

PROFESSIONAL PROGRAMME
MODULE 3, PAPER 8

MULTIDISCIPLINARY CASE STUDIES

SAMPLE CASE STUDIES **&** **SUGGESTED SOLUTIONS**



THE INSTITUTE OF
Company Secretaries of India

भारतीय कम्पनी सचिव संस्थान

IN PURSUIT OF PROFESSIONAL EXCELLENCE

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Case Study-1

Narmada Limited (The Company) is incorporated as a Private Limited Company under the provision of Companies Act, 1956 with the Registrar of Companies, Gwalior, Madhya Pradesh. The company is having its registered office at Plot No.1, First Floor, West Chamber, Gwalior, Madhya Pradesh. Authorized share capital of the Company is Rs. 5, 00,000/-. The Issued, subscribed and paid up share capital of the Company is Rs. 5, 00,000/-. The main objects of the company are construction of building and housing and also educational.

A notice of struck off has been received from Registrar of Companies, Gwalior, Madhya Pradesh by the Narmada Limited. Registrar of Companies, Gwalior, Madhya Pradesh issued a notice on company for non-compliance of provisions of the Companies Act, 2013 in respect of filing of Annual Returns and Financial Statements for years 2014-15 to 2017-18 and subsequently the name of the company was struck off in terms of provision of Section 248(1) of the Companies Act, 2013 read with Rule 7 and Rule 9 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016. Aggrieved by the order of Registrar of Companies, Gwalior, Madhya Pradesh, Narmada Limited filed an appeal before National Company Law Tribunal (NCLT), Gwalior under Section 252 of the Companies Act, 2013 and submitted that the company was in operation and the business activities were carried out by the company during the period of striking off but the reporting of such activities through Annual Returns and Financial Statement had not been filed with Registrar of Companies due to inadvertence on part of the management.

You are a Practicing Company Secretary and the Company has hired you as a Consultant to advise Narmada Limited on the following, considering the above facts:

- (a) What would be the procedure regarding filing of appeal before National Company Law Tribunal (NCLT)?
- (b) State the grounds on which Registrar of Companies can remove the name of a company from Register of Companies.
- (c) Enumerate the categories of Companies which shall not be removed from the Register of Companies under the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016. **(10 marks each)**

Suggested Solution- Case Study-1

- (a) *Procedure regarding appeal before National Company Law Tribunal*
- According to Rule 87A of the National Company Law Tribunal Rules, 2016, an appeal under Section 252(1) or an application under Section 252(3) may be filed before the National Company Law Tribunal (NCLT) in Form No. NCLT. 9, with such modifications as may be necessary.
 - Following Documents shall be attached with Form No. NCLT.9:
 - Copy of Memorandum and Articles of Association

- Copy of list of struck off companies issued by ROC
 - Evidence regarding payment of Fee
 - Affidavit Verifying the Petition
 - Memorandum of Appearance
 - Copy of Board Resolution & Vakalatnam
 - Sufficient evidence to prove that it has been in operation during striking off and therefore could not be termed as defunct company
- A copy of the appeal or application, shall be served on the Registrar of Companies and on such other persons as the National Company Law Tribunal may direct, not less than fourteen days before the date fixed for hearing of the appeal or application, as the case may be.
 - Upon hearing the appeal or the application or any adjourned hearing thereof, the National Company Law Tribunal may pass appropriate order, as it deems fit.
 - Where the National Company Law Tribunal makes an order restoring the name of a company in the register of companies, the order shall direct that-
 - The appellant or applicant shall deliver a certified copy to the Registrar of Companies within thirty days from the date of the order;
 - On such delivery, the Registrar of Companies do, in his official name and seal, publish the order in the Official Gazette;
 - The appellant or applicant do pay to the Registrar of Companies his costs of, and occasioned by, the appeal or application, unless the Tribunal directs otherwise; and
 - The company shall file pending financial statements and annual returns with the Registrar and comply with the requirements of the Companies Act, 2013 and rules made thereunder within such time as may be directed by the Tribunal.

(b) *Grounds on which Registrar of Companies can remove the name of a company from Register of Companies:*

As per Section 248 of the Companies Act, 2013, where the Registrar has reasonable cause to believe that—

- Company has failed to commence its business within one year of its incorporation
- Company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013
- Subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under Section 10A (1) of the Companies Act, 2013
- Company is not carrying on any business or operations, as revealed after the physical verification carried out under Section 12(9) of the Companies Act, 2013.

(c) *Categories of Companies which shall not be removed from the Register of Companies under the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016:*

According to Rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 the following categories of companies shall not be removed from the register of companies:

- (i) Listed companies;
- (ii) Companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;
- (iii) Vanishing companies;
- (iv) Companies where inspection or investigation is ordered and being carried out or actions on such order are yet to be taken up or were completed but prosecutions arising out of such inspection or investigation are pending in the Court;
- (v) Companies where notices under section 234 of the Companies Act, 1956 or section 206 or section 207 of the Act have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 has not yet been submitted or follow up of instructions on report under section 208 is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the Court;
- (vi) Companies against which any prosecution for an offence is pending in any court;
- (vii) Companies whose application for compounding is pending before the competent authority for compounding the offences committed by the company or any of its officers in default;
- (viii) Companies, which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;
- (ix) Companies having charges which are pending for satisfaction; and
- (x) Companies registered under section 25 of the Companies Act, 1956 or section 8 of the Companies Act, 2013.

Case Study-2

M/s Jooly Private Limited (Corporate Debtor) is a company incorporated on 01.01.2005 under the provisions of Companies Act, 1956, having its registered office at Mumbai. The Authorised Share Capital of the company is Rs. 100, 00, 00,000/- and Paid up Share Capital of the company is Rs. Rs. 99, 00, 00,000/-.

M/s Jemmy Private Limited (Operational Creditor) is a company incorporated on 01.01.2006 under the provisions of Companies Act, 1956 having its registered office at Kolkata.

M/s Jooly Private Limited approached M/s Jemmy Private Limited for purchase of inputs for his production. It was specifically agreed that upon procuring the inputs by M/s Jooly Private Limited and raising of invoices by M/s Jemmy Private Limited, the entire payment for such

invoices shall be made in a timely manner. As per the arrangement, the M/s Jooly Private Limited placed various purchase orders for supply of inputs. M/s Jemmy Private Limited supplied the goods as per the orders placed by M/s Jooly Private Limited and raised invoices against the said supply.

