PAPER- 4 – CORPORATE AND ECONOMIC LAWS

*Question No. **1** is compulsory.*

*Answer any **four** out of remaining five questions*

Question 1

(a) You are a young women Chartered Accountant from India, having graduated from a top notch business school in India and later on became a Certified Public Accountant (CPA) from USA. You have a special acumen for providing scratch to end business advisory and regulatory related solutions. Your client, M/s New Tech Software Solutions Limited (NTSSL) is a listed entity engaged in developing customised software packages for two and three wheeler automobile manufacturers in India and abroad. The Company follows strict corporate governance norms in letter and spirit and has the following composition of Board of Directors:

NAME	*DESIGNATION/CATEGORY*
Mr. X	*CEO and Managing Director*
Mr. Y	*Non-Independent and Non-Executive Director*
Mr. A, Mr. B, Mr. C and Mr. D	*Independent Directors*
Mrs. E	*Independent Women Director*

During the financial year 2019-2020, the Company made the following remuneration to its Directors:

Name	*Amount (in ₹)*
Mr. X-CEO & MD	*Monthly remuneration of ₹ 50,000 + Commission of ₹1,50,000 calculated as a percentage of net profits*
Mr. Y	*Commission at the rate of 1 % of the net profit.*

(i) Mr. Y was paid a fee of ₹ 1,00,000 for the services rendered by him, as a graduate civil engineer for valuing the assets of the Company. Though he is not a Registered Valuer, he carried out the valuation on the assumption that, valuation can be done by a person having such qualifications and experience for registered valuers.

(ii) Payment of ₹ 5,00,000 insurance premium towards Directors and Officers Liability Policy to protect the Company against any negligence on the part of Mr. X, the Managing Director. A claim of ₹ 1,00,000 was lodged with the Insurance Company as a result of guilty of negligence of Mr. X.

With the above information, the said Company approached you seeking certain clarifications. Clearly explaining the relevant provisions of the Companies Act, 2013 and the Rules made there under, provide your professional advise to the following questions as raised by the Company:

(i) *Whether the payments made to Mr. X and Mr. Y forms part of an overall maximum managerial remuneration?*

(ii) *Whether payment of insurance premium towards Directors and Officers Liability Policy form part of remuneration of Mr. X?*

(iii) *Who is the approving/recommending authority for the payments made to Mr. Y?*

(8 Marks)

(b) *You are the CFO and in-charge of compliances of a listed entity. The Company is professionally managed and has earned a niche in the market for its robust management practices. Mr. Edward, an eminent American business man, currently living in Germany, joined the Company as an Executive Director. On assuming his mantle, he being a foreign director residing abroad, approached you to specifically understand the relevant provisions of the Companies Act, 2013 relating to participation of directors in Board Meetings conducted through Video Conferencing in respect of the following matters:*

(i) *What shall be the venue of Board Meeting through video conference?*

(ii) *How the statutory registers placed at the scheduled venue of the meeting shall deemed to have been signed by the directors participating through electronic mode?*

(iii) *Whether meetings can be convened through audio/teleconferencing i.e. without video facility?*

You are required to provide correct legal-position to the above queries after examining and evaluating the provisions of the Companies Act, 2013. ***(6 Marks)***

Answer

(a) (i) As per section 197(1) of the Companies Act, 2013, the total managerial remuneration payable by a public company, to its Directors, including Managing Director and Whole-Time Director, and its Manager in respect of any financial year shall not exceed eleven per cent. of the net profits of that company for that financial year.

Whereas section 197(6), states that a Director or Manager may be paid remuneration by way of a monthly payment; or at a specified percentage of the net profits of the company; or partly by one way and partly by the other.

Further section 197(4), states that the remuneration payable to the directors of a company, including any Managing or Whole-Time Director or Manager, shall be determined, in accordance with and subject to the provisions of this section, either by the articles of the company, or by a resolution or, if the articles so require, by a special resolution, passed by the company in general meeting and the remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity:

Provided that any remuneration for services rendered by any such director in other capacity shall not be so included if — (a) the services rendered are of a professional

nature; and (b) in the opinion of the Nomination and Remuneration Committee, if the company is covered under section 178(1), or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Accordingly, as per the provision, **payment made to Mr. X** comprising of monthly remuneration of ₹ 50,000 and commission ₹ 1,50,000 and the payment of the premium amount of ₹ 5,00,000 on account of guilty of negligence of Mr. X, will form the part of the overall maximum managerial remuneration.

Whereas **payment made to Mr. Y** comprising of commission at the rate of 1% of the net profit will form part of the overall maximum managerial remuneration.

Further, fee of ₹ 1,00,000 rendered to him for valuing the asset of the company is the service not given in professional capacity as he does not possess the requisite qualification for practice of respective profession as per Rule 3(2) of the Companies (Registered Valuers and Valuation) Rules, 2017. This payment of fees in light of section 197(4) will also form the part of the overall maximum managerial remuneration.

(ii) As per Section 197(13),where any insurance is taken by a company on behalf of its Managing Director, Whole-Time Director, Manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel:

Provided that if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration.

In the given case claim of ₹ 1,00,000 was lodged with the Insurance company as a result of guilty of negligence of Mr. X. Therefore payment of the insurance premium of ₹ 5,00,000 shall be treated as part of the remuneration of Mr. X.

(iii) According to section 197(1) of the Companies Act, 2013 remuneration payable to Mr. Y who is neither Managing Director nor Whole time director, shall not be exceeding 1% of the net profits of the company, as there is Mr. X (a Managing Director). Here in the given case, payment of ₹ 1,00,000 over 1% may require the approval of the company in general meeting by passing a Special Resolution. Since NTSSL is a listed company, so Nomination and Remuneration Committee will recommend for payment of commission and ₹ 1,00,000 for valuation purposes for approval of Board.

(b) (i) As per Sub-rule (6) of Rule 3 of the Companies (Meetings of Board and its Powers) Rules 2014, with respect to every meeting conducted through video conferencing or other audio visual means authorised under these rules, the scheduled venue of the meeting as set forth in the notice convening the meeting, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall

be deemed to be made at such place.

(ii) Sub-rule (7) of Rule 3 of the Companies (Meetings of Board and its Powers) Rules 2014, provides that the statutory registers which are required to be placed in the Board Meeting as per the provisions of the Act, shall be placed at the scheduled venue of the meeting and where such registers are required to be signed by the directors, the same shall be deemed to have been signed by the directors participating through electronic mode, if they have given their consent to this effect, it is so recorded in the minutes of the meeting.

(iii) According to section 173(2) of the Companies Act, 2013, the participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Accordingly, meeting can be convened through audio visual means capable of recording and recognising the participation of the directors but not through audio teleconferencing i.e, without video facility.

Question 2

(a) RMP Limited was facing acute financial difficulties as operations were continuously disrupted and the Company was facing the brunt of:

(i) Non-Availability of Raw Materials,

(ii) Loss of demand for the Company's products,

(iii) Frequent lockdown due to workmen's unrest.

On the verge of liquidation, the Management proposed one last arrangement between creditors and the Company, whereby, the creditors will have to forego 50%, of their dues to the Company. This has evoked strong protest from some of the creditors who may block the arrangement.

Examine the arrangement in the light of the Companies Act, 2013 and advice the course of action/procedure to be adopted by the company to implement the arrangement.

(4 Marks)

(b) As a part of amalgamation, Harsha Limited acquired 90% of the issued capital of Ananya Limited. The issued, subscribed and paid up capital of Ananya Limited is ₹100 Crore. Out of remaining minority shareholding of Ananya Limited, ₹ 8 Crore are held by Mr. Raju. Mr. Raju was not satisfied with the amount decided under the scheme and therefore negotiated for a higher price. As a result, he received an extra amount of ₹10 Lakh. The other minority shareholders claim that Mr. Raju is not entitled to the entire extra amount of ₹10 Lakh.

Examine the validity of claim made by other minority shareholders under the relevant provisions of the Companies Act, 2013. ***(3 Marks)***

(c) *Under the auspices of the Foreign Exchange Management Act, 1999, (the Act) examine whether the given situations fall under "Current Account Transactions" or not as defined in the Act?*

(i) *Mr. S, a resident in India, imports machinery from a vendor in UK for installing in his factory.*

(ii) *An Indian resident, imports machinery from a vendor in US for installing in his factory on a credit period of 3 months.*

(iii) *An Indian resident, transfers US$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian Bank account to the NRI brother's Bank account in New York.* ***(3 Marks)***

(d) *Glow Bright Limited, engaged in business of printing of advertisement material, took a term loan of ₹ 5 Crore from a Bank against security created as first charge on its printing machines. Glow Bright Limited made default in re-payment of term loan to the Bank. Consequently, the Bank issued notice to the Company under SARFAESI Act, 2002 to discharge its liabilities. Answer the following with reference to provisions of SARFAESI Act, 2002:*

(i) *What is the maximum period within which Glow Bright Limited must pay its liabilities?*

(ii) *What if, Glow Bright Limited failed to discharge its liabilities within the specified time limit?* ***(3 Marks)***

Answer

(a) Procedure for adoption of the Scheme of Compromise or Arrangement (Section 230 of the Companies Act, 2013)

The proposed scheme involves a compromise or arrangement with creditors and it attracts section 230. Said section contains the powers of the Tribunal on the filing of application for the compromise or arrangement. According to this section:

(1) In the given case, a compromise or arrangement is proposed between a company and its creditors, so the Tribunal may, on the application of the company or creditor, order a meeting of the creditors or class of creditors, to be called, held and conducted in such manner as the Tribunal directs.

(2) The company or any other person, by whom an application is made, shall disclose to the Tribunal by affidavit all the material facts relating to the company.

(3) Where a meeting is proposed to be called in pursuance of an order of the Tribunal, a notice of such meeting shall be sent to all the creditors and members and concerned persons individually at the address registered with the company with the statement disclosing the details of scheme.

(4) Such notice and other documents shall also be placed on the website of the company.

(5) The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

(6) A notice shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice.

(7) Where, at a meeting held, majority of persons representing three-fourths in value of the creditors, or class of creditors, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, and all the creditors.

(8) The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

Accordingly, RMP Limited is advised to file an application to the tribunal for compromise and arrangement.

(b) Section 236 of the Companies Act, 2013, where the shares of minority shareholders have been acquired in pursuance of this section, and as on or prior to the date of transfer following such acquisition, the shareholders holding seventy-five per cent. or more minority equity shareholding negotiate or reach an understanding on a higher price for any transfer, proposed or agreed upon, of the shares held by them without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation, understanding or agreement,-

the majority shareholders shall share the additional compensation so received by them with such minority shareholders on a pro rata basis.

Accordingly, in the given case as Mr. Raju negotiated on extra amount of ₹ 10 lakh which was entirely held by him. Therefore the claim contended by the minority shareholders **is valid** because in the light of the above stated provision the extra amount received by Mr. Raju shall be allocated to all minority shareholders on pro rata basis.

(c) **(i)** An Indian resident imports machinery from a vendor in UK for installing in his factory. As per FEMA, it does not alter (create) an asset in India for the UK vendor. It does not create any liability to a UK vendor for the Indian importer. Once the payment is made, the Indian resident or the UK vendor neither owns nor owes anything in the other country. Hence it is a Current Account Transaction.

(ii) An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months. Under FEMA, it is a liability outside India. However, under definition of Current Account Transaction [S. 2(j)(i)], "short-term banking and

credit facilities in the ordinary course of business" are considered as a Current Account Transaction. Hence import of machinery on credit terms is a Current Account Transaction.

(iii) An Indian resident transfers US$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian bank account to the NRI brother's bank account in New York. As per FEMA, once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA, the transaction is over. Hence it is a Current Account Transaction.

(d) (i) **Period of payment for discharge of liability:** As per section 13 of the SARFAESI Act, 2002, where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset(NPA), then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor **within sixty days from the date of notice** failing which the secured creditor shall be entitled to exercise all or any of the rights under Section 13(4).

(ii) **In case of failure to discharge the liability:** if the borrower fails to discharge his liability in full within the above specified period, the secured creditor may take recourse to one or more of the following measures to recover his secured debt: -

- **take possession of the secured assets of the borrower** including the right to transfer by way of lease, assignment or sale for realising the secured asset;
- **take over the management of the business of the borrower** including the right to transfer by way of lease, assignment or sale for realising the secured asset;
- **appoint any person** (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
- **require at any time by notice in writing, any person** who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, **to pay the secured creditor**, so much of the money as is sufficient to pay the secured debt.

Glow Bright Ltd. must act in compliance with the stated provisions for payment of the term loan to the Bank and in case of failures, bank may take the said measures to recover the secured debt.

Question 3

(a) *Digital Era Limited (DEL), is a start-up Company, incorporated in the year 2017 under the provisions of the Companies Act, 2013. The main object of the Company is to manufacture and market two wheelers adopting a new technology of using hydrogen as a fuel to run the vehicle in lieu of petrol. Despite several experiments, the technology of hydrogen fuelled engine for the two wheelers was not successful. As per the requirements of the Companies Act, 2013, no business was commenced and no financial statements were filed with the Registrar of Companies (RoC). Eventually the Board of Directors of the Company resolved to apply to the RoC for getting the name of the Company struck-off from the Register of Companies.*

The RoC, after satisfying that all the compliances specified under Section 248 of the Companies Act, 2013 have been met by the Company and after publishing a notice for general public and also in the official gazette, the name of the Company was struck-off from the Register of Companies w.e.f 7th January,2020.

Earlier in the year 2018, Mr. Amrit, had supplied certain spares to the Company for ₹ 2,50,000 and despite his several requests, the amount was not settled by the Company. In September 2020, he came to know from his close aides that DEL has some assets available with them. Thereafter, with a view to recover his dues from the Company, he approached you seeking your professional guidance. As a competent professional, advise Mr. Amrit, the following, in the light of the provisions of the Companies Act, 2013:

(i) Whether the assets of the company shall be made available for the discharge of its liabilities even after the date of the order removing the name of the company from the Register of Companies?

(ii) Can an aggrieved person file an appeal against the order of the RoC? If so, state the legal provisions in this regard.

(iii) When and under what circumstances can the RoC restore the name of the company?

(iv) State the circumstances and the time frame within which the Tribunal can order the name of the company to be restored to the Register of Companies?

(v) Can the name of a company registered under Section 8 of the Companies Act, 2013 be removed from the Register of Companies? ***(8 Marks)***

(b) *Three Companies belong to Gopal group based out of Bengaluru. Each of the three companies are into businesses as under:*

Company A	*Chit Funds*
Company B	*Housing Finance*
Company C	*Payment System Operator*

In the light of the relevant provisions of the Prevention of Money Laundering Act, 2002, examine the following:

(i) *Who is a "beneficial owner" under the Prevention of Money Laundering Act, 2002?*

(ii) *Whether each of the above businesses fall within the definition of "Financial Institution"?*

(iii) *What are the obligations of a financial institution regarding maintenance of records?*

(iv) *Whether a Civil Court have jurisdiction to entertain any suit or proceeding in respect of any matter which the Appellate Tribunal is empowered by or under this Act?*

(v) *Can an injunction be granted by any Court or other Authority in respect of any action taken or to be taken in pursuance of any power conferred on the Appellate Tribunal?*

(6 Marks)

Answer

(a) (i) **Realisation of assets**: According to section 248(6) of the Companies Act, 2013, the Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company.

Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

Hence, the assets of the company (DEL) shall be made available for the discharge of its liabilities even after the date of order of removing the name of the company from the register of companies.

(ii) **Appeal:** According to section 252(1) of the Companies Act, 2013, any person aggrieved by an order of the Registrar, notifying a company as dissolved under section 248, may file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the company in the register of companies.

Before passing any order under this section, the Tribunal shall give a reasonable opportunity of making representations and of being heard to the Registrar, the company and all the persons concerned.

(iii) **Restoration of name of company:** If the Registrar is satisfied, that the name of the company has been struck off from the register of companies either inadvertently or

on the basis of incorrect information furnished by the company or its directors, which requires restoration in the register of companies, he may within a period of three years from the date of passing of the order dissolving the company under section 248, file an application before the Tribunal seeking restoration of name of such company. [second proviso to section 252(1)]

(iv) If a Company, or any member or creditor or workman thereof feels aggrieved by the Company having its name struck off from the Register of Companies, the Tribunal on an application made by the Company, Member, Creditor or Workmen before the expiry of twenty years from the publication in the Official Gazette of the notice under sub section (5) of Section 248 may, if satisfied that the Company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the Company be restored to the Register of Companies, order the name of the Company to be restored to the Register of Companies, and the tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the Company and all other persons in the same position or nearly as may be as if the name of the Company had not been struck off from the Register of Companies.

(v) **Exemption to section 8 companies:** A company registered under section 8 of the Companies Act, 2013 cannot be removed from the register of companies. [Section 248(3)]

(b) **(i)** **"Beneficial owner"** means an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person. As in the given case, Company A, Company B, and Company C belongs to Gopal Group, who exercises ultimate control over them, therefore, Gopal Group is the Beneficial owner.

(ii) **"Financial institution"** means a financial institution as defined in clause (c) of section 45 I of the Reserve Bank of India Act, 1934 and includes a chit fund company, a housing finance institution, an authorised person, a payment system operator, a non-banking financial company and the Department of Posts in the Government of India.

In the instant case, Company A, Company B and Company C falls within the definition of "Financial Institution" conducting the business of chit fund, housing finance institution, payment system operator respectively.

(iii) Section 12 of the Prevention of Money Laundering Act, 2002 provides for the obligation of Banking Companies, Financial Institutions and Intermediaries i.e. the reporting entity to maintain records of transactions.

Maintenance of records: According to sub-section 12 (1), every reporting entity shall–

- maintain a record of all transactions, including information relating to transactions (mentioned in next point) in such manner as to enable it to reconstruct individual transactions;
- furnish to the Director information relating to such transactions, whether attempted or executed, the nature and of value;
- maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

(iv) Civil court not to have jurisdiction [Section 41]

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Director, an Adjudicating Authority or the Appellate Tribunal is empowered by or under this Act to determine.

(v) Injunction: 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 power conferred by or under this Act on the Appellant Tribunal.

Question 4

(a) As at 01.04.2019, the composition of the Board of Directors of M/s. Apex Ltd, an unlisted, Company comprised of 7 directors as under:

S. No	*Name*	*Designation*
01	*Mr. X*	*Executive Chairman (Executive and Non-Independent)*
02	*Mr. Y*	*Managing Director and CEO (Executive and Non-Independent)*
03	*Mrs. Z*	*Women Director (Non-Independent)*
04	*Mr. A*	*Independent*
05	*Mr. B*	*Independent*
06	*Mr. C*	*Independent*
07	*Mr. D*	*Independent*

As at 01.04.2019, the constitution of the Audit Committee comprised of the following Directors:

Name	*Designation*
Mr. Y	*Chairman*
Mr. X	*Member*
Mrs. Z	*Member*
Mr. Y	*Member*

The majority of the members of the Audit Committee have the ability to read and understand the financial statements but none of them have accounting or related financial management expertise. During January, 2020, the company went for an Initial Public Issue (IPO) and got its shares listed on a recognized Stock Exchange. Referring to SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015:

(i) State, how a qualified and an independent Audit Committee should be constituted?

(ii) Whether the present constitution of the Audit Committee is in order and whether it can continue post listing of its securities in the Stock Exchange? ***(4 Marks)***

(b) MNK Limited has incurred heavy losses during the preceding 3 consecutive financial years and has a negative net worth of ₹ 525 crore as at 31st March, 2020. Trading in securities of Company has remained suspended, for a period of more than 9 months. CSE, a recognized Stock Exchange, delisted the securities of MNK Limited. Mr. Y was having 25,000 shares of MNK Limited, purchased at ₹ 100 per share, aggrieved against the decision of the Stock Exchange to delist the securities of MNK Limited. Referring to the provisions of the Securities Contracts (Regulation) Act, 1956, examine:

(i) Whether CSE, a recognized Stock Exchange can delist the securities of MNK Limited?

(ii) If yes, state the grounds for delisting. ***(4 Marks)***

(c) Mr. Soumak is an editor of a daily business news on BNN TV. He received a salary of US $ 180,000 from Mr. Bob. Mr. Bob is a US citizen resident in India and operates BNN TV business operations in India. Mr. Bob received such payment i.e. salary given to Mr. Soumak from his parent Company BNN Inc. of USA. Examine under the provisions of the Foreign Contribution (Regulation) Act, 2010, whether receipt of salary by Mr. Soumak is prohibited? ***(3 Marks)***

(d) Shyam started a fresh juice shop and contacted Naresh for supply of fruits and vegetables. Most of the communication between them happened over email. On the email, they decided the payment, terms and other conditions of service. For initial 5 months, Shyam was regular in making payment to Naresh for the fruits bought, but later on stopped making payments. Naresh filed a suit against Shyam in a Magisterial Court but Shyam contended that the matter should be settled through Arbitration. Referring to provision of the Arbitration and Conciliation Act, 1996, state, whether the contention of Shyam is correct? ***(3 Marks)***

Answer

(a) (i) **Audit Committee**: According to Regulation 18 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, every listed entity shall constitute a qualified and independent audit committee which shall have:

(a) Minimum three directors as members.

(b) Two-thirds of the members of audit committee shall be independent directors.

(c) All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise.

(ii) As per the facts of the question, M/s Apex Limited, listed its securities in a recognised stock exchange in the month of January, 2020. In order to comply with the requirements of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, the company requires to do the following:

A. The audit committee of M/s Apex Limited already has 3 directors as members, which is in compliance.

B. The audit committee has 3 directors which are Non-Independent. However, once the company gets listed, at least 2 [3*(2/3)] directors shall be independent directors. Thus, they need to change the composition of audit committee once the company gets listed on stock exchange.

C. In the existing audit committee though majority of the members have the ability to read and understand the financial statement but none of them has accounting or related financial management expertise. However, once the company gets listed it is required that all members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise. Hence, it is required that the company should appoint at least one member in the audit committee who shall have accounting or related financial management expertise.

In view of above, the existing audit committee cannot continue after listing of its securities.

According to Section 177(1) of the Companies Act, 2013 and rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014, if the Company was required to have the audit committee, the existing audit committee is also not in order as it does not have majority of the members as independent directors.

(b) Delisting of securities (Section 21A)

(i) A recognised stock exchange may delist the securities, after recording the reasons, from any recognised stock exchange on any of the ground or grounds as may be prescribed under this Act. The securities of a company shall not be delisted unless the company concerned has been given a reasonable opportunity of being heard.

In the instant case, MNK Limited has incurred losses during the preceding 3 consecutive financial years and it has negative net-worth of ₹ 525 crore. Trading in securities of the company has remained suspended for a period of more than 9 months.

Hence, on the said grounds (covered under Rule 21 of SCR Rules, 1957) CSE, a recognized stock exchange, can delist the securities of MNK Limited.

(ii) As per Rule 21 of SCR Rules, 1957, MNK Limited is said to have incurred losses during the preceding 3 consecutive years and has negative net-worth and remained suspended for more than 6 months in trading of securities.

(c) According to section 3 of the Foreign Contribution (Regulation) Act, 2010, no foreign contribution shall be accepted by any editor.

Also, as per section 4, nothing contained in section 3 shall apply to the acceptance, by any person specified in that section, of any foreign contribution where such contribution is accepted by him, subject to the provisions of section 10, by way of salary, wages or other remuneration due to him or to any group of persons working under him, from any foreign source or by way of payment in the ordinary course of business transacted in India by such foreign source.

Hence, taking into account the above provisions, receipt of salary by Mr. Soumak from parent company BNN Inc. of USA is not prohibited.

(d) Arbitration is a private method of dispute resolution. Under the Indian law every individual has the right to approach the court for resolution of his/her dispute that may involve infringement of right(s) vested upon that individual. This protection is so stringent that it cannot be contracted away. The Indian Contract Act, 1872 however notes an exception in favour of arbitration.

Arbitration cannot happen without the parties consenting to submit their dispute to arbitration. Consent of the parties therefore is the most fundamental requirement for an arbitration to happen. An arbitration agreement records the consent of the parties that in the event of a dispute between them that matter instead of being taken to court, will be submitted for resolution to arbitration. Arbitration agreement therefore is necessary to start arbitration.

In the instant case, there is no express arbitration agreement between the parties (Naresh &Shyam) as regards to reference of disputes for arbitration. Further, Naresh filed a suit against Shyam in the Magisterial court but Shyam contended that the matter of dispute should be settled through Arbitration. Here, since no express arbitration agreement was made between the parties, Shyam contention to submit the dispute for arbitration, is not correct. Even the court cannot refer the parties to arbitration unless there's a written consent by parties by way of joint application or memo or an affidavit.

Question 5

(a) By an order dated 25th June, 2020, NCLT had ordered for winding up of Kamath Trading Limited. Consequently, Official Liquidator took control for the assets and other records of the Company. During the winding up proceedings, the Official Liquidator came across a transaction where some of the properties of the Company was sold to a small Private Company. Mr. Nag, who was interested in that small Private Company happened to be the brother of Director of Kamath Trading Limited. The sale of the said properties took place on 20th March, 2020 at a price which was ₹58 Lakh less than the market price.

In the light of the facts given above, examine, with reference to relevant provisions of the Companies Act 2013, what action the Tribunal can take in this regard? ***(4 Marks)***

(b) *In the annual general meeting of XYZ Ltd. held on 28th May, 2020, while discussing on the matter of retirement and reappointment of director Mr. X, allegations of fraud of ₹ 20 lakh in Bombay branch of the Company were marked against him by some members. This resulted into disorder and confusion in the meeting. The Chairman declared initiating an inquiry against the director. Mr. X, however, could not be re-appointed in the meeting. The matter was published in the newspapers next day. On the basis of such news, examine whether the Court can take cognizance of the matter and take action against the Director on its own? Justify your answer with reference to the provisions of the Companies Act, 2013.* ***(4 Marks)***

(c) *Pursuant to Section 33 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) a liquidation order was passed against Luci Soya Limited (LSL) (Corporate Debtor) by the Adjudicating Authority (NCLT). Mr. Solanki was appointed as the liquidator by the NCLT. Upon resuming his mantle, Mr. Solanki started collecting claims from all the creditors within the time frame as prescribed in the IBC, 2016. While initiating the liquidation process as per provisions of the IBC, 2016, Mr. Solanki proposed to include the equity shares of one of its subsidiary as part of the liquidation estate in relation to the corporate debtor. Besides this, one of the unsecured financial creditor demanded that, at the time of distribution of liquidation proceeds, his dues may be paid before the government dues are paid. Mr. Solanki also observed that pending legal proceedings against the corporate debtor, 'A' Ltd, an operational creditor, has filed a case with the Arbitral Tribunal praying for an arbitral award against LSL.*

On the basis of the above information and in the light of the Insolvency and Bankruptcy Code, 2016, answer the following:

(i) Whether the proposal of Mr. Solanki to include the equity shares of the subsidiary Company of LSL as part of liquidation estate is tenable?

(ii) How should Mr. Solanki deal with the demand of the unsecured financial creditor?

(iii) Whether 'A' Ltd will succeed in its prayer for an arbitral award against LSL?

(6 Marks)

Answer

(a) The official liquidator can invoke the provisions contained in Section 328 of the Companies Act, 2013 to recover the sale of assets of the company. According to Section 328 of the Companies Act, 2013, if the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

Since in the present case, the sale of some properties took place on 20th March, 2020 and the company went into liquidation on 25th June, 2020 i.e., within 6 months before the winding up of the company and the sale has resulted in a loss of ₹ 58 lakhs to the company.

The official liquidator will be able to succeed in proving the case under Section 328 by way of fraudulent preference as the property was sold to a small private company in which the brother of director of Kamath Trading Limited was interested.

Hence, the transaction made will be regarded as invalid and restore the position of the Kamath Trading Limited as if no transfer of property has been made.

(b) Section 439 of the Companies Act, 2013 provides that offences under the Act shall be non-cognizable. As per this section:

1. Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in sub section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.
2. No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder or a member of the company, or of a person authorized by the Central Government in that behalf.

Thus, in the given situation, the court shall not initiate any suo moto action against the director Mr. X without receiving any complaint in writing of the Registrar of Companies, a shareholder or a member of the company or of a person authorized by the Central Government in this behalf.

(c) **(i)** **Liquidation estate:** As per section 36 of the Insolvency and Bankruptcy Code, 2016, for the purposes of liquidation, the liquidator shall form an estate of the assets, which will be called the liquidation estate in relation to the corporate debtor.

Liquidation estate shall comprise all liquidation estate assets which shall include any assets over which the corporate debtor has ownership rights, including shares held in any subsidiary of the corporate debtor.

Hence, the proposal of Mr. Solanki to include the equity shares of subsidiary company of LSL as part of liquidation estate is tenable.

(ii) According to section 53 of the IBC, 2016, out of proceeds from the sale of the liquidation assets, financial debts owed to unsecured creditors shall be distributed in priority over the amount due to the Central Government and the State Government. [clauses (d) and (e)]

Hence, Mr. Solanki has to fulfill the demand of unsecured financial creditor, at the time of distribution of liquidation proceeds, to pay his dues before the Government dues are paid.

(iii) Section 33(5) of the Code provides that when a liquidation order has been passed, no suit or legal proceeding shall be instituted by or against the corporate debtor.

The institution of suits or continuation of any 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.

Hence, Mr. A will not succeed in its prayer for an arbitral award against LSL.

Question 6

(a) Excel Limited is a listed Company with a turnover of ₹ 60 Crore in the FY 2016-2017. The Company appoints Ms. R as the women director on 1st March, 2017. Ms. R is already a director in twelve companies including ten public companies. Also, Ms. R is a Chartered Accountant in practice. Further, also, Ms. R, is a Director in Supreme Ltd. where she is acting in a professional capacity. Since lots of proposal for the holding of directorship in various companies are lined up before Ms. R, so in order to retain her, the Remuneration and Nomination Committee proposed to enhance the remuneration of Ms. R from 4 Lakh per month to 6 Lakh per month. However, Supreme Limited was running in losses in the last 2 years.

Evaluate in the light of the given facts, the following with reference to the provisions of the Companies Act, 2013:

(i) The validity of appointment of Ms. R in Excel Limited.

(ii) Analyse the proposition of enhancement of remuneration of Ms. R in Supreme Ltd.

(4 Marks)

OR

Evaluate the following cases of appointment of Director(s), with reference to the relevant provisions of the Companies Act, 2013:

(i) Ms. Nisha was appointed a director of LMN Limited on 10th October, 2020 in place of Ms. Rachna, who resigned from her office on 31st May, 2020 six months before expiry of term of her office. LMN Limited had its Board meeting on 31st July 2020. Whether appointment of Ms. Nisha is valid?

(ii) The Board of Directors of a Company appointed Mr. Sarvesh as an additional director on 30th July, 2020. Mr. Sarvesh continued to hold his office till 15th October, 2020. The Company had its annual general meeting on 15th October, 2020 which should have held on 30th September, 2020, Whether Mr. Sarvesh can hold office till 15th October, 2020?

(b) Eighty-two shareholders of Perish Limited, a listed Company holding shares of nominal value of ₹ 19,000 each proposed Mr. Babulal as a Director on the Board. The paid-up share capital of Perish Limited is ₹ 6.2 Crore (6,20,000 equity shares of ₹ 100 each). The Company has 800 such shareholders, who are holding shares of nominal value of

₹ 19,000 or less. Examine with reference to relevant provisions of the Companies Act 2013, whether Mr. Babulal can be appointed as a Director of Perish Limited? ***(4 Marks)***

(c) *The Adjudicating Authority under the Prevention of Money Laundering Act, 2002 (the Act) made an order under Section 8(3), confirming the provisional attachment of property made under Section 5(1) of the said Act. Mr. Rana, owner of the attached property, aggrieved by the order, wanted to make an appeal to the Appellate Tribunal. However, before making an appeal Mr. Rana is adjudicated as an insolvent. Explain, with reference to the relevant provisions of the said Act, whether appeal could be made to Appellate Tribunal in the present case?* ***(3 Marks)***

(d) *Abhi Limited entered into an agreement with Atulya Gas Limited for purchase of natural gas, which is not specified as an essential supply. On failure of Abhi Limited to make payments, Atulya Gas Limited issued notice to Abhi Limited that further supply of gas would be stopped if payments are not made immediately. On further non payment, Atulya Gas Limited filed a petition before NCLT for initiating Corporate Insolvency Resolution process against Abhi Limited. On 15th March, 2020 the petition was admitted, on 30th April, 2020, Atulya Gas Limited disconnected gas supply to Abhi Limited for non-payment. As a result of disconnection of gas supply, operations of Abhi Limited came to a halt. The Resolution professional filed a petition to NCLT seeking Atulya Gas Limited to resume the supply of natural gas, as natural gas was an important material for production of electricity by Abhi Limited.*

Referring to the provisions of Insolvency and Bankruptcy Code, 2016, answer the following:

(i) When the moratorium period will expire in this case?

(ii) Whether Resolution Professional will be successful in his petition filed with NCLT?

(3 Marks)

Answer

(a) (i) According to Section 165 (1), a person shall not hold office as director, including any alternate directorship, in more than 20 companies at the same time.

