PAPER- 4 – CORPORATE AND ECONOMIC LAWS

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

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

Question 1

(a) Innovative Intelligence Limited, a listed Company proposes to pay the following managerial remuneration:

(i) Commission at the rate of five percent of the net profits to its Managing Director, Mr. Sharma.

(ii) The directors other than the Managing Director are proposed to be paid a monthly remuneration of ₹2,50,000 and also commission at the rate of one percent of the net profits of the Company subject to the condition that overall remuneration payable to ordinary· directors including monthly remuneration payable to each of them shall not exceed two percent of the net profits of the Company. The commission is to be distributed equally among all the directors.

You are required to examine with reference to the provisions of the Companies Act, 2013 the validity of the above proposals. ***(4 Marks)***

(b) The Board of Directors of the UN Ltd., which is a MNC, comprising of directors who are Indian as well as of Foreign Nationals, Mr. X, who is a Director on the Board is very often on business tour abroad. He approached you, being legal expert of the Company, to know the regulatory provisions of the Companies Act, 2013 relating to appointment of Alternate Directors.

Examine the following situations and advise, Mr. X suitably as per the provisions of the Companies Act, 2013.

(i) Number of directors for which a person, say Mr. Y can be appointed as an Alternate Director.

(ii) If Mr. Y is appointed as an alternate director in place of a director whose term is indefinite, then, what will be the tenure of Mr. Y? ***(4 Marks)***

(c) The Board of Directors of Blackstone Ltd. (BL) made the following appointments at its meeting held on 1st January, 2021:

(i) Mr. Amir, a Director of its subsidiary Company, namely, Black Ruby Ltd., was appointed as General Manager on a consolidated salary of ₹1,75,000 per month with effect from 1st January, 2021.

(ii) Mr. Kumar was appointed as the Production Manager on a consolidated salary of ₹1,50,000 per month with effect from 1st January, 2021.

(iii) Mr. Pratap, a relative of Mr. Kumar was appointed as a Director of BL on 1st April 2021.

In the light' of the provisions of the Companies Act, 2013, critically examine the following:

(A) Whether the appointment of Mr. Amir requires the approval of the shareholders of BL at a general meeting?

(B) Does the appointment of Mr. Pratap as a Director of BL affect the continuation of Mr. Kumar as the Production Manager? ***(6 Marks)***

Answer

(a) Innovative Intelligence Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

(i) **Commission at the rate of 5% of the net profits to its Managing Director, Mr. Sharma:** Clause (i) of the Second Proviso to Section 197(1), provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to any one managing director or whole time director or manager shall not exceed 5% of the net profits of the company and if there is more than one such director then remuneration shall not exceed 10% of the net profits to all such directors and manager taken together.

In the present case, since the Innovative Intelligence Limited is being managed by a Managing Director, the commission proposed to be paid at the rate of 5% of the net profit to Mr. Sharma, the Managing Director, is permissible and no approval of company in general meeting is required. Therefore, said proposal is valid.

(ii) The Clause (ii) of the Second Proviso to Section 197(1) provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to directors who are neither managing directors nor whole time directors shall not exceed-

(A) 1% of the net profits of the company, if there is a managing or whole-time director or manager;

(B) 3% of the net profits in any other case.

In the present case, the maximum remuneration allowed to directors other than managing or whole-time director is 1% of the net profits of the company because the company is managed by a managing director. Hence, if the company wants to fix directors' remuneration at not more than 2% of the net profits of the company**,** the approval of the company in general meeting is required by passing a special resolution. Therefore the said proposal is not valid and can be said to be valid, only if made in compliance with the said requirement.

(b) **(i)** According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorized by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in

the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

Further, section 165 provides that no person shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. However, the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

Hence, in the instant case, Mr. Y can be appointed as an alternate director for only one director in the same company but shall not hold office as a director, including alternate directorship in maximum twenty different companies.

(ii) According to second proviso to section 161(2), an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

Third proviso says that if the term of office of the original director is determined before he so returns to India, any provision for the automatic reappointment of the retiring directors in default of another appointment shall apply to the original and not to the alternate director.

Hence, in the instant case, the alternate director shall hold office till the time original director returns to India. In this case, Y will hold office till the time original director returns to India.