The invoices were duly acknowledged by M/s Jooly Private Limited and an amount as part payments were also made. But thereafter, inspite of various requests made and reminders sent by M/s Jemmy Private Limited, the M/s Jooly Private Limited had neither responded nor repaid the remaining claim.

On failure to pay the outstanding dues by the M/s Jooly Private Limited, the M/s Jemmy Private Limited sent a demand notice dated 01.012019 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the respondent asking them to make the entire outstanding payments of Rs. 10,00,000/- (Rupees Ten Lakhs) inclusive of interest within 15 days from receipt of the notice, failing which the M/s Jemmy Private Limited shall initiate the Corporate Insolvency Resolution process against the M/s Jooly Private Limited.

Despite the demand notice, the M/s Jooly Private Limited did not pay the amount demanded, neither raised any notice of dispute nor replied to the said notice. As a next action M/s Jemmy Private Limited filed an application before National Company Law Tribunal (NCLT), seeking to unfold the process of Corporate Insolvency Resolution Process (CIRP).

Based on the above fact, answer the following:

- (a) Who can make application before the Adjudicating Authority on behalf of Operational Creditor and where to file such application to initiate the Corporate Insolvency process in the given case and also state the documents needs to be attached with such application under Insolvency and Bankruptcy Code, 2016.
- (b) Who can appoint Interim Resolution Professional in case Resolution Professional is not appointed by the Operational Creditor? State the moratorium as envisaged under the provisions of Section 14(1) to (4) of the Insolvency and Bankruptcy Code, 2016 in relation to the Corporate Debtor.
- (c) Enumerate the duties of interim resolution professional during the Corporate Insolvency Resolution Process (CIRP) specified under Section 18 of the Insolvency and Bankruptcy Code, 2016. **(10 marks each)**

Suggested Solution - Case Study-2

- (a) As per Section 6 of the Insolvency and Bankruptcy Code, 2016, where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under Chapter II of the Part II of the Insolvency and Bankruptcy Code, 2016. It may be noted that in terms of Section 5(20) of the Insolvency and Bankruptcy Code, 2016 operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Application to initiate the Corporate Insolvency process may be filed before the Adjudicating Authority. In terms of Section 5(1) of the Insolvency and Bankruptcy Code, 2016, Adjudicating Authority means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

According to Section 9 of the Insolvency and Bankruptcy Code, 2016, Application for initiation of corporate insolvency resolution process by operational creditor shall be filed in such form and manner and accompanied with such fee as may be prescribed. The operational creditor shall, along with the application furnish following documents-

- A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
- An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- 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;
- 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
- 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.

(b) Adjudicating Authority(National Company Law Tribunal) appoint Interim Resolution Professional in case Resolution Professional is not appointed by the Operational Creditor.

Section 14 of the Insolvency and Bankruptcy Code, 2016 deals with Moratorium.

Section 14(1) provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing off 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.

Section 14(2) 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 Section 14(3) the provisions of sub-section (1) shall not apply to —

- (a) such transaction as may be notified by the Central Government in consultation with any financial regulator;
- (b) a surety in a contract of guarantee to a corporate debtor.

Section 14(4) provides that the order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process. It may be noted that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

- (c)** Section 18 of the Insolvency and Bankruptcy Code, 2016 deals with the duties of interim resolution professional.

The interim resolution professional shall perform the following duties, namely: -

- (a) Collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to -
 - (i) business operations for the previous two years;
 - (ii) financial and operational payments for the previous two years;
 - (iii) list of assets and liabilities as on the initiation date; and
 - (iv) such other matters as may be specified;
- (b) Receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;
- (c) Constitute committee of creditors;
- (d) Monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;
- (e) File information collected with the information utility, if necessary; and
- (f) Take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including -
 - (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;
 - (ii) assets that may or may not be in possession of the corporate debtor;
 - (iii) tangible assets, whether movable or immovable;
 - (iv) intangible assets including intellectual property;
 - (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;
 - (vi) assets subject to the determination of ownership by a court or authority;

- (g) To perform such other duties as may be specified by the Board.

It may be noted that the term “assets” shall not include the following, namely: -

- (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
- (b) assets of any Indian or foreign subsidiary of the corporate debtor; and
- (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

Case Study-3

Kanzra Kysco, a company incorporated and listed in South Korea, is *inter-alia* engaged in the business of manufacturing and sale of steel products, automotive parts and fuel cell systems. Kanzra Kysco present in India through its subsidiaries, i.e. Kanzra Kysco India Private Limited. Kanzra Kysco India Private Limited a company incorporated in India, is engaged in the business of supply/distribution of processed steel sheets to automobile original equipment manufacturers (OEMs), or their vendors.

Kanzra Steel, a company incorporated and listed in South Korea, is an integrated iron and steel mining company *inter-alia* engaged in manufacture and sale of various steel products such as steel bars, steel beams, hot and cold rolled steel and plates. Kanzra Steel’s presence in India is largely limited to the supply of certain raw materials to Kanzra Kysco India Private Limited.

Kanzra Kysco and Kanzra Steel contemplates a merger. The proposed combination under Section 5 of the Competition Act, 2002 relates to the merger of Kanzra Kysco into Kanzra Steel as a result of which Kanzra Kysco would cease to exist and Kanzra Steel will be the surviving company. Both Kanzra Kysco and Kanzra Steel belong to the Kanzra Automobiles Group of South Korea.

Based on the above fact, answer the following:

- (a) As Company Secretary of Kanzra Kysco India Private Limited, advise the Chairman of your Company, who is seeking your advice, regarding threshold of combination as prescribed under Competition Act, 2002.
- (b) Merger notice under Section 6(2) of the Competition Act, 2002 has been received by Competition Commission of India. Assuming yourself as the Chairman of Competition Commission of India, state the factors that need to be considered while determining the above combination whether such merger is likely or not likely to have an appreciable adverse effect on competition in India? **(10 marks each)**

Suggested Solution- Case Study-3

- (a)** The thresholds for the combined assets/turnover of the parties to a combination prescribed under the Competition Act, 2002 are as follows:

At Enterprise level: The value of combined assets of the combining enterprises exceeds INR 2,000 crores or the combined turnover of the combining enterprise exceeds INR 6,000 crores, in India. In case either or both of the combining enterprises have assets /

turnover outside India also, then the combined assets of the combining enterprises value exceeds US\$ 1000 million, including at least INR 1000 crores in India, or combined turnover exceeds US\$ 3000 million, including at least INR 3000 crores in India.

At Group level: The group to which the combining enterprise whose control, shares, assets or voting rights are being acquired, would belong after the acquisition, or the group to which the combining enterprise remaining after the merger or amalgamation, would belong has either assets of value of more than INR 8000 crores in India or turnover more than INR 24000 crores in India. Where the group has presence in India as well as outside India then the group has assets more than US\$ 4 billion including at least INR 1000 crores in India or turnover more than US\$ 12 billion including at least INR 3000 crores in India.

The term 'Group' has been explained in the Act. Two enterprises belong to a "Group" if one is in position to exercise at least 26 per cent voting rights or appoint at least 50 per cent of the directors or controls the management or affairs in the other.

The above thresholds are presented in the form of a table below:

	APPLICABLE TO	ASSETS		TURNOVER	
In India	Individual Parties	Rs. 2,000 cr.		Rs. 6,000 cr.	
	Group	Rs. 8,000 cr.		Rs. 24,000 cr.	
In India and outside		ASSETS		TURNOVER	
		Total	Minimum Indian Component out of Total	Total	Minimum Indian Component out of Total
	Individual parties	US\$ 1 bn.	Rs. 1000 cr.	US\$ 3 bn.	Rs. 3,000 cr
	Group	US\$ 4 bn.	Rs. 1000 cr.	US\$ 12 bn.	Rs. 3,000 cr.

(b) The Competition Act, 2002 envisages appreciable adverse effect on competition in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the Commission to evaluate the effect of Combination on the basis of factors mentioned in Section 20(4) of the Competition Act, 2002.

Factors to be considered by the Competition Commission of India while evaluating appreciable adverse effect of Combinations on competition in the relevant market, are as under:

- (a) Actual and potential level of competition through imports in the market;
- (b) Extent of barriers to entry into the market;
- (c) Level of concentration in the market;
- (d) Degree of countervailing power in the market;
- (e) Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- (f) Extent of effective competition likely to sustain in a market;
- (g) Extent to which substitutes are available or are likely to be available in the market;
- (h) Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- (i) Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- (j) Nature and extent of vertical integration in the market;
- (k) Possibility of a failing business;
- (l) Nature and extent of innovation;
- (m) Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- (n) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Case Study-4

Amez Inc. is an E-commerce entity incorporated as an agency in India under Section 2 (v) (iii) of Foreign Exchange Management Act, 1999(FEMA) owned or controlled by a person who is a resident outside India and conducting the e-commerce business in marketplace based model. As a Practicing Company Secretary, Amez Inc. sought your advise on possibility of Foreign **Direct** Investment on e-commerce sector. Prepare a Policy Paper for Foreign Direct Investment on e-commerce sector, in India. **(10 marks)**

Suggested Solution- Case Study-4

Foreign Direct Investment (FDI) on e-commerce sector

- 100% FDI under automatic route is permitted in marketplace model of e-commerce and FDI is not permitted in inventory based model of e-commerce.

It may be noted that:

E-commerce means buying and selling of goods and services including digital products over digital & electronic network.

Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

Market place based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

E-commerce entity means a company incorporated under the Companies Act 1956 or the Companies Act 2013 or a foreign company covered under section 2 (42) of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2 (v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business.

- Subject to provisions of FDI Policy, e-commerce entities would engage only in Business to Business (B2B) e-commerce and not in Business to Consumer (B2C) e-commerce.
- Digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.
- Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on Business to Business (B2B) basis.
- E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services.
- E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.
- An entity having equity participation by e-commerce marketplace entity or its group companies, or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity.
- In marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.
- In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
- In marketplace model, any warranty/ guarantee of goods and services sold will be responsibility of the seller.
- E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be

provided by e-commerce marketplace entity or other entities in which e-commerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and non-discriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/ marketing, payments, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For this purposes provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.

- Guidelines on cash and carry wholesale trading of Consolidated FDI Policy Circular 2017 will apply on B2B e-commerce.
- E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.
- E-commerce marketplace entity will be required to furnish a certificate along with a report of statutory auditor to Reserve Bank of India, confirming compliance of above guidelines, by 30th of September of every year for the preceding financial year.
- Subject to the conditions of FDI policy on services sector and applicable laws/regulations, security and other conditionalities, sale of services through e-commerce will be under automatic route.

Case Study-5

Under the scheme of amalgamation, *M/S Pro-Prof Limited Liability Partnership (LLP)* is proposing to amalgamate with *M/S Queens Private Limited*. The scheme of amalgamation filed before the National Company Law Tribunal (NCLT) for approval.

In view of the above fact, answer the following:

- (a) Whether a Limited Liability Partnership can be allowed by the NCLT to amalgamate with a Private Limited Company under Scheme of Amalgamation? Justify your answer.
- (b) Discuss the powers of NCLT to enforce compromise or arrangement of limited liability partnerships as mentioned under Limited Liability Partnership Act, 2008.

(5 marks each)

Suggested Solution- Case Study-5

- (a)** Yes, a Limited Liability Partnership may be allowed by the NCLT to amalgamate with a Private Limited Company under Scheme of Amalgamation.

Chapter XII (Section 60 to 62) of the Limited Liability Partnership Act, 2008 deals with compromise, or arrangement of limited liability partnerships. Further, Section 230 to 234 of the Companies Act, 2013 deals with provisions of compromise, or arrangement of companies.

In the matter of Amalgamation between *M/s Real Image LLP (the transferor LLP)* with *M/s Qube Cinema Technologies Pvt Ltd. (Transferee Company)* and Their Respective Partner Shareholders and Creditors (CP/123/CAA/ 2018/TCA/157/CAA/2017) the

National Company Law Tribunal (Single Bench, Chennai) vide its Order delivered on 11th June, 2018 in Para 15 *inter-alia* observed that:

..... *"the legislative intent behind enacting both the LLP Act, 2008 and the Companies Act, 2013 is to facilitate the ease of doing business and create a desirable business atmosphere for companies and LLPs. For this purpose, both the Acts have provided provisions for merger or amalgamation of two or more LLPs and companies."*.....

..... *"If the intention of Parliament is to permit a foreign LLP to merge with an Indian company, then it would be wrong to presume that the Act prohibits a merger of an Indian LLP with an Indian company. Thus, there does not appear any express legal bar to allow/ sanction merger of an Indian LLP with an Indian company."*.....

(b) Section 61 of the Limited Liability Partnership Act, 2008 empowers the National Company Law Tribunal (Tribunal) to enforce compromise or arrangement.

Where the Tribunal makes an order under Section 60 of the Limited Liability Partnership Act, 2008 sanctioning a compromise or an arrangement in respect of a limited liability partnership, it—

- (a) shall have power to supervise the carrying out of the compromise or an arrangement; and
- (b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

If the Tribunal is satisfied that a compromise or an arrangement sanctioned under section 60 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the limited liability partnership, make an order for winding up the limited liability partnership, and such an order shall be deemed to be an order made under section 64 of the Limited Liability Partnership Act, 2008.

Case Study - 6

ABC Limited is a company engaged in the business of cement exports and it is also specialized in the area of Enterprise Resource Planning (ERP) implementation offering their services to domestic and overseas customers.

Enforcement Directorate under Foreign Exchange Management Act (FEMA) carried out the investigation against the ABC Limited. The investigation also centered around the details of the Promoters and their shareholdings; how many subsidiaries companies were formed by the appellants in India and abroad for doing business; details of the share transactions between the promoters of the Company and Non-Resident Indian(NRI) and the details of loans raised by the ABC Limited for their business purpose etc.

The investigation carried out by Enforcement Directorate has clearly made out a case against ABC Limited of violation of Section 8 and Section 42 of Foreign Exchange

Management Act as well as Foreign Exchange Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2015.

A complaint has been made by the Enforcement Directorate before Special Director. Special Director allowed the complaint and held that ABC Limited has contravened the provisions of FEMA as prayed in the complaint and accordingly imposed a penalty of Rs.5 crores on the Company.

ABC Limited felt aggrieved by the aforementioned order of Special Director and contemplates to file an appeal. As a Company Secretary of ABC Limited advise the company regarding:

- (a) Adjudication and Appeal under Foreign Exchange Management Act, 1999.
- (b) Duty of persons to realise foreign exchange due and Manner of Repatriation as well as Period for surrender of realised foreign exchange under Foreign Exchange Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2015.
- (c) Consequence of contravention of provisions of Foreign Exchange Management Act, 1999 and Rules and Regulation made thereunder by a company.

(10 Marks Each)

Suggested Solution- Case Study-6

- (a)** Chapter V (Section 16 to 35) of the Foreign Exchange Management Act, 1999(FEMA) deals with the provisions of Adjudication and Appeal as under:

Adjudicating Authority

For the purpose of adjudication under Section 13 of FEMA (dealing with Penalties), the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under Section 13, against whom a complaint has been made. Adjudicating Authority shall not hold an enquiry except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government.

Appeal to Special Director (Appeals)

Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities. Every appeal shall be filed within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by prescribed fee.

Appeal to Appellate Tribunal

Central Government or any person aggrieved by an order made by an Adjudicating Authority, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal.

Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such prescribed.

Appeal to High Court

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

(b) *Duty of persons to realise foreign exchange due:*

A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Foreign Exchange Management Act, 1999, or the Rules and Regulations made thereunder, or with the general or special permission of the Reserve Bank of India, take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

- a. that the receipt by him of the whole or part of that foreign exchange is delayed; or
- b. that the foreign exchange ceases in whole or in part to be receivable by him.

Manner of Repatriation:

- (1) On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and -
 - a. sell it to an authorised person in India in exchange for rupees; or
 - b. retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
 - c. use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.
- (2) A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

Period for surrender of realised foreign exchange:

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person, within the period specified below :-

- i. foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;

ii. in all other cases within a period of ninety days from the date of its receipt.

(c) According to Section 42 of the Foreign Exchange Management Act, 1999, where a person committing a contravention of any of the provisions of the Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

It may be noted that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.

Where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

For the purposes of section 42 of the Act, "Company" means anybody corporate and includes a firm or other association of individuals; and "director", in relation to a firm, means a partner in the firm.

Case Study - 7

XYZ Limited is a company engaged in real estate and construction business. In order to build a land bank in various parts of India that were likely to see commercial development and anticipating a future upward trend in land prices in various parts India. XYZ Limited hired the services of Mr. Mahesh to assist in the process of acquisition of lands.

XYZ Limited issued a detailed offer letter to Mr. Mahesh for purchase of around 100 acres of land at the maximum price of Rs. 10, 00,000/- per acre in different parts of India within a period not exceeding five years. The said offer was accepted by Mr. Mahesh by a letter of acceptance. Upon exchange of offer and acceptance, a legally binding and valid contract came to be force between XYZ Limited and Mr. Mahesh.

Mr. Mahesh received from XYZ Limited a sum of Rs. 1000 Crore as a loan/advance for the purchase of lands as specified in the contract between the parties. Mr. Mahesh purchased various movable and immovable properties with the funds received from XYZ Limited. Since all the funds could not be directly invested in land as required by the contract, investments were made by Mr. Mahesh by himself or through his company in purchase of immovable property, including land, built-up residential and commercial buildings, etc. and Investment in fixed deposits in name of Mr. Mahesh and PQR Limited(95% shareholding by Mr. Mahesh) also investment in movable property including bank balance and few vehicles.

In the meantime Director of Enforcement initiated *suo moto* proceedings under the Prevention of Money Laundering Act, 2002(PMLA) and registered a complaint under Sections 3 and 4 of the PMLA and attached the property of Mr. Mahesh under the Prevention of Money Laundering Act, 2002.

In view of the above, answer the following question:

- (a) Discuss the attachment of property involved in money laundering under PMLA
- (b) Explain the extent of punishment prescribed under PMLA.
- (c) Discuss Appellate Authority establish under PMLA and what is the time limit to file appeal.

(10 Marks Each)

Suggested Solution- Case Study-7

- (a)** Section 5 of the Prevention of Money Laundering Act, 2002(PMLA) deals with the provision of attachment of property involved in money laundering.

As per Section 5(1) of the PMLA, Where the Director or any other officer not below the rank of Deputy Director authorised by the Director, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that

- (a) any person is in possession of any proceeds of crime; and
- (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

It may be noted that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country.

Further, notwithstanding anything contained in above , any property of any person may be attached , if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of Section of the PMLA has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately, the non-attachment of the property is likely to frustrate any proceeding under the Act.

For the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under Section 5 of PMLA is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.;

Section 5(2) states that the Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

Section 5(3) provides that every order of attachment made under sub-section(1) shall cease to have effect after the expiry of the period specified in sub-section(1) or on the date of an order made under sub-section (3) of section 8, whichever is earlier.

As per Section 5(4) of PMLA, nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

It may be noted that person interested, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

Section 5(5) states that the Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

- (b)** Offence of money-Laundering and Punishment for money-Laundering are specified under Section 3 and 4 of the Prevention of Money Laundering Act, 2002 respectively.

Section 3 of the Prevention of Money Laundering Act, 2002 provides that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

It may be further noted that proceeds of crime means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property

According to Section 4 of the Prevention of Money Laundering Act, 2002, whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

It may be noted that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule to the PMLA, shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and shall also be liable to fine.

- (c)** The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act, may prefer an appeal to the Appellate Tribunal. Appeal has to be filed within a period of forty-five days from the date of receipt of a copy of the order made by the Adjudicating Authority. Appellate Tribunal may entertain an appeal after the expiry of the period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order. Thus appeal can be filed before High Court on any question of law or fact. High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Case Study-8

A Corporate Debtor defaulted in the payment to the Operational Creditor, Safe Bank, a foreign bank, amounting to INR 1,000 crore. A certificate was also furnished by the Safe Bank with regards to the non-payment of the outstanding amount by the Corporate Debtor and repeated reminders as to the payment of the debt were made, but such communications could not influence the Debtor to make the payment, pursuant to which a Statutory Notice was sent by the Operational Creditor under Section 433 and 434 of the Companies Act, 1956. The reply to such notice denied the existence of any such outstanding debt on the part of the Debtor.

After, the Insolvency and Bankruptcy Code (the Code) was enacted in 2016, the Operational Creditor furnished a Demand Notice through his lawyer to the Corporate Debtor under Section 8 of the Insolvency and Bankruptcy Code, 2016. The Corporate Debtor replied to the notice saying that there existed no outstanding default on its part and simultaneously, also questioned the validity of the Purchase Agreement. The Debtor also challenged the validity of sending the Demand Notice through his lawyer.

Aggrieved by the action of the Corporate Debtor, the Operational Creditor approached the National Company Law Tribunal (NCLT) and applied for the initiation of the Corporate Insolvency Resolution Process. NCLT rejected the application for initiation of Corporate Insolvency Resolution Process. Operational Creditor aggrieved by the decision of NCLT, preferred an appeal to the National Company Law Tribunal (NCLAT), which also upheld the decision of NCLT.

Subsequently, the Operational Creditor approached the Supreme Court for the redressal of its grievance.

In this backdrop, answer the following questions:

- (i) Give reasons for the rejection of the application for the initiation of the Corporate Insolvency Resolution Process by NCLT and NCLAT citing relevant provisions of the Code. *(10 marks)*
- (ii) Discuss whether challenging the validity of the Demand Notice by Corporate Debtor is justified? Discuss with relevant provisions of the Code. *(5 marks)*
- (iii) The Supreme Court overruled the orders of NCLT and NCLAT and allowed initiation of Corporate Insolvency Resolution Process. Discuss reasons for the same with the help of a decided case law. *(10 marks)*

Suggested Solution- Case Study-8

- (i) The NCLT rejected the application for initiation of the Corporate Insolvency Resolution Process since it was incomplete as it did not comply with the mandatory requirements of Section 9(3)(c) of the Insolvency and Bankruptcy Code, 2016 which require a certificate from a financial institution with regards to the non-payment of the outstanding amount by the Corporate Debtor. The certificate from the Safe Bank itself was not held to be a certificate from a financial institution as it was a foreign bank which did not fulfill any of the requirements to qualify as a 'financial institution' as per Section 3(14) of the Code. Section 3(14) defines financial institution as under:

"financial institution" means-

- (a) a scheduled bank;
- (b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);
- (c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013 (18 of 2013); and
- (d) such other institution as the Central Government may by notification specify as a financial institution;

NCLAT upheld the NCLT order since the application has to be complete before the initiation of the Corporate Insolvency Resolution Process and that the appellant failed to comply with the mandatory requirement of furnishing a certificate by a financial institution in which the Corporate Debtor has its account with regards that it has failed to pay the outstanding debt. Moreover, it reiterated that the Appellant Bank was not a 'financial institution' as per Section 3(14) of the Code. Also, as it is a mandatory document which acts as an evidence to the existence of default, it has to be necessarily furnished and without it the application is incomplete.

- (ii) There was an existence of dispute before the Demand Notice was furnished upon the Corporate Debtor as per Section 8(2)(a) of the Code which was also raised at the time when a reply to the Statutory Notice was furnished under Section 433 and 434 of the Companies Act, 1956 by the Respondent.

Section 8(1) of the Code contains provision relating to Demand Notice, it reads as under:

"An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed."

NCLAT noted that "in the present case, as the notice has been given by an advocate/lawyer and there is nothing on the record to suggest that the lawyer was authorized by the appellant, and as there is nothing on the record to suggest that the said lawyer/ advocate hold any position with or in relation to the appellant company, we hold that the notice issued by the advocate/ lawyer on behalf of the appellant

cannot be treated as notice under Section 8 of the Code. And for the said reason also the petition under Section 9 at the instance of the appellant against the respondent was not maintainable.

NCLT took cognizance of the Demand Notice which was furnished by the lawyer of the Appellant and noted that such Demand Notice has to be in compliance with Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. It was also observed that such Demand Notice was invalid as it has to be furnished as per Form 3 by the Creditor himself or by any authorized person on his behalf and lawyer cannot come under such purview as there was absence of any authority by the Operational Creditor.

(iii) Supreme Court in the matter of *Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.* dated December 15, 2017 while deciding upon the aforesaid issues, made the following observations:

(a) *Section 9(3)(c) of the Code is directory and not mandatory in nature*

The Supreme Court observed that a creative interpretation of Section 9(3)(c) is necessary in the present case as the literal interpretation would be unreasonable and would create hardships for Appellants and other foreign banks in the future. Also, the requirement of certificate as a document is not necessary for substantiating the existence of default as it can be proved by other documents as well. Also, in such cases where such certificates are impossible to furnish, serious inconvenience will be caused to the innocent persons like Appellant when such requirements are not even necessary to further the object of the Code.

Section 9(3)(c) has been since amended to read as under,

“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 ¹[by the corporate debtor, if available;]”

(b) *A Lawyer can issue a demand notice of an unpaid operational debt on behalf of the operational creditor*

In this context, the Supreme Court observed that Section 8 of the Code speaks of an operational creditor delivering a demand notice and if the legislature had wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been ‘issued’ and not ‘delivered’. Delivery, therefore, would postulate that such notice could be made by an authorized agent.

The expression ‘practise’ under Section 30 of the Advocates Act, 1961 providing for the ‘Right of advocates to practice’ is an expression of extremely wide import, and would include all preparatory steps leading to the filing of an application before a Tribunal.

Court also noted that the non-obstante clause contained in Section 238 of the Code (provisions of the Code overriding other laws) will not override the Advocates Act, 1961 as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act.

¹ Inserted by the Insolvency And Bankruptcy Code (Second Amendment) Act, 2018 dated 17-8-2018

SC also considered the judgment in *Byram Pestonji Gariwala v. Union Bank of India, (1992) 1 SCC 31*. In this judgment, what fell for consideration was Order XXIII Rule 3 of the Code of Civil Procedure, 1908 after its amendment in 1976. It was argued in that case that a compromise in a suit had, under Order XXIII Rule 3, to be in writing and “signed by the parties”. It was, therefore, argued that a compromise effected by counsel on behalf of his client would not be effective in law, unless the party himself signed the compromise. This was turned down stating that Courts in India have consistently recognized the traditional role of lawyers and the extent and nature of the implied authority to act on behalf of their clients, which included compromising matters on behalf of their clients. The Court held there is no reason to assume that the legislature intended to curtail such implied authority of counsel.

SC also noted that to insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by *vakalatnama*, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated.

Therefore, a conjoint reading of Section 30 of the Advocates Act, 1961 and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer is in order.

Case Study – 9

‘Taste Bud’ was a restaurant located at leased premises in New Delhi. It had a great reputation, award-winning chefs and tastefully designed interiors. Much of its business came from executive lunches and dinners. Following the opening of ‘Heavens’, another excellent restaurant in the nearby vicinity, trading losses were incurred by Taste Bud and eventually the business became insolvent.

Efforts to either have the rent reduced or to sell the business were unsuccessful. Suppliers of food, beverages and utilities were unpaid for supplies provided in the previous 45- 60 days, amounting to around Rs.90,000. There were rental arrears for one month amounting to Rs.50,000 towards landlord Mr. Deepak (the landlord had received advance rent for three months, lease deed provided for one-month rent as security and one-month rent as advance).

Taste Bud also had a secured creditor, ‘Secure Bank’. The bank indicated that it did not wish to appoint a receiver/ file for insolvency as the accounts were regularly maintained. Taste Bud was managed by Mr. Kapil, as a sole proprietor. He employed a staff of 10 people, including a chef, an assistant chef, six waiters and two house-keeping staff. The salaries due to these employees were paid in half since the past three months.

In light of the above, answer the following questions:

- (a) Whether Taste Bud can apply for fresh start process? Give answer with citing reasons.
- (b) In priority of payment of debts who will be paid before the wages and unpaid dues of employees of the bankrupt? How the priority is decided under the IBC 2016?
- (c) Who can initiate an insolvency resolution process in this case? Give reasons.
- (d) In the above situation if a bankruptcy order is passed against Taste Bud, who shall prepare the list of creditors? Mention provisions of IBC 2016 in this regard?
- (e) Analyse the effect of Bankruptcy Order on secured creditors under the IBC 2016.

(5 marks each)

Suggested Solution- Case Study-9

- (a)** No, Taste Bud is ineligible for applying for fresh start process.

Reason : Section 80(2)(c) of the Code provides a Fresh Start Process for individuals under which they will be eligible for a debt waiver of up to INR 35,000. The individual will be eligible for the waiver subject to certain limits prescribed under the Code.

Section 80 of the Insolvency and Bankruptcy Code, 2016 provides that a debtor who is unable to pay his debt and fulfils the conditions as mentioned in sub-section (2) of section 80 shall be entitled to make an application to the Debt Recovery Tribunal (DRT) for a fresh start process for discharge of his qualifying debt.

Section 79(19) of the Code defines the meaning of Qualifying Debt. It means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time but does not includes

- an excluded debt;
- a debt to the extent it is secured; and
- any debt which has been incurred three months prior to the date of the application for fresh start process;

- (b)** The first priority of payment shall be for the costs and expenses incurred by the bankruptcy trustee for the bankruptcy process in full. The Workmen's dues for the period of twenty-four months preceding the bankruptcy commencement date and the debts owed to the secured creditors comes after second in priority.

Reason: Section 178(1) of the Insolvency and Bankruptcy Code, 2016 prescribes the priority of payments of debts as under:

Notwithstanding anything to the contrary contained in any law enacted by the Parliament or the State Legislature for the time being in force, in the distribution of the final dividend, the following debts shall be paid in priority to all other debts —

- (a) firstly, the costs and expenses incurred by the bankruptcy trustee for the bankruptcy process in full;
- (b) secondly, -
 - (i) the workmen's dues for the period of twenty-four months preceding the bankruptcy commencement date; and
 - (ii) debts owed to secured creditors
- (c) thirdly, wages and any unpaid dues owed to employees, other than workmen, of the bankrupt for the period of twelve months preceding the bankruptcy commencement date;
- (d) fourthly, any amount due to the Central Government and the State Government including the amount to be received on account of Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the bankruptcy commencement date;
- (e) lastly, all other debts and dues owed by the bankrupt including unsecured debts.

(c) No one can initiate an insolvency resolution process.

Reason: Here 'Tast Bud' is the sole proprietorship concern and the proprietor is named as Mr Kapil. As mentioned in sub-question (a) above 'Taste Bud' is eligible to initiate the insolvency.

Section 6 of the Insolvency and Bankruptcy Code, 2016 provides that where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner provided under Chapter II of Part II of the Code. However, it is to be mentioned here that the case referred above relates to Individual and not of the CIRP.

(d) Bankruptcy Trustee shall prepare the list of creditors.

Reason: Section 132 of the Insolvency and Bankruptcy Code, 2016 provides that the bankruptcy trustee shall within fourteen days from the bankruptcy commencement date prepare a list of creditors of the bankrupt on the basis of,

- (i) the information disclosed by the bankrupt in the application for bankruptcy filed by the bankrupt under Section 118 of the Insolvency and Bankruptcy Code, 2016 and the statement of affairs filed under Section 125 of the Insolvency and Bankruptcy Code, 2016; and
- (ii) claims received by the bankruptcy trustee under sub-Section (2) of Section 130 of the Insolvency and Bankruptcy Code, 2016.

(e) Section 128 of the Insolvency and Bankruptcy Code, 2016 provides that on passing of the bankruptcy order under Section 126 of the Insolvency and Bankruptcy Code, 2016:

- a) the estate of the bankrupt shall vest in the bankruptcy trustee as provided under Section 154 of the Insolvency and Bankruptcy Code, 2016;

- b) the estate of the bankrupt shall be divided among his creditors;
- c) a creditor of the bankrupt indebted in respect of any debt claimed as a bankruptcy debt shall not:
 - (i) initiate any action against the property of the bankrupt in respect of such debt; or
 - (ii) commence any suit or other legal proceedings except with the leave of the Adjudicating Authority and on such terms as the Adjudicating Authority may impose.

Subject to the provisions of Section 123 of the Insolvency and Bankruptcy Code, 2016, the bankruptcy order shall not affect the right of any secured creditor to realize or otherwise deal with his security interest in the same manner as he would have been entitled if the bankruptcy order had not been passed: Provided that no secured creditor shall be entitled to any interest in respect of his debt after the bankruptcy commencement date if he does not take any action to realise his security within thirty days from the said date.

Case Study – 10

Disqualification of Director

As on 30th November, 2018, the filing status of the financial statement or annual return of ABC Limited for the last 4 financial year is as under:

Financial Year ended 31st March	Filing of Financial Statement	Filing of Annual Return	Date of AGM
2017-18	Not Submitted	Not submitted	25 th September, 2018
2016-17	Not submitted	Submitted	5 th June, 2017
2015-16	Submitted	Not submitted	30 th May, 2016
2014-15	Submitted	Not submitted	25 th May, 2015

On the basis of above please advise:

- i. Due date of the filing of the Financial Statement and Annual Return for the FY2015-16.
- ii. On the basis of the above filing status, whether the directors of the company are being disqualified or not under section 164(2) of the Companies Act, 2013.
- iii. Whether the company has made any non-compliance in calling of the AGM.
- iv. Consequence to the company for the Non filing of the Financial Statement.

Suggested Solution- Case Study-10

- i.** Due date of the filing of the Financial Statement and Annual Return for the FY 2015-16. As per the Section 137 of the Companies Act, 2013, A copy of the financial statements, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the annual general meeting of the company, shall be filed with the Registrar within thirty days of the date of annual general meeting.

In the above case the AGM is held on the 30th May, 2016 accordingly, the financial statement of the company should be filed on or before the 29th June, 2016.

As per section 92 of the companies act, 2013 Every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting.

In the above case the AGM is held on the 30th May, 2016 accordingly, the financial statement of the company should be filed on or before the 29th July, 2016.

- ii.** On the basis of the above filing status, whether the directors of the company are being disqualified or not under section 164(2) of the Companies Act, 2013. As per Section 164 (2) of the Companies Act, 2013, No person who is or has been a director of a company which—
- (a) has not filed financial statements or annual returns for any continuous period of three financial years; or
 - (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.]

As per the above filing status, the company has not filed the financial statement for the FY 2016 -17 and 2017-19 and the Annual return for the FY 2014-15 and 2015-16. Hence, all the Director of the company are disqualified. However, in case any director appointed during the FY 2016-17 and 2017-18 will not be disqualified for appointment or reappointment in any company.

- iii.** Whether the company has made any non-compliance in calling of the AGM. As per section 96 of the Companies Act, 2013 every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

From the above table it can be seen that the company has call AGM on 05th June, 2017 and the AGM for the FY 17-18 is called on 25th September, 2018, which is called after the gap of fifteen months which was expired on 05th September, 2018. However, if the company has taken the prior approval of the registrar of companies for extension of the date of the Annual general meeting, the company is in compliance with the law.

iv. Consequence to the company for the Non-filing of the Financial Statement.

As per section 137 of the companies Act, 2013 If a company fails to file the copy of the financial statements under sub-section (1) or sub-section (2), as the case may be, before the expiry of the period specified therein the company shall be liable to a penalty of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees, and the managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, shall be shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupee.

The company has not filed the financial statement for the year 2016-17 and 2017-18 and company is liable to pay additional fees as per section 403 and the penalty of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees.

Case Study-11

Acceptance of Deposit by Private Company

The Promoter of the ABC Private Limited (a Start-up Registered company) incorporated on 20th June, 2016 is willing to accept deposit from its members. The shareholding of Mr. A and Mr. B and Mr. C as on the 31st March 2017 is as under:

Mr. A Director of the company holding 4000 shares of Rupees 100 per share

Mr. B Friend of Mr. A

Mr. C 3000 Shares of Rupees 100 per share

The Company is not having investment in any Subsidiary Company and Associate Company, the borrowing from the Financial Institutions as on 31st March, 2017 is Rupees 10 Crores.

On the basis of the above information, Please advise on the following:

- i.** Whether the company can Accept deposit from Mr. A
- ii.** Whether the company can Accept deposit from Mr. B
- iii.** Whether the company can Accept deposit from Mr.C?
- iv.** What will be the maximum limits up to which the deposit can be accepted?
- v.** Describe the various compliance requirements for the company.

Suggested Solution- Case Study-11

i. Whether the company can Accept deposit from Mr. A

As per the Companies (Acceptance of Deposit) Rules, 2014 any amount received from a person who, at the time of the receipt of the amount, was a director of the company or a relative of the director of the Private Company is exempted under the deposit rules. However in such case the director of the company or relative of the director of the private company, as the case may be, from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report.

Hence the company can accept deposit from Mr. A as he is the Director of the company with No limit on the amount of deposit, further he need to give declaration on the same.

ii. Whether the company can accept deposit from Mr. B

No, the Company cannot accept deposit from Mr. B as he is not the director, relative of the directors of the company also he is not the members of the company. The definition of the private company prohibited for any invitation of the public to subscribe for any securities of the company.

iii. Whether the company can accept deposit from Mr. C

Yes, the company can accept deposit from Mr. C as per MCA notification dated 13th June, 2017, the provision the provision of clauses (a) to (e) of sub-section (2) of section 73 shall not apply to following class of private company-

- (A) which accepts from its members monies not exceeding one hundred per cent. of aggregate of the paid up share capital, free reserves and securities premium account; or
- (B) which is a start-up, for five years from the date of its incorporation; or
- (C) which fulfils all of the following conditions, namely:-
 - (a) which is not an associate or a subsidiary company of any other company;
 - (b) if the borrowings of such a company from banks or financial institutions or anybody corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and
 - (c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section:

In the above case the company is fits in the various conditions placed in the section for private limited companies for acceptance of deposit. Accordingly, the company can accept deposits from its members up to the one hundred per cent. of aggregate of the paid up share capital, free reserves and securities premium account.

- iv.** What will be the maximum limits up to which the deposit can be accepted?
As per rule 3(3) of the Companies (Deposit)Rules, 2014 o No company referred to in sub-section (2) of section 73 shall accept or renew any deposit from its members, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits exceeds thirty five per cent of the aggregate of the Paid-up share capital, free Reserves and securities premium account] of the company.
- However maximum limit in respect of deposits to be accepted from members shall not apply to following classes of private companies, namely:-
- (i) a private company which is a start-up, for five years from the date of its incorporation;
 - (ii) a private company which fulfils all of the following conditions, namely:-
 - (a) which is not an associate or a subsidiary company of any other company;
 - (b) the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is less ; and
 - (c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under section 73:
- v. Filing requirement:**
The companies accepting deposits is required to file the details of monies so accepted to the Registrar in Form DPT-3.

Case Study-12

Notice of Board Meeting

Mr. Sumit, an officer of the Corporate Secretarial Department of the Executive Limited has called the meeting of the members of the board of the director on 25th April, 2019, and served the notice on 17th April, 2019 on email as well as through Registered post, later on Mr. Ashok, one of the directors of the company has challenged the validity of the meeting on the following grounds.

- (a) Mr. Sumit was not authorised person to call the meeting.
- (b) The Notice was not sent on the letter head of the company.
- (c) The Notice is not served as per the statutory requirements.
- (d) The notice does not to inform about the facility of the video conferencing being provided by the company.

In this back drop answer the following:

- i. Whether Mr. Sumit was authorised person to call the meeting? If so give reasons.
- ii. Whether it is mandatory to send Notice of the meeting on the letter head of the company?
- iii. What are the statutory requirements for serving of notice of board meeting through emails and registered post?
- iv. Whether the facility of the video conferencing is mandatorily required to be provided by the company?

Suggested Solution- Case Study-12

- i.** Mr. Sumit was authorised person to call the meeting.

As a best practice and a measure of good governance, the Director desirous of summoning a Meeting for any purpose should send his requisition in writing to convene such Meeting, along with the agenda proposed by him for discussion at the Meeting, either to –

- the Chairman or in his absence, to the Managing Director or in his absence, to the Whole-time Director, or
- the Company Secretary or in his absence, to any other person authorised by the Board in this regard.

“any person authorised by the Board”, whether an officer of the company or any person other than the officer of the company, should be clearly identifiable.

It is advised to check whether Mr. Sumit fits under the criteria of the any person authorised by the board.

- ii.** The Notice was not sent on the letter head of the company.

As per the secretarial standard on the meeting of the Board of Director (SS-1) and guidance note issued Theron, The Notice should preferably be sent on the letter-head of the company. Where it is not sent on the letter-head or where it is sent by e-mail or any other electronic means, there should be specified, whether as a header or footer, the name of the company and complete address of its registered office together with all its particulars such as Corporate Identity Number (CIN) as required under Section 12 of the Act, date of Notice, authority and name and designation of the person who is issuing the Notice, and preferably the phone number of the Company Secretary or any other designated officer of the company who could be contacted by the Directors for any clarifications or arrangements.

- iii.** The Notice is not served as per the statutory requirements.

In case the company sends the Notice by speed post or by registered post, an additional two days shall be added for the service of Notice.

Addition of two days in case the company sends the Notice by speed post or by registered post is in line with Rule 35(6) of the Companies (Incorporation) Rules, 2014 which provides that in case of delivery of Notice of a Meeting by post, the service shall be deemed to have been effected at the expiration of forty eight hours after the letter containing the same is posted.

However, the requirement of adding two days is applicable only if the Notice is sent to any of the Directors solely by speed post or by registered post and not by facsimile or by e-mail or any other electronic means.

In case the Notice is sent by facsimile or by e-mail or by any other electronic means to the Directors, and it is additionally sent by speed post or by registered post to all or any of the Directors, whether pursuant to their request or otherwise, the additional two days need not be added.

- iv.** The notice does not inform about the facility of video conferencing being provided by the company.

The Director who desires to participate through Electronic Mode may intimate his intention of such participation at the beginning of the Calendar Year and such declaration shall be valid for one Calendar Year [Clause 3(e) read with Clause 3(d) of Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014]. The Notice shall also contain the contact number or e-mail address (es) of the Chairman or the Company Secretary or any other person authorised by the Board, to whom the Director shall confirm in this regard. In the absence of an advance communication or confirmation from the Director as above, it shall be assumed that he will attend the Meeting physically.