Further, out of the above limit of 20 companies, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.

In the instant case, since the directorship held by Ms. R is already 10 in public companies, so her appointment in Excel Limited is not valid.

(ii) As per SECTION II OF PART II OF SCHEDULE V, Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may pay remuneration to the managerial person not exceeding the limits under (A) and (B) provided in it.

In case of a managerial person who is functioning in a professional capacity, remuneration as per item (A) may be paid, if such managerial person possesses

graduate level qualification with expertise and specialised knowledge in the field in which the company operates.

Applicable conditions for payment of remuneration: The limits specified under items (A) and (B) specified in the mentioned Schedule shall apply, if payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under Section 178 (1), also by the Nomination and Remuneration Committee.

Since Ms. R is a Chartered Accountant in practice and acting in a professional capacity in Supreme Ltd. So, here as per the above provision, proposal to enhance the remuneration can be done by resolution passed by the Board. Hence the said proposal of enhancement of remuneration of Ms. R by Nomination and Remuneration Committee in Supreme Ltd. which is a listed company is valid. Moreover, it also does not require approval of the Central Government.

Note: As the question talk about the proposal of enhancement of remuneration by Nomination and Remuneration Committee, this may lead to the understanding that Supreme Ltd. is a listed company in the said question.

OR

(a) (i) As per Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 along with *Second proviso to section 149(1), a*ny intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

In the instant case, Ms. Rachna has resigned on 31st May 2020 and the immediate board meeting of LMN Ltd. was held on 31stJuly, 2020. Ms. Nisha was appointed on 10th October 2020. The intermittent vacancy of women director shall be filled by 31stJuly, 2020 (immediate Board meeting) or by 1st September, 2020 (three months from the date of vacancy of Ms. Rachna) whichever is later.

Hence, appointment of Ms. Nisha is not valid.

(ii) As per section 161(1) of the Companies Act, 2013, Additional director shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

In the instant case, Mr. Sarvesh, the additional director shall hold office upto next AGM i.e. 30th October 2020 or the last date on which the AGM should have been held i.e. 30th September, whichever is earlier. But Mr. Sarvesh continued to hold office till 15th October, 2020 which is not valid. He should hold office till 30th September, 2020.

(b) According to Section 151 of the Companies Act, 2013 and Rule 7 of the Companies(Appointment and Qualification of Directors) Rules, 2014, a listed company may, upon notice of not less than:

(a) one thousand small shareholders; or

(b) one- tenth of the total number of such shareholders,

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

The term "small shareholders" means a shareholder holding shares of nominal value of not more than ₹ 20,000 or such other sum as may be prescribed.

In the instant case, Perish Ltd. has 800 small shareholders out of which 82 small shareholders proposed Mr. Babulal as a director on the Board. Thus, it fulfills the requirement of one-tenth of the total number of such shareholders (800*1/10: 80). Hence, Mr. Babulal can be appointed as a director of Perish Ltd.

(c) Continuation of proceedings in the event of death or insolvency [Section 72 of PMLA, 2002]

Where-

(a) any property of a person has been attached under section 8 and no appeal against the order attaching such property has been preferred; or

(b) any appeal has been preferred to the Appellate Tribunal, and-

(i) in a case referred to in clause (a), such person dies or is adjudicated an insolvent before preferring an appeal to the Appellate Tribunal; or

(ii) in a case referred to in clause (b), such person dies or is adjudicated an insolvent during the pendency of the appeal,

then, it shall be lawful for the legal representatives of such person or the official assignee or the official receiver, as the case may be, to prefer an appeal to the Appellate Tribunal or as the case may be, to continue the appeal before the Appellate Tribunal, in place of such person and the provisions of section 26 shall, so far as may be, apply, or continue to apply, to such appeal.

Hence, in the instant case, the appeal can be made to the Appellate Tribunal by the official assignee or the official receiver of Mr. Rana.

(d) (i) According to section 14 of the IBC, with the admission of an insolvency application and commencement of Corporate Insolvency Resolution process, the Adjudicating authority will declare moratorium period during which no action can be taken against the company or the assets of the company to keep the Company as a going concern.

A calm period for 180 days is declared, during which all suits and legal proceedings etc. against the Corporate Debtor are held in abeyance to give time to the entity to resolve its status. It is called the Moratorium Period.

In the instant case, Atulya Gas Ltd. filed a petition before NCLT for initiating Corporate Insolvency Resolution process against Abhi Ltd. on 15thMarch, 2020. Hence, Moratorium period will expire within 180 days i.e. by 11th September 2020.

(ii) Section 14 also provides some exemptions under Moratorium according to which 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.

Hence, since as per the agreement between Abhi Limited and Atyulya Gas Limited it's specified that natural gas is not an essential supply for production of electricity. Therefore, resolution professional will not be successful in his petition filed with NCLT to resume the supply of Natural Gas disconnected by Atulya Gas Ltd.