(c) Section 188 of the Companies Act, 2013 relates with the related party transactions (RPT). Here, as per section 2(76) of the Companies Act, 2013, related party with reference to a company, includes any company which is holding, subsidiary or an associate company of such company. According to this section 188, except with consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as prescribed under rule 15(1) of the Companies (Meeting of Board and its Powers) Rules, 2014, no company shall enter into any contract or arrangement with a related party with respect to the such transaction where there is a related party's appointment to any office or place of profit in the company, its subsidiary company or associate company.

(i) In the given case, Mr. Amir, a director of Black Ruby Ltd., which is a subsidiary of Blackstone Ltd., was appointed as General Manager on salary of ₹ 1,75,000 per month.

Accordingly, related party's appointment (i.e. of Mr. Amir) to an office or place of profit in Blackstone Ltd. will not require the approval of the members in a general meeting of the company as the monthly remuneration is not exceeding ₹ 2,50,000. Such transactions as to a related party's appointment to any office or place of profit in the company, its subsidiary company or associate company shall require consent of the Board of Directors given by a resolution at a meeting of the Board.

(ii) As per section 2(76) of the Companies Act, 2013, related party with reference to a company, includes a director or his relative. So, Mr. Pratap appointed as a director of Blackstone Ltd. on 1st April, 2021 was a relative of Mr. Kumar who was appointed as Production Manager in the Blackstone Ltd. This falls within the purview of section 188 of the Companies Act, 2013 which relates with the related party transactions with related party. Yes, the continuation of Mr. Kumar as a Production Manager will lead to conflict of interest and will affect the continuation unless ratified by the Board under section 188(3) of the Companies Act, 2013.

Question 2

(a) A group of members of XYZ Ltd. made a complaint to the Registrar of Companies alleging that the management of the Company is indulging in destruction and falsification of the records of the Company. Decide the liability of the person for commission of the following acts during the course of inspection, inquiry or investigation under the Companies Act, 2013:

(i) Mr. B who is required to make a statement during the course of investigation pending against its Company, is a party to the manipulation of documents related to the transfer of securities and name of shareholders in the Register of Members of the Company.

(ii) Mr. N, an employee of the Company posted in social media that the Company was making profits so as to influence probable investors, when on the contrary, the Company was incurring losses. ***(4 Marks)***

(b) The shareholders and creditors of XYZ Limited, in a meeting convened for approval of a scheme of reconstruction of the Company, passed the necessary resolutions. The scheme of reconstruction provided for the following:

(i) Sale of plant and machineries and appropriation of proceeds for payment of outstanding wages, tax dues and repayment of loan.

(ii) Unsecured creditors to forego 60% of their claims against the Company and receive debentures of the balance amount. A few shareholders and creditors raised objections against the said arrangements.

Advise the directors about the steps to be taken by the Company to give effect to the scheme of reconstruction under the Companies Act, 2013. ***(4 Marks)***

(c) Mr. Joe, a resident in India had obtained an External Commercial Borrowing of $ 25,000 from a foreign lender on a collateral charge of his residential property in India. Mr. Joe, however, could not repay the loan and the lender prefers the property charged to be sold in India to any person (resident in India or not) and repatriate the same proceeds to him. You are required to provide the correct legal position to the above situation in the light of the provisions of the Foreign Exchange Management Act, 1999 and Rules made thereunder. ***(3 Marks)***

(d) An Asset Reconstruction Company (ARC) took over the management of the affairs of RSK Limited in order to realise its secured assets. On the contrary, the borrower Company being aggrieved by its measures requested the ARC not to appoint any manager or administrator for the said purpose. The ARC rejected the proposal and communicated its decision of rejection of the request to RSK limited. Now RSK Limited wants to approach the Debts Recovery Tribunal against the order of the ARC. Analyse and advise the further course of action as per the provisions of the SARFAESI Act, 2002. ***(3 Marks)***

Answer

(a) As per section 229 of the Companies Act, 2013, **w**here a person who is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation, shall be punishable for fraud in the manner as provided in section 447, if he—

(a) destroys, mutilates or falsifies, or conceals or tampers or unauthorizedly removes, or is a party to the destruction, mutilation or falsification or concealment or tampering or unauthorized removal of, documents relating to the property, assets or affairs of the company or the body corporate;

(b) makes, or is a party to the making of, a false entry in any document concerning the company or body corporate; or

(c) provides an explanation which is false or which he knows to be false.

Accordingly, following are the answers:

(i) In this part, Mr. B, is a party to the manipulation of documents related to the transfer of securities and name of shareholders in the Register of Members of the company. Thus he is party in making of a false entry in register of members of the XYZ Ltd. Thus, liable for fraud as provided in section 447 of the Companies Act, 2013.

(ii) Here Mr. N, an employee of XYZ Ltd. posted false explanation in social media that company was making profits so as to influence probable investors, in fact the company was incurring losses. Therefore, Mr. N is liable for the fraud as provided in section 447 of the Companies Act, 2013.

(b) Scheme of compromise or arrangement: As per section 230 of the Companies Act, 2013, the proposed scheme of reconstruction involves scheme of compromise or arrangement with members and creditors. The scheme of reconstruction provided for sale of plant and machineries and appropriation of proceeds for payment of outstanding wages, tax dues and repayment of loan. And also the unsecured creditors are to forego 60% of their claims against company and receive debentures of the balance amount. Besides, a few shareholders and creditors raised objections against the said arrangements.

Following is the procedure to give effect to the said Scheme of Compromise/arrangement:

1. **Filing of an application:** While the company or any creditor or member or liquidator (in case of voluntary liquidation) can make application to the Tribunal under section 230. On such application, the Tribunal may order that a meeting of creditors and/or members, be called and held and conducted as per directions of the Tribunal.
2. **Disclosure by applicant**: All the relevant disclosures as regards material facts related to financial aspects, reduction of share capital, scheme of corporate debt restructuring consented by not less than 75% of the secured creditors, and the valuation report, shall be made to the Tribunal by affidavit.
3. **Serving of Notice:** Company must arrange to send notice of meeting to every creditor/member/ debenture holders/sectoral regulators at the registered address. Notice shall be containing a statement setting forth the terms of compromise or arrangement explaining its effect.
4. Such notice and other documents shall be hosted on website and published in newspaper and also advertised.
5. Tribunal may dispense with the calling of meeting where such creditors/ class of creditors having at least 90% value, agree and confirm to the scheme.
6. Person to whom notice is sent may vote in the meeting to the adoption of the compromise or arrangement within 1 month from the date of receipt of such notice.
7. Any objection to the scheme shall be made only by persons holding not less than 10% of the shareholding or having outstanding debt amounting to not less than 5% of the total outstanding debt as per the latest audited financial statement.
8. At the meetings convened as per directions of the Tribunal, majority in number representing ¾th in value of creditors/members present and voting (either in person or by proxy or by postal ballot if allowed) must agree to the scheme of compromise or arrangement.
9. Such scheme of the compromise or arrangement is sanctioned by the Tribunal by an order.
10. Such an order shall be binding on the company, all the creditors, members or on liquidator, and the contributories of the Company.
11. Copy of order must be filed with the Registrar of Companies.

In the light of above the order shall be binding on the company, all creditors, members or on liquidator and contributories of the company and the objections raised by a few shareholders and creditors will not sustain.

(c) As per the ECB Framework, AD Category I banks are permitted to allow creation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees in favour of overseas lender / security trustee, to secure the ECB to be raised/ raised by the borrower.

Following are the requisite conditions for creation of Charge on Immovable Assets/ property:

(i) Such security shall be subject to provisions contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2017.

(ii) The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender/ security trustee.

(iii) In the event of enforcement / invocation of the charge, the immovable asset/ property will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.

Accordingly, in the given case, Mr. Joe, a resident in India, obtained an ECB of $ 25,000 from foreign lender on a collateral charge of his residential property in India. He failed to repay the loan. As of that, lender prefers the property charged to be sold in India to any person whether resident in India or not so as to repatriate the sale proceeds to him.

Therefore, in line with the clause (iii) of the above stated provision, in the event of enforcement of the charge, the immovable property (Residential property of the Joe) will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.

(d) According to section 17 of the SARFAESI, 2002, any person (including borrower), aggrieved by any of the measures taken by the secured creditor or his authorised officer, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measure had been taken.

The communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower, shