builder engaged KCPL, a contractor company engaged in the construction work. The KCPL provided the labours at site, to do the civil work. One day, an Inspector came to site for checking, whether adequate safety measures are being followed on not. During his inspection, he observed that some labours have defective vision and some labours are deaf too. He prepared a detailed report and summoned to the contractor to give explanation. Amrish, who is a regular employee of KCPL was given the task of pulling the chain, operated through electricity, to lift the mixture of cement and concrete. One day, while he was doing this work, the chain broke and fell down on the land which caused a serious bodily injury to Amrish. Sonali's father Hari Ram is having a small piece of land in a village near by Panvel. Hari Ram thought to construct a dwelling house for his family. So he contacted a person named Ashutosh, who takes contracts for small house projects (not the multi-storey project) costing around 15-20 lakh rupees. Ashutosh agreed to construct the house for Hari Ram for a total cost of 15 lakh rupees including the building material, labour cost, sanitary and electrical fittings and flooring.

Based on the above fact, answer the following questions :

(a) *Whether Sonali and Kamal can be treated as 'Building worker' ?* *(8 marks)*

(b) *Whether the construction work on the land owned by Hari Ram (Sonali's father), amounts to 'Building or other construction work'. Quote the relevant provisions of the law.* *(8 marks)*

(c) *What are the provisions under the law relating to employment of persons who are deaf and having defective vision ?* *(8 marks)*

(d) *In the above case whether Amrish, can be treated as a contract labour ? Quote the relevant provisions of the law.* *(8 marks)*

(e) Amrish got serious bodily injury due to the accident happened at the site. Who shall be treated as employer in this case, the Builder or KCPL ? Also state whether the employer shall be liable to pay compensation ? (8 marks)

Answer 1(a)

In terms of Section 2(1)(e) of the Building & Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996, "building worker" means a person who is employed to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, in connection with any building or other construction work but does not include any such person –

(i) who is employed mainly in a managerial or administrative capacity; or

(ii) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred 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 in the given case, Sonali and Kamal were hired by the builder to do only the managerial, supervisory and administrative nature of work, hence these two people shall not be treated as 'Building worker'.

Answer 1(b)

In terms of Section 2(1)(d) of the Building & Other Construction Workers (Regulation of Employment & Conditions of Service) Act , 1996, 'building or other construction work' means the construction, alteration, repairs, maintenance or demolition, of or, in relation to, buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works (including storm water drainage works), generation, transmission and distribution of power, water works (including channels for distribution of water), oil and gas installations, electric lines, wireless, radio, television, telephone, telegraph and overseas communications, dams, canals, reservoirs, watercourses, tunnels, bridges, viaducts, aqueducts, pipelines, towers, cooling towers, transmission towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or other construction work to which the provisions of the Factories Act, 1948, or the Mines Act, 1952, apply.

Any building or construction work to which the provisions of the Factories Act, 1948 or the Mines Act, 1952 are applicable are not covered under the definition and hence workers employed therein will not get benefit under "The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act".

In the given case, Hari Ram (Sonali's father) thought to construct a dwelling house for his family, hence, it is the construction work for own residential purpose in individual capacity. Therefore, the labour work being done by the Ashutosh along with his co-labours at the village site, will not come under the category of 'Building or other construction work'.

Answer 1(c)

Prohibition of employment of certain persons in certain building or other construction work

Section 31 of the Building & Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996 provides that no person about whom the employer knows or has reason to believe that he is a deaf or he has a defective vision or he has a tendency to giddiness shall be required or allowed to work in any such operation of building or other construction work which is likely to involve a risk of any accident either to the building worker himself or to any other person.

Answer 1(d)

In terms of section 2(1)(b) of the Contract Labour (Regulation and Abolition) Act, 1970, a workman shall be deemed to be employed as "contract labour" in or in connection with the work-of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer;.

"Contract labour" can be distinguished from employees in terms of employment relationship with the principal establishment and the method of wage payment. A workman is deemed to be a contract labour when he/she is hired in connection with the work or contract for service of an establishment by or through a contractor. They are indirect employees. Contract labour is neither borne on pay roll or muster roll or wages paid directly to the employer.

As per the above definition of 'contract labour', Amrish is a regular employee of the KCPL and hence, will not be treated as a 'contract labour'.

Answer 1(e)

In terms of Section 2(1)(i) of the Building & Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996, "Employer", in relation to an establishment, means the owner thereof, and includes, –

(i) in relation to a building or other construction work carried on by or under the authority of any department of the Government, directly without any contractor, the authority specified in this behalf, or where no authority is specified, the head of the department;

(ii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment;

(iii) in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor;

Hence, in the given case the contractor (KCPL) shall be treated as employer of Amrish.

Section 3 (1) of the Employee's Compensation Act, 1923 provides that if personal injury is caused to an employee by accident arising out of and in the course of his

employment, his employer shall be liable to pay compensation in accordance with the provisions of this Act. However, the employer shall not be so liable-

a) in respect of any injury which does not result in the total or partial disablement of the employee for a period exceeding three days;

b) in respect of any injury, not resulting in death or permanent total disablement caused by an accident which is directly attributable to –

   i. the employee having been at the time thereof under the influence of drink or drugs, or

   ii. the wilful disobedience of the employee to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of employees, or

   iii. the wilful removal or disregard by the employee of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of employees.

Question 2

(a) A private TV channel recruited some female journalists to anchor their various programs, live shows and reality shows. The terms and conditions of the employment was that such female employees shall remain unmarried, maintain glamours look, slim and fit, till the age of retirement, which was kept as 35 years. However, at the discretion of the management, the employee's services could be terminated before the age of 35 years, if she could not maintain her look or gets married. Purvi, one such employee, after two years of taking up the employment in that TV Channel, got married, but she kept this news, as secret and not informed her employer. After some time, when she got pregnant, the matter was revealed to the management. As a result, and as per the terms of the employment, she was expelled from the services.

In light of the above facts, comment, whether putting up of such stringent conditions of employment on the part of the employer was right ? Give your answer with any decided case law.

(6 marks)

(b) Armaan, was working with his employer at Dadar (Kabootarkhana) in Mumbai. After some time, he was laid off by his employer. Armaan was offered another job at Virar in Mumbai, which also belongs to the same employer but it is 14 km away from the current establishment. However, Armaan refused to accept the new assignment, complaining that Virar is far away from his residence at Panvel and claimed compensation for lay-off. Whether the claim of Armaan is tenable ?

(6 marks)

Answer 2(a)

Article 14 of the Constitution of India reads as under:

'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

Article 14 bars discrimination and prohibits discriminatory laws. The said Article is clear in two parts - while it commands the State not to deny to any person 'equality before law', it also commands the State not to deny the 'equal protection of the laws'. Equality before law prohibits discrimination. It is a negative concept. The concept of 'equal protection of the laws' requires the State to give special treatment to persons in different situations in order to establish equality amongst all. It is positive in character. Therefore, the necessary corollary to this would be that equals would be treated equally, whilst un-equals would have to be treated unequally.

In the case of the *Air India* v. *Nargesh Meerza (1981 AIR 1829)* Regulation 46 and 47 of Air India Employees Service Regulations was in question which provides that an air hostess will retire from the service upon attaining the age of 35 years or on marriage within 4 years of Service or on first pregnancy, whichever occurs earlier but the Managing Director had the discretion that he may extend the age of retirement one year at a time beyond the age of retirement up to the age of 45 years at his option if an air hostess was found medically fit. It was held by the court that the clauses regarding retirement and pregnancy of the regulation as unconstitutional and therefore struck down. The retirement of air hostess on the ground of pregnancy was unreasonable and arbitrary and it was in violation of Article 14 of the Constitution of India.

Answer 2(b)

Section 25E of the Industrial Disputes Act, 1947 deals with the Workmen not entitled to compensation in certain cases. It provides that-

No compensation shall be paid to a workman who has been laid-off-

(i) if he refuses to accept any alternative employment in the same establishment from which he has been laid-off, or in any other establishment belonging to the same employer situate in the same town or village or situate within a radius of five miles from the establishment to which he belongs, if, in the opinion of the employer, such alternative employment does not call for any special kill or previous experience and can be done by the workman, provided that the wages which would normally have been paid to the workman are offered for the alternative employment also;

(ii) if he does not present himself for work at the establishment at the appointed time during normal working hours at least once a day;

(iii) if such laying-off is due to a strike or slowing-down of production on the part of workmen in another part of the establishment.

In the given case, Armaan's present place of work is at Dadar, Mumbai and the employer has offered to work at another place at Virar, Mumbai which also belongs to the same employer, is beyond the radius of 5 miles (8 km approx.) from the present establishment. Thus, he is entitled to get the compensation.

Question 3

(a) YSWM Ltd., is a company engaged in the business of manufacturing of polyester yarn. It has nearly 500 workers. There was a news in the TV/Newspaper that on 1st of June 2021, there will be Solar Eclipse. The workers were of traditional thoughts and strong belief that on the day of Solar Eclipse, no one should move

to work place and remain in the home to escape the unwanted happenings on account of this Solar Eclipse. The representatives of the workers discussed the matter with Navneet, the Factory Manager, to declare a holiday on 1st June, 2021. But Navneet denied for declaration of holiday and said that, Solar Eclipses is nothing but a Solar Event and need not to be afraid. However, the workers were not convinced withNavneet's plea and they all decided to remain on casual leave for one day on 1st June, 2021. Whether absence of all the workers on 1st June, 2021, amounts to 'Strike' ? *(6 marks)*

(b) "International Labour Organization (ILO) is a nodal agency coming under the ambit of United Nations (UN)". State in this context the aims and objectives of ILO. *(6 marks)*

Answer 3(a)

In terms of Section 2(q) of the Industrial Disputes Act, 1947, "strike" means a cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment;

Strike can take place only when there is a cessation of work or refusal to work by the workmen acting in combination or in a concerted manner. Time factor or duration of the strike is immaterial. The purpose behind the cessation of work is irrelevant in determining whether there is a strike or not. It is enough if the cessation of work is in defiance of the employers authority.

In the given case, all the workers observed one day casual leave on 1st June, 2021, which as per the given definition, amounts to strike.

Answer 3(b)

International Labour Organization (ILO) is a nodal agency coming under the ambit of the United Nations. Its primary objective is to deal with issues related to labour, namely, maintaining International Labour Standard, insuring social protection and providing work opportunities to all. ILO was established in 1919, it works towards setting up of labour standards, developing policies and chalking out programmes promoting decent work to all men and women. The ILO functions with the unique tripartite structure that brings together Governments', Employers' and Workers' representatives.

The aims and objectives have been succinctly enshrined in the preamble of the ILO constitution which are as follows –

Whereas universal and lasting peace can be established only on the base upon social justice and whereas conditions of labour exists involving such injustice, hardship and privation to large number of peoples as to produce unrest so great that the peace and harmony of the world imperiled; and improvement of those conditions is urgently as, for example, by the regulations of hours of work, including the establishment the maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of adequate leaving Wage, the protection of the worker against sickness, dieses and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection the interest of worker when employed in countries other than their own, recognition of the principal of equal remuneration of work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures.

Whereas also the failure of any nation to adopt humane condition of labour is an obstacle in the way of other nations which desire to improve the condition in their own countries. The International Labour Organization works towards providing such a decent work as and productive employment to the labour force worldwide. This is done with a view of reducing poverty rates and achieving just Globalization throughout. This view point has been strengthened after the economic and financial crises of 2008. To achieve this task ILO look as matter for job creation, providing rights at work, ensuring social protection enabling channels for dialogue, all this with the basic objective maintaining gender equality.

The major objectives of the decent work agenda are as under:

(a) Set and promote Standards and fundamental principles and rights at work.

(b) Create greater opportunities for women and men to decent employment and income.

(c) Enhance the coverage and effectiveness of social protection for all.

(d) Strengthen tripartism and social dialogue.

Question 4

(a) Sunidhi is Assistant General Manager, heading the Forex Division of Best Bank Ltd., at Bandra Kurla Complex, Mumbai. In this Forex Division of the Bank, under the official hierarchy of Sunidhi, 10 other employees are also working. Among them Aniruddha, is the Chief Manager. One fine evening, there was heavy rain in Mumbai so the Sunidhi's driver made a call to her and expressed his inability to come. When Sunidhi was talking to her driver, Aniruddha was sitting in her office chamber. Aniruddha offered Sunidhi to drop at her home in his car, which she accepted. After that day, Sunidhi took lift in Aniruddha's car intermittently, for quite some time, as and when her driver pretended due to some reasons. She thereafter changed the driver. One day, in the Lounge, Aniruddha was taking lunch with other office colleagues. Sunidhi was also seating opposite of Aniruddha, which he was not aware of it. Suddenly, Sunidhi heard some absurd words of comments about her, which Anirudhha was saying to his office colleagues. "Madam, is now a days showing her attitude. Earlier she liked my company, so she pretended that her driver is not coming, and many a times she had asked me for a lift, but now it seems that somebody else, is in her heart and I have been discarded." Sunidhi was shocked. She made a written complaint before the Internal Complaint Committee (ICC).

Based on the above facts, whether the Lounge (meant for lunch place for the staff) comes under the definition of workplace under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ? Substantiate your answer with the decided case law.

(6 marks)

(b) In a matter, Agra Municipal Corporation (AMC) dismissed two of its employees, Mr. Kuldeep Singh, a Head clerk and Mr. Ramnath, a Sanitary Inspector on charges for negligence, insubordination and indiscipline. The Municipal Workers' Union, of which the dismissed employees were members, questioned the order of dismissal and the matter was referred to the Industrial Tribunal. In defence, the AMC argued that its status is of local self-government, thus it does not

come within the meaning of industry and the dispute was not an industrial dispute. Whether AMC is an Industry ? Whether this dispute shall be termed as an Industrial Dispute ? *(6 marks)*

Answer 4(a)

Section 2(o) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 defines the 'workplace' as under:

(i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;

(ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainmental, industrial, health services or financial activities including production, supply, sale, distribution or service;

(iii) hospitals or nursing homes;

(iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

(v) any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey;

(vi) a dwelling place or a house;

Hence, if harassment takes place even during transportation or during a lunch meeting at a restaurant, the same will be covered under the Act.

In the case of *Saurabh Kumar Mallick* v. *Comptroller & Auditor General of India, WP(C) No. 8649/2007*, the Delhi Court observed that 'the aim and objective of formulating the Vishaka Guidelines was obvious in order to ensure that sexual harassment of working women is prevented and any person guilty of such an act is dealt with sternly. Keeping in view the objective behind the judgment, a narrow and pedantic approach cannot be taken in defining the term 'workplace' by confining the meaning to the commonly understood expression "office". It is imperative to take into consideration the recent trend which has emerged with the advent of computer and internet technology and advancement of information technology. A person can interact or do business conference with another person while sitting in some other country by way of videoconferencing. It has also become a trend that the office is being run by CEOs from their residence. In a case like this, if such an officer indulges in an act of sexual harassment with an employee, say, his private secretary, it would not be open for him to say that he had not committed the act at 'workplace' but at his 'residence' and get away with the same. Noting the above, the High Court observed that the following factors would have bearing on determining whether the act has occurred in the 'workplace':

- Proximity from the place of work;

- Control of the management over such a place/residence where the working woman is residing; and
- Such a residence has to be an extension or contiguous part of the working place.

In conclusion, the Delhi High Court held that the official mess where the employee was alleged to have been sexually harassed definitely falls under the definition of 'workplace'.

Answer 4(b)

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.

The Supreme Court carried out an in-depth study of the definition of the term industry in a comprehensive manner in the case of *Bangalore Water Supply and Sewerage Board* v. *A Rajiappa, (AIR 1978 SC 548)* after considering various previous judicial decisions on the subject and in the process, it rejected some of them, while evolving a new concept of the term "industry".

The above decision of the Supreme Court has a wide sweep. The triple test along with dominant nature criteria will cover almost the entire labour force in the country. The charitable or missionary institutions, hospital, educational and other research institutions, municipal corporations, firms of chartered accountants, solicitors' firms, etc., which were not held to be "industry" earlier will now are covered by the definition of "industry".

Sovereign functions : Sovereign functions strictly understood alone qualify for exemption, not the welfare activities or economic adventures undertaken by Government or statutory bodies. Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable then they can be considered to come within Section 2(j). (Bangalore Water Supply case). If a department of a municipality discharged many functions, some pertaining to "industry" and other non-industrial activities, the predominant function of the department shall be the criterion for the purposes of the Act (*Corpn. of City of Nagpur* v. *Employees, AIR 1960 SC 675*).

Municipalities : Following departments of the municipality were held, to be "industry" (i) Tax (ii) Public Conveyance (iii) Fire Brigade (iv) Lighting (v) Water Works (vi) City Engineers (vii) Enforcement (Encroachment) (viii) Sewerage (ix) Health (x) Market (xi) Public Gardens (xii) Education (xiii) Printing Press (xiv) Building and (xv) General administration. If a department of a municipality discharges many functions some pertaining to industry and others non-industrial, the predominant function of the department shall be the criterion for the purpose of the Act.

As per Section 2(k) "Industrial Dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.

Hence, as per the definition of 'Industry' and 'Industrial Disputes', the Agra Municipal Corporation has been considered as Industry and there is Industrial Dispute between the employer and workman.

Question 5

(a) Renuka, received an appointment letter on 25th February, 2022 from Global Bank Ltd., HR Division, Fort Mumbai. The appointment was for the post of Assistant Manager and she was to join at its branch office Vashi, Mumbai latest by 28th February, 2022, else the Bank will treat that the candidate is not interested and shall cancel the appointment. Renuka was having pregnancy of 3 months at the time of receipt of the appointment letter. She was very happy to receive such appointment letter and as per the demand of her friends, she gave a little party in a Hotel, near her home. During the party hours, when she was in little dancing mood, all of a sudden she slipped down and an unwanted miscarriage happened. After taking the necessary medical treatment, she decided to join the bank branch on 28th February, 2022. She went to the branch, shown the appointment letter and the manager allowed her to join. At the end of the same day, she applied for maternity leave from 1st March, 2022. As per the relevant provisions of the law, whether the Manager of the branch was liable in employing Renuka, after her miscarriage ? (6 marks)

(b) The Occupational Safety, Health and Working Conditions Code, 2020 is an Act to consolidate and amend the laws regulating the occupational safety, health and working conditions of the persons employed in an establishment. In light of this, list out the Central Acts, which were amalgamated, simplified and rationalised? (6 marks)

Answer 5(a)

Section 4 of the Maternity Benefit Act, 1961 prohibits the employment of, or work by, women during certain period. It reads as under-

(1) No employer shall knowingly employ a woman in any establishment during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy.

(2) No woman shall work in any establishment during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy.

In sub-section (1) the word 'knowingly' is used. In the given case, the manager was not knowing about the miscarriage of Renuka. The only point is that before permitting any employment, usual practice in many of the establishment to insist Medical Certificate.

As Renuka has not tendered the Medical Certificate and also not disclosed the fact to the Manager about her mis-carriage, the Manager is not liable for employing her during the period of miscarriage.

Answer 5(b)

Occupational Safety, Health and Working Conditions Code, 2020 amalgamated, simplified and rationalised the relevant provisions of the following thirteen Central labour enactments relating to occupation, safety, health and working conditions:

1. The Factories Act, 1948;
2. The Plantations Labour Act, 1951;

3. The Mines Act, 1952;
4. The Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955;
5. The Working Journalists (Fixation of Rates of Wages) Act, 1958;
6. The Motor Transport Workers Act, 1961;
7. The Beedi and Cigar Workers (Conditions of Employment) Act, 1966;
8. The Contract Labour (Regulation and Abolition) Act, 1970;
9. The Sales Promotion Employees (Conditions of Service) Act, 1976;
10. The Inter-State Migrant workmen (Regulation Employment and Conditions of Service) Act, 1979;
11. The Cine -Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981;
12. The Dock Workers (Safety, Health and Welfare) Act, 1986; and
13. The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.

Question 6

Kishan Lal is a farmer. He is having a small piece of agriculture land, in which he and his wife Kanta, do all the farming activities. They do not engage any labour and do the work themselves. Sometime their children, Suresh and Mahesh, who are of 10 and 12 years old only, helps in farming activity, when there are holidays in their school. In March, 2022, when the wheat crop was ready, Kishan Lal hired a threshing machine and asked his children to get the wheat out of the dry plant, through the use of that machine. The provisions of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 suggest that no child shall be employed or permitted to work in any occupations or process. What will be your answer in the following situations:

(i) When the children are doing normal farming activity, when schools are off.

(ii) When the children are using the machine for segregating the wheat from the dry plant.

(iii) Rohan, a friend of Suresh, came from city to see the village life and stayed with Suresh in his house. Rohan is also of the age of 12. Kishan Lal also asked Rohan to help in the farm activity and if he do the work daily, for 8 hours, he will give him ₹200 per day. Rohan, in the greed of earning money, agreed to do the work. Whether Kishan Lal can engage Rohan ?

(iv) If Rohan would have been of the age of 16 years, whether Kishan Lal can engage him in extracting the wheat from the threshing machine.

(12 marks)

Answer 6(i)

Section 3 of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986

provides that no child shall be employed or permitted to work in any occupation or process except:-

(a) helps his family or family enterprise, which is other than any hazardous occupations or processes set forth in the Schedule, after his school hours or during vacations;

(b) works as an artist in an audio-visual entertainment industry, including advertisement, films, television serials or any such other entertainment or sports activities except the circus, subject to such conditions and safety measures, as may be prescribed. However, no such work shall effect the school education of the child.

Hence, in the given case, when the children are asked to help the parents and their school timings are not affected, there is no violation, since section 3 of the Act permits such activities.

Answer 6(ii)

Section 3A of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 provides that no adolescent shall be employed or permitted to work in any of the hazardous occupations or processes set forth in the Schedule.

The hazardous occupations or processes set forth in the Schedule are as under:

(1) Mines.

(2) Inflammable substances or explosives.

(3) Hazardous process.

In the given case, in sub-question (ii) the wheat separator machine is operated by the electric and is a hazardous machine. Children are not permitted to use this machine.

Answer 6(iii)

In section 3 of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, the word, 'family' is used. It may be noted that the expression:

(a) "family" in relation to a child, means his mother, father, brother, sister and father's sister and brother and mother's sister and brother;

(b) "family enterprise" means any work, profession, manufacture or business which is performed by the members of the family with the engagement of other persons;

Since Rohan is only the friend of Suresh who came to enjoy the village life, do not come in the definition of family. Hence, Kishan Lal cannot employ Rohan, since he is below the age of 14 and is not a family member.

Answer 6(iv)

Section 3A of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 provides that no adolescent shall be employed or permitted to work in any of the hazardous occupations or processes set forth in the Schedule.

The hazardous occupations or processes set forth in the Schedule are as under:

(1) Mines.

(2) Inflammable substances or explosives.

(3) Hazardous process.

Adolescent means a person who has completed his fourteenth year of age but has not completed his eighteenth year.

In the given case Rohan is of the age of 16 only (means not yet completed the 18 years of age), hence again he cannot be employed to do the hazardous activity of extracting the wheat from the cutter machine.

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INSOLVENCY - LAW AND PRACTICE
(Elective Paper 9.5)

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *Answer **ALL** Questions*

Question 1

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

JCP Industries Ltd (JIL) was incorporated in the year 2011 with an authorized share capital of ` 2,000 crore having its registered office located in Mumbai with the main objects to carry out the business (a) manufacturing of heavy duty earth moving machinery and their spare parts (b) purchase, sale, construction of multi-story commercial and residential apartments under own name or as under Joint Development Agreements (c) Mining of minerals and thereafter refining and processing them for sale; and (d) doing the business in the hospitality sector by running and maintaining Hotels, Resorts and Budget Hotels. The paid-up share capital of the company as on date is ` 1,750 crore.

During the course of business, the company has approached various banks, state finance corporations and NBFCs for availing financial assistance in the nature of term loans and other facilities. However, based on the business plans and security offered, the finance proposal was approved by National Bank of India (the Bank) in the form of both fund based and non-fund based limits. The company during the course of its business operations was also availing credit for 90 days to 120 days from its creditors in connection with the purchase of raw material being used in the business of manufacturing heavy duty earth moving machineries, real estate, mining and hospitality sectors. The progress of the company since its incorporation till 31st March, 2019 was exceptional. However, because of certain transactions carried out by the directors with their relatives and other parties between 1st July, 2020 to 30th June, 2021 which were in the nature purchase of raw-material for different business segments of the company including the purchase of immovable properties as well as transferring and sale of goods and assets of the company to such related and other parties by givingthem preference over the other buyers ultimately resulted into mismatch in the cash flows and consequently resulted into losses to the company.

With an intention to grow organically, the company also incorporated a wholly owned subsidiary in the year 2017 under the name of JCP Buildcon Ltd (JAL) which was mainly engaged in the real estate business involving construction of apartments and flats in multi-story buildings under the Joint Development Agreements being entered into with the various parties including various State Governments under Housing Schemes. JAL entered into a tripartite Joint Development Agreement with Jaipur Development Authority (JDA) for construction of apartments and flats in multi-story buildings after development of land belonging to JDA. In an attempt to extend support to JIL, JAL had also mortgaged its assets in favour of banks in the month of August, 2018 when additional financial assistance was provided to JIL.

The financial condition of JIL started deteriorating after July, 2019 because of reduction in the business activities as well as default being committed in honoring the debt obligations towards banks, payment to trade creditors and delays in construction of apartments to be handed over to the buyers who had entered into agreements with the company and have paid almost 95% of the cost of the apartment.

The banks, trade creditors and buyers of the flats were constantly making follow up with the management but no reply was given to them by the management of JIL as well as JAL. National Bank of India during their internal review meeting informed their legal team that the promoter/directors may have siphoned off the money which was supposed to have been used for business purposes; since it appears to them that the amounts have been advanced to related parties and diverted towards a few suspicious transactions.

The bank despite the continuous follow up with the management and the Board of directors could not get any suitable response relating to the repayment plan to honor the debt obligations.

Considering the situation and based on the recommendation of their legal department, the bank decided to take action against the company under the Insolvency and Bankruptcy Code, 2016 (the Code) and thus filed an application on 16th February, 2022 before the Adjudicating Authority (AA) for initiating Corporate Insolvency Resolution Process (CIRP). In the application, the Bank had proposed name of Robin to act as Interim Resolution Professional (IRP). Simultaneously, other lenders of JAL also submitted an application before the AA to initiate CIRP against JAL for default in repayment of their dues.

After hearing the parties, the AA admitted the applications in the case of JIL and JAL on 25th April, 2022 and also confirmed the appointment of Robin as IRP in both the companies. In the case of JIL, Robin constituted a Committee of Creditors (CoC) on 15th May, 2022 and called first meeting of the CoC on 20th May, 2022. The constitution of CoC by Robin was challenged by the operational creditors as well as home buyers since their name was not included in the list of the CoC. Further, the members of the suspended Board of directors of JIL also challenged the actions of Robin who did not allow their participation in the first meeting of the CoC.

During the first meeting of the CoC in the case of JIL, Robin was confirmed to act as Resolution Professional (RP) by the CoC and was asked to invite the Expression of Interest (EoI) from the Resolution Applicants (RA) for submitting Resolution Plan. Besides the above, JDA has also issued notice to JAL for taking over possession of the land given for the purpose of construction.

Considering the above facts answer the following questions :

(a) *The AA on admitting the application for CIRP against the corporate debtor and confirming the appointment of IRP is also required to issue various other orders as per the Code. State the necessity of making such further orders by the AA against the corporate debtor when the order for initiating CIRP stands approved and appointment of IRP has also been made.*

(10 marks)

(b) (i) *JIL had also taken loan on the strength of property mortgaged by JAL. Examine and state whether such transaction would be treated as a preferential transaction and whether the creditors of JIL will be treated as*

"Financial Creditors" of JAL since JAL had provided the securities for funding given to JIL. (7 marks)

(ii) State what will be the fate of the registration, licenses, grants and other benefits availed by JIL after the Insolvency Commencement Date.

(3 marks)

(c) (i) JAL had entered into tripartite Joint Development Agreement for development of land belonging to JDA. State whether moratorium will apply on such tripartite Joint Development Agreement and whether the owner of land being JDA after service of termination notice can repossess the land despite that the corporate debtor was having interest in it ? (7 marks)

(ii) Whether the operational creditors and the home buyers who have paid advances in the building project of JIL can raise objection for not including them in the list of CoC prepared by Robin for the purpose of voting on the agenda items ? (3 marks)

(d) Examine the correctness of the following statements by giving brief reasons in respect of each of the following independent cases in the context of facts in the aforesaid case study, provisions of the Code as well as the decided case laws :

(i) Role of the RP is adjudicatory in nature.

(ii) The CoC can have sub-committees and can also delegate the power to approve the resolution plan.

(2 marks each = 4 marks)

(iii) There is no demarcation between the Secured and Unsecured, Financial and the Operational creditors under the Code.

(iv) The objection raised by the members of the suspended Board of directors to include them in CoC and to get the copy of resolution plan of the company is not maintainable.

(3 marks each = 6 marks)

Answer 1(a)

The Adjudicating Authority (AA) being National Company Law Tribunal in the given case has accepted and admitted the application for Corporate Insolvency Resolution Process (CIRP) against JCP Industries Ltd (JIL) and JCP Buildcon Ltd. (JAL) on 25th April, 2022 and also confirmed appointment of Robin to act as Interim Resolution Professional (IRP). As required under section 13 (1) of the Insolvency and Bankruptcy Code, 2016 (the Code), the AA after admission of the application shall by an order:

(a) Declare moratorium for the purpose mentioned under section 14 of the Code; and

(b) Cause a public announcement of the initiation of CIRP and call for submission of claims under section 15 of the Code.

(c) Appoint an interim resolution professional in the manner as laid down in section16.

The public announcement referred to in clause (b) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional. The purpose

and necessity of orders of such actions relating to the proceedings against the corporate debtor are as under:

Declaring Moratorium

The moratorium is being declared by the AA on the Insolvency commencement date for the following purposes:-

(a) to ensure that multiple proceedings are not taking place simultaneously and thus avoids the possibility of potentially conflicting outcomes of related proceedings.

(b) to ensure that the company may continue as a going concern while the creditors assess the options for resolution of default.

(c) to keep the corporate debtor's assets together during the insolvency resolution process and facilitates orderly completion of the process.

(d) Prohibition on disposal of the corporate debtor's assets ensure that the corporate debtor/management does not transfer its assets, thereby stripping the corporate debtor of value during the corporate insolvency resolution process.

The moratorium so declared is primarily for prohibiting the following:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Cause for a public announcement

Public announcement in connection with the CIRP against the corporate debtor as per section 15 caused to be made by the AA shall contain the following information:-

(a) Name and address of the corporate debtor under the corporate insolvency resolution process along with the name of the authority with which the corporate debtor is incorporated.

(b) Details of the IRP who shall be vested with the management of the corporate debtor and be responsible for receiving claims.

(c) Last date for submission of the claims, as may be specified as well the penalties for false or misleading claims, and the date on which the CIRP process against the corporate debtor shall close.

(d) Penalties for false or misleading claims, and

(e) Date on which the corporate insolvency resolution process shall close.

The purpose for making the public announcement is to bring to the notice of all the parties having dealings with the corporate debtor, (such as suppliers of goods or services, the government authorities and employees / workmen, etc.) to file their true claims against the corporate debtor so that the RP can collate all such claims and constitute Committee of Creditors within the time allowed under the Code.

Answer 1(b)(i)

JIL had taken the financial assistance from National Bank of India and in facts it is being stated that the assets of JAL were mortgaged for such financial assistance extended by the banks to JIL. The issue is related with the third party mortgage and whether such transaction of mortgage is a preferential transaction as per section 43 of the Insolvency and Bankruptcy Code, 2016 and to decide whether the creditor appearing in the books of JIL will be treated as financial creditor of JAL.

The issue and the facts given in the case are identical as were before the Apex Court in the case of Anuj Jain IRP v/s Axis Bank Ltd and the Apex Court vide its order dated 26th February, 2020 after analyzing the provisions contained in section 43 of the Insolvency & Bankruptcy Code held that the intention of the party is not important to determine whether the transaction is preferential and for clarity in the categorization of a transaction as preferential, the Apex Court laid down the following steps:

a) Determine "Relevant Time" concerning section 43 - which is two years in case of related party and one year in case of unrelated parties (both to be calculated from insolvency commencement date).

b) The next step would be to determine whether there has been a transfer of property or transfer of an interest of the corporate debtor.

c) Establishment of the fact whether the beneficiary is a creditor or guarantor or surety in the capacity of the corporate debtor.

d) Analyze whether the transaction is made on account of financial debt or an operational debt and whether the said transfer puts the transferee in a beneficial position than it would have been in the event of distribution of assets as per section 53 of the Code.

The Apex Court based on the above analysis held that the transaction between the Corporate Debtor and its holding as 'preferential' under the Code.

In the present case, JAL had mortgaged its assets as security for loans taken by JIL and there was no "director nexus" between JAL and the lenders of JIL. The basic requirement of a creditor to become a financial creditor for the purpose of the Code is the transaction vis-à-vis the corporate debtor. The Apex court thus held that in the given facts, the corporate debtor has given its property in mortgage to secure the debt of a third party (its holding company), the same may fall within the definition of 'debt' as per section 3(10) of the Code but it cannot partake the character of 'financial debt' within the meaning of section 5(8) of the Code. Hence, considering the above judgement, the financial creditor of JIL will not be treated as the financial creditor of JAL as there was no direct financial assistance given to JAL which had time value of money.

Answer 1(b)(ii)

The order passed by the Adjudicating Authority (AA) in the case of JIL provides moratorium for prohibiting certain actions during its Corporate Insolvency Resolution Process (CIRP). The CIRP so ordered shall not be construed as to suspension or termination of registration, licenses, quota rights and all other benefits so availed by the corporate debtor.

Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 had clarified by inserting an Explanation under section 14(1) of the Code that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment or current dues arising for the use or continuation of the license or a similar grant or right during moratorium period.

Considering the above, registration, licenses, grants and other benefits availed by JIL shall not be suspended or terminated.

Answer 1(c)(i)

The tripartite joint development agreement entered into is for the development of land belonging to JDA and for construction of apartments in multi-storied building under the housing project.

The Adjudicating Authority on admission of the application for CIRP declared a moratorium as provided under the Code. JDA on knowing about the default and CIRP order passed against JAL served a notice for termination of the agreement stating that the land with all the structure would be repossessed by it since the land belongs to JDA and not to JAL.

The issue is relating to the land of JDA which is under tripartite joint development agreement to determine whether moratorium with reference to section 14(1)(d) of the Code will apply to statutorily freeze the occupation of land that have been handed over under the Joint Development Agreement.

The issues and the facts are identical as were before the Apex court in the case of Rajendera K Bhutta vs. Maharashtra Housing Development Authority (MAHADA) and others in Civil Appeal No. 12248 of 2018 and the Apex Court vide order dated 19.02.2020, after analyzing the provisions of section 14(1)(d) of the Code dealing with moratorium has held that the section does not deal with any beneficial interest or legal rights of the corporate debtor in any property. Further, applying the maxim 'reddendo singula singulis' it clarified that the words 'owner', 'lessor' and 'recovery of property' will have to be addressed separately i.e., the recovery of a property 'occupied by' a corporate debtor shall be made by an owner and a property in 'possession' (which means either constructive or actual possession and includes legal possession of the property) of the corporate debtor can be recovered by the 'lessor'.

Section 14(1)(d) of the Insolvency & Bankruptcy Code, when it speaks about the recovery of property "occupied", does not refer to rights or interests created in property but the only actual physical occupation of the property.

However, in the given situation the JAL only has a license to make developments on the land of the party to the contract which creates a beneficial interest in its favour and does not amount to occupancy or possession. Therefore, the termination notice would not fall under the ambit of moratorium and the land will not be a property of JAL. Accordingly, JDA can take possession of the land.

Answer 1(c)(ii)

Robin after collation and verification of claims is required to constitute a Committee of Creditors (CoC). The CoC as per provisions of section 21(2) of the Insolvency & Bankruptcy Code comprises of all financial creditors of the corporate debtor and as such the operational creditor cannot object on the actions taken by Robin for including their names in the list of CoC. However, operational creditor may attend the meeting of the CoC if their admitted debt is not less than 10% of the total debt.

However, as per section 5(7) read along with 5(8) of the Code the allottees in the real estate project of the company have been considered as financial creditors. Also, the Supreme Court in the case of "Pioneer Urban Land & Infrastructure Ltd. & Anr. vs. Union of India & Ors. has held that the allottees in the real estate project company shall be considered as financial creditors. Accordingly, the allottees in the real estate project of the company are required to be included in CoC constituted by Robin.

The given statement is thus partly correct because the objection of the operational creditors to be included in CoC is incorrect but the objection of the allottees in the real estate project of the company to be included in CoC is correct.

Answer 1(d)

(i) The given statement is not correct. Various provisions of the Insolvency & Bankruptcy Code provide for the roles and duties of a Resolution Professional (RP) which can be summed up to state that an RP is responsible for managing the affairs of the corporate debtor and operate it as a going concern during CIRP. RP is entrusted with the duty to convene the meeting of the CoC and collate the claims of the creditors etc. Thus, it is evident that the role of RP is not adjudicatory whereas it is administrative in nature. He is a custodial owner of the corporate debtor.

Supreme Court in the case of Swiss Ribbons Pvt limited V Union of India (2019) held as under:

(i) It is clear from a reading of the Code as well as the Regulations that the RP has no adjudicatory powers.

(ii) The RP is given administrative as opposed to quasi-judicial powers.

The Supreme Court in this regard said that on careful examination of Section 18 read with Regulations 10, 12, 13 and 14 of CIRP Regulation, certain safeguards have been introduced and resolution professionals cannot act arbitrarily in many matters without the approval of the committee of the creditors (COC) and COC with the two-third majority can replace the resolution professional. Thus, the resolution professional acts as a facilitator.

(ii) The given statement is not correct. The Insolvency & Bankruptcy Code doesn't provide for such sub- committees; however, based on judicial precedents it is

observed that in the interest of the corporate debtor, the CoC forms a sub-committee to focus on a particular administrative aspect. Though the sub-committee may take decision, such decisions will have to be discussed during the meeting of CoC for taking necessary approvals and implementation. The power to approve the resolution plan, being a very important and critical matter, cannot be delegated to such a sub-committee by the CoC.

(iii) The given statement is not correct as there exists a clear demarcation under section 3(10) of the Insolvency & Bankruptcy Code between secured and unsecured creditors as well as between financial and operational creditors which defines creditor as any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder. Financial creditor provides capital to the corporate debtor and in turn acquires interest or charge on the assets of the corporate debtor, whereas the operational creditor is just a supplier of goods or services to the corporate debtor who gets paid in return.

(iv) The given statement is partly correct, as the members of the suspended Board of directors do not form the part of CoC because CoC as per section 21(2) of the Insolvency & Bankruptcy Code is constituted of all financial creditors of the corporate debtor. However, the members of the suspended Board as being held by the Apex Court in the case of Vijay Kumar Jain vs. Standard Chartered Bank have a right to participate in each and every meeting held by the COC, also have a right to discuss along with members of the CoC all resolution plans that are presented at such meetings as they are being vitally interested in resolution plans that may be discussed at meetings of CoC and therefore, must be given a copy of such plans.

In addition, for effective participation as vitally interested parties in discussion on resolution plans, they have the right to receive copies of the resolution plans presented to the COC. The Hon'ble Supreme Court also clarified that under Regulation 21(3)(iii) of the CIRP Regulations, the notice of the COC meeting, which is required to be given to the directors as well must contain copies of all the documents relevant for matters to be discussed, including the resolution plans.

Question 2

Ruby and Emerald Pvt. Ltd (REPL), incorporated on 1st April, 2013 has its registered office in Surat. Gems and Gems Pvt. Ltd (GGPL), incorporated on 11th September, 2014 has its registered office in Jaipur. REPL was approached by GGPL for procuring its goods which can be used as raw material in the factory of REPL. It was agreed through a contract between REPL and GGPL that upon procurement of the goods entire payment shall be made by REPL within 10 days of issuance of the tax invoice. The transaction was smoothly going between REPL and GGPL without any delays in supply of goods and payment. Owner of REPL died due to cardiac arrest and the business operations of REPL were severely affected. REPL started supplying faulty goods to its customers and the quality of raw material being supplied by the suppliers also deteriorated gradually. As on 2nd January, 2021, there were no dues outstanding towards GGPL and balance confirmation from GGPL was also taken by REPL. However, between 3rd January, 2021 and 31st May, 2021 various transactions happened between REPL and GGPL. GGPL requested for the payments multiple times for

such transaction between 3rd January, 2021 and 31st May, 2021; however, GGPL kept supplying goods in good faith based on relationship with REPL. REPL neither responded to requestsof GGPL nor stopped buying goods from them. Because of the long overdue from REPL, GGPL sent a demand notice on 16th June, 2021 through their lawyer to make the payment of entire outstanding to the tune of ' 1,25,00,000/- exclusive of interest @ 15% p.a. within 10 days from the receipt of the notice, failing which GGPL will take suitable actions under the law. No communication whatsoever was received from REPL. Therefore, as per the directions of the lawyer, GGPL filed an application to initiate Corporate Insolvency Resolution Process (CIRP) against REPL. Also, they have sent a letter to the power company to disconnect the supply of electricity to REPL considering that they are not in a position to pay their dues

Considering the above facts answer the following questions :

(a) State whether GGPL can file an application to initiate CIRP against REPL. State the documents that are required to be attached with such application as per Insolvency and Bankruptcy Code, 2016. (6 marks)

(b) GGPL missed to mention the name of Interim Resolution Professional (IRP) in its application. Can this mistake lead to rejection of their application ? (3 marks)

(c) Examine whether the power company can disconnect the electricity supply based on the letter received from GGPL, being an applicant who initiated CIRP ? (2 marks)

(d) Whether moratorium as envisaged under the Insolvency and Bankruptcy Code, 2016 is applicable in the present case ? (1 mark)

Answer 2(a)

Pursuant to provisions of section 4 of the Insolvency & Bankruptcy Code prescribing minimum default of Rs one crore for initiating CIRP by a financial creditor, operational creditor or corporate debtor, Gems and Gems Pvt. Ltd (GGPL) being an operational creditor, intends to initiate the Corporate Insolvency Resolution Process (CIRP) against Ruby and Emerald Pvt. Ltd (REPL), can file an application under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) before the National Company Law Tribunal (NCLT) considering that their dues exceed Rs 1 crore.

Section 9 provides that after the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under subsection (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

According to Section 9 of the Insolvency & Bankruptcy Code, an application for initiation of corporate insolvency resolution process by the operational creditor shall be filed in such form and manner and accompanied with such fee as may be prescribed.

GGPL shall along with the application furnish the following documents:

i) A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

ii) An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

iii) A copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

iv) A copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

v) Any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

Answer 2(b)

According to section 9(4) of the Insolvency & Bankruptcy Code, an operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

GGPL may propose a resolution professional to act as an interim resolution professional. However, being an operational creditor, it is not mandatory for them to propose a name. According to section 16 (3) of the Code, in such cases where no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Insolvency and Bankruptcy Board of India for the recommendation of the name of insolvency professional who may act as an interim resolution professional.

Therefore, this mistake will not lead to rejection of their application.

Answer 2(c)

Section 14(1) of the Insolvency & Bankruptcy Code deals with the moratorium and provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium. Section 14(2) of the Code states that the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

As per regulation 32 of IBBI (Resolution Process for Corporate Persons) Regulations, 2016 essential supplies referred to in section 14(2) of the Code shall mean electricity to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Considering the above, power-company cannot disconnect the power supply.

Answer 2(d)

Provisions of section 14 of the Insolvency & Bankruptcy Code doesn't differentiate whether the application is filed under section 7, 9 or 10 of the Code in so far as application of moratorium is concerned. Therefore, in the present case as well, the moratorium will be applicable.

Question 3

(a) Multi-National Companies (MNCs) can operate their business in different countries because of availability of talented manpower, skilled workforce, infrastructural

facilities as well as government support. Many such companies are also doing business outside India because of the locational advantages and benefits offered by the governments in different countries. Such companies have assets located outside India as well. When such companies are unable to repay their debts, the financial institutions face a lot of difficulties and encounter bottlenecks since the lawyer of one such financial institution has mentioned during the board meeting that there exists no provision with respect to cross border insolvency under the Insolvency and Bankruptcy Code, 2016 (the Code). Examine the correctness of the above statement made by the lawyer and comment on whether the Code prescribes the procedure to deal with Cross Border Insolvency cases. *(6 marks)*

(b) Examine under the provision of the Insolvency and Bankruptcy Code, 2016 and the decided case law(s) about the correctness of the following statement : "Resolution Plan under Corporate Insolvency Resolution Process generally aims that the corporate debtor should be liquidated whereas the resolution plan should comply with certain principles other than that of liquidation". State all principles other than that of liquidation which a resolution plan should have complied with. *(6 marks)*

Answer 3(a)

With the globalization, the business at international level is increasing day by day and also the presence of the companies in different countries which are having different regulations relating the business and insolvency process in respect of Cross Border Insolvency. The law adopted by 44 countries is UNCITRAL Model of Cross Border Insolvency, 1997 and the same has been recommended by the Insolvency Law Committee to be adopted as Model Law in case of Cross Border Insolvency in India.

The statement that Insolvency and Bankruptcy Code, 2016 (the Code) do not deal with the Cross Border Insolvency is incorrect since Section 234 and 235 of the Code deal with Cross Border Insolvency. Section 234 of the Code empowers the Central Government to enter into an agreement with other countries to resolve situations pertaining to cross border insolvency and provides that:

a) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code. [Section 234(1)]

b) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified. [Section 234(2)].

Section 235 of the Code lays down that

(1) Notwithstanding anything contained in this Code or any law for the time being in force it, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that

assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the adjudicating authority that evidence or action relating to such assets is required in connection with such process or proceeding.

(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.

Considering the above, the statement made by the lawyer is not correct.

Answer 3(b)

A resolution process under the provision of the Insolvency and Bankruptcy Code, 2016 (the Code) against a corporate debtor is not a liquidation process as the Code does not allow for liquidation of a corporate debtor directly but permits the liquidation only on failure of the resolution process. Further, the preamble of the Code also doesn't mention that the objective of the Code is liquidation. Therefore, the given statement is not a correct statement.

The National Company Law Appellate Tribunal (NCLAT), in the matter of Binani Industries Limited vs. Bank of Baroda while approving the revised resolution plan submitted by Ultratech Cement Limited laid down certain principles that a resolution plan should comply with inter alia are:-

a) Functionally, the resolution plan shall resolve insolvency, maximize the value of the asset of corporate debtor, and promote entrepreneurship, availability of credit, and balance the interest of all the stakeholder, the resolution plan is not a sale, or auction, or recovery or liquidation but a resolution of the corporate debtor as a going concern.

b) A resolution process under IBC is not an auction. Feasibility and viability of a 'Resolution Plan' are not amenable to bidding or auction; it requires application of mind by the 'Financial Creditors' who understand the business well.

c) A resolution process under IBC is not recovery. Recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. The IB Code prohibits and discourages recovery.

d) A resolution process is not a liquidation process. The IBC does not allow liquidation of a corporate debtor directly and permits liquidation only on failure of the resolution process.

e) The IBC aims to balance the interest of all stakeholders and does not maximize value for financial creditors. Therefore, the dues of operational creditors must get at least similar treatment as compared to the dues of financial creditors.

Question 4

(a) Examine and state in the context of provisions of Insolvency and Bankruptcy Code, 2016 and the decided case law that "no suit or proceedings in a civil court

or any other authority in any matter on which the National Company Law Tribunal (NCLT) or the National Company Law Appellate Tribunal (NCLAT) hold jurisdiction under the Insolvency and Bankruptcy Code, 2016 are maintainable against the corporate debtor".

(b) *ABC Pvt. Ltd. is a corporate debtor against whom the Corporate Insolvency Resolution Process (CIRP) as per Insolvency and Bankruptcy Code, 2016 (the Code) was in progress pursuant to an order of National Company Law Appellate Tribunal (NCLAT). However, the corporate debtor being aggrieved from the order of NCLAT filed an appeal before the Supreme Court on the principle of natural justice pleading that no notice of appeal was served upon him. Consider the above facts and based on the decided case law(s), state whether the ground taken by the appellant being the corporate debtor for filing an appeal before the Supreme Court as per the Code is maintainable ?*

(6 marks each)

Answer 4(a)

Section 60 of the Insolvency and Bankruptcy Code, 2016 (the Code) provides that the National Company Law Tribunal (NCLT) being the Adjudicating Authority, in relation to any insolvency resolution and liquidation for corporate persons, including corporate debtors and personal guarantors thereof, shall be having territorial jurisdiction over the place where the registered office of the corporate persons is located.

Section 63 of the Code bars any suit or proceedings in a civil court or any other authority in any matter on which the National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code.

Section 238 of the Code grants an overriding effect by having a non-obstante clause and ensuring that provisions of the Code will continue to be in full force even if they are inconsistent with any other law of the country. It is further also stated in section 231 of the Code that no civil court shall have the jurisdiction in any matter where the Adjudicating Authority (NCLT) or the Board is empowered, by, or under, this Code, to pass any order. It also states that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority or the Board under this Code.

Section 33 of the Code bars every suit or proceeding instituted against the corporate debtor when a liquidation order has been passed.

NCLAT, New Delhi in the case of E.C. John vs. Jitendra Kumar Jain & Ors, set aside the order of the NCLT and quashed the civil suit against the Corporate Debtor. The Tribunal further observed that, even though the filing of a civil suit is barred in terms of the Code, the correct course for the liquidator is to approach the Court where the civil suit was pending and point out the pertinent provisions of law.

Answer 4(b)

The facts given in the case are identical as were in the case of Jai Balaji Industries v/s SBI in Civil appeal No. 1929 of 2019 where the corporate debtor being aggrieved w.r.t. the order of National company Law Appellate Tribunal (NCLAT) for admission of application under section 7 of the Insolvency and Bankruptcy Code, 2016 filed an appeal before the

Supreme Court. The plea of the corporate debtor was that it had been denied the right to be heard since no notice of the appeal was served upon him. However, the contention of the respondent State Bank of India was that an advance copy of the appeal paper book filed with the NCLAT was served on the registered office of the corporate debtor and thus the appellant has been employing the delaying tactics to install the insolvency proceedings. The Apex Court admitted the application of the corporate debtor as being maintainable.

The Apex Court after admitting the application of the corporate debtor vide judgment dated 8th March, 2019 has held that the corporate debtor appellant has been denied the right to be heard which is the principle for natural justice and the stand taken by the corporate debtor that no notice of the appeal by NCLAT was served upon him is correct.

The Apex Court further held that Rule 48 of NCLAT Rules, 2016 clearly state that service of notice on the other side, pursuant to the issuance of notice by the NCLAT in the appeal, regardless of the supply of an advance copy of appeal paper book before the issuance of notice by NCLAT is necessary. Further Rule 52 of the NCLAT Rules, 2016 categorically states that the judicial section of the registry of the NCLAT shall record, in the "Notes of the Registry" column in the order sheet, the details regarding completion of service of notice on the respondents.

Thus, appellants appeal was allowed as no processing fee for issuance and service of notice was paid by the respondent and the matter was remanded back to NCLAT to be decided on merits.

Considering the above in the given case, the grounds by the appellant being the corporate debtor for filing an appeal before the Supreme Court will be maintainable.

Question 5

Insolvency and Bankruptcy Code, 2016 (the Code) primarily focus on resolution of the corporate debtor but where the resolution plan fails as the Committee of Creditors (CoC) do not approve the resolution plan and no other way can be adopted then the ultimate resort is the liquidation and dissolution of the corporate debtor. However, even in the case of liquidation of corporate debtor as held by the Supreme Court the liquidator can sale the business of the corporate debtor as a 'going concern'. The liquidation process under chapter – III of Part – II of the Code is being regulated by the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and the order of liquidation is also being passed by the Adjudicating Authority (AA). A resolution professional is being appointed by AA to act as liquidator. However, occasions may arise where the appointed liquidator can be threatened and may not be allowed to enter the premises of corporate debtor to carry out his functions or the appointment of the liquidator is challenged by CoC after the order of liquidation is passed by the AA. Despite the order of liquidation the entire assets of the corporate debtor do not constitute liquidation estate assets. Consider the above facts and answer the following questions :

(a) Based on the applicable case law(s) state the protection, if any, made available to the liquidator when he is not being allowed to enter the premises of the corporate debtor to carry out his functions with the threat of his life. (3 marks)

(b) Can CoC challenge the appointment of liquidator after passing of the order of liquidation by the Adjudicating Authority ? (3 marks)

(c) *Despite the liquidation estate comprising assets held by the corporate debtor, certain assets have to be excluded from the liquidation estate assets. Specify all such assets.* *(6 marks)*

Answer 5(a)

The Liquidator as per section 35 of the Insolvency and Bankruptcy Code, 2016 to ensure orderly completion of the liquidation proceedings has been given powers and duty which includes to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor, to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary, to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary. Further section 34 of the Code mandate that the personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor.

However, where the liquidator is being opposed to enter into the premises of the corporate debtor by a group/ mob of unknown person, hurled threats with weapons, the NCLAT in the case of S. Muthuraju Vs. Commissioner of Police directed the Superintendent of Police to give adequate police protection to the liquidator to enable him to perform his duties.

Answer 5(b)

Section 34(4) of the Code provides for that the Adjudicating Authority shall by order replace the resolution professional, if– (a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or (b) the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing; or (c) the resolution professional fails to submit written consent under sub-section (1).

The Code nowhere provides for where CoC could challenge replacement of liquidator, after the liquidation order is passed by the Adjudicating Authority.

NCLAT in the case of *Punjab National Bank* Vs. *Mr. Kiran Shah, Liquidator of ORG Informatics Ltd* held that after the liquidation order, the CoC has no role to play and that they are simply claimants, whose matters are to be determined by the liquidator and hence cannot move an application for his removal.

Considering the above, CoC cannot challenge the appointment of liquidator after passing the order of liquidation by the Adjudicating Authority.

Answer 5(c)

The liquidation estate shall comprise of all liquidation assets of the corporate debtor forming part of liquidation estate. However, certain assets as specified in section 36(4) of Insolvency and Bankruptcy Code, 2016 shall not be the forming part or to be included in the liquidation estate assets. Such assets are:

(a) assets owned by a third party which are in possession of the corporate debtor, including:

    (i) assets held in trust for any third party;

(ii) bailment contracts

(iii) all sums due to any workmen or employees from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor, or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

Question 6

(a) Raman is acting as Resolution Professional (RP) during the Corporate Insolvency Resolution Process (CIRP) of Delta Ltd. Subsequently, Raman was also appointed as Interim Resolution Professional (IRP) of Sigma Ltd. (a wholly owned subsidiary of Delta Ltd). There was a pre-existing commercial dispute between Delta Ltd. and Sigma Ltd. which was not pursued by the lenders of Sigma Ltd. prior to commencement of CIRP of Delta Ltd. as well as Sigma Ltd. However, during the first meeting of the Committee of Creditors (CoC) of Sigma Ltd. the members of CoC asked Raman to file an application before the Adjudicating Authority in connection with recovery of dues from Delta Ltd. In response to this Raman informed to the members that since he will be filing the application against Delta Ltd. where he himself is an RP; therefore, he proposes to increase his fee to Rs. 1 crore per month from Rs. 3 lacs per month citing complexity in managing the legal issues. Considering the above facts, state whether the actions of Raman to continue to act as RP/IRP as well as demanding higher fees is in accordance with the Insolvency and Bankruptcy Code, 2016 ? (6 marks)

(b) Regulation 37 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the provisions of the Insolvency and Bankruptcy Code, 2016 are silent on the measures for the operational and financial restructuring of the corporate debtor. Regulation 37 was substituted and amended from time to time vide various notifications so that the corporate debtor to be saved from liquidation. Considering the above, explain in brief the concept about the operational and financial restructuring and what does a resolution plan should demonstrate for the corporate debtor. Also, state the broad categories under which a corporate restructuring may be carried out in relation to a corporate debtor. (6 marks)

Answer 6(a)

The IBBI (Insolvency Professionals) Regulations, 2016 makes provisions for the examination and registration of Insolvency Professionals with the Insolvency and Bankruptcy Board of India. These regulations also make provisions for the disciplinary proceedings against the insolvency professional as well as prescribes a Code of Conduct for insolvency professionals.

First schedule to the aforesaid regulations prescribes a Code of Conduct for insolvency professionals. According to regulation 7(2)(h), the registration of an insolvency professional shall be subject to the condition that he shall abide by the following Code of Conduct specified in the First Schedule to the Regulations.

Integrity and Objectivity

An insolvency professional must disclose the details of any conflict of interests to the stakeholders, whenever he comes across such conflict of interest during an assignment.

Considering the above, since Raman is facing a direct conflict of interest because of he being acting as resolution professional in Delta Ltd. and Sigma Ltd. and his actions may get prejudiced; therefore, he shall promptly inform the Committee of Creditors of both the companies about the conflict of interest and tender his resignation from one of the companies to avoid such conflict of interest.

Remuneration and Costs

As per Regulation 25 of the Code of Conduct, an insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.

Further Regulation 26 provides that an insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

Regulation 27 makes it mandatory for an insolvency professional to disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.

Considering the above, the fee demanded by Raman is not in accordance with the Code and work to be performed by him.

Answer 6(b)

Resolution Plan should first demonstrate as to operational restructuring for improving the operational efficiency of the corporate debtor so as to increase its business receipts and profitability. It may consist of creation of new departments to serve growing markets or downsizing or eliminating departments to conserve overheads.

Besides the operational restructuring the plan can also demonstrate of financial restructuring which primarily comprises of equity capital and debt capital so as to overcome poor financial performance and gain the market share and opportunity.

The Insolvency and Bankruptcy Board of India has made the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 to regulate the Insolvency Resolution Process for Corporate Persons. Regulation 37 as substituted vide Notification No. IBBI/2017-18/GN/REG024, dated 6th February, 2018 (w.e.f. 06 February 2018) provides that a resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following:

(a) transfer of all or part of the assets of the corporate debtor to one or more persons;

(b) sale of all or part of the assets whether subject to any security interest or not;

(c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;

(ca) cancellation or delisting of any shares of the corporate debtor, if applicable;

(d) satisfaction or modification of any security interest;

(e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;

(f) reduction in the amount payable to the creditors;

(g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;

(h) amendment of the constitutional documents of the corporate debtor;

(i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;

(j) change in portfolio of goods or services produced or rendered by the corporate debtor;

(k) change in technology used by the corporate debtor; and

(l) obtaining necessary approvals from the Central and other authorities.

Corporate Restructuring is an inorganic business strategy where one or more aspects of a business are redesigned to improve commercial efficiency, manage competition effectively, drive faster pace of growth, ensure effective utilization of resources, and fulfilment of stakeholders' expectations. It serves different purposes for different companies at different points of time and may take up various forms. Restructuring typically occurs to address challenges or it can be driven by the necessity to make financial adjustments to its assets and liabilities. Mergers, amalgamations, acquisitions, compromises, arrangement or reconstruction are various forms of corporate restructuring exercises. The purpose of each of these restructuring exercises may be different but each of these exercises attempts to bring in more efficiency in the system. Corporate restructuring may be broadly categorised as:

1. Organisational Restructuring

2. Financial Restructuring

1. Organisational Restructuring: Organizational Restructuring may involve creation of new departments to serve growing markets or downsizing or eliminating departments to conserve overheads. A company may undertake restructuring to focus on a particular market segment leveraging its core competencies or may undertake restructuring to make the organisation lean and efficient. This type of restructuring affects employees and involves layoffs or collaboration with third parties to upgrade skills and technical know-how.

2. Financial Restructuring Financial restructuring is the process of reorganizing the financial structure, which primarily comprises of equity capital and debt capital. There may be several reasons (financial and non-financial) that trigger the need for financial restructuring. Financial restructuring is undertaken either because of compulsion (to recover from financial distress) or as part of company's financial strategy. Financial restructuring is done for various business reasons such as to overcome poor financial performance, to gain market share, or to seize emerging market opportunities. Financial restructuring undertaken to recover from financial distress involves negotiations with various stakeholders such as banks, financial institutions, creditors in order to reduce liabilities.

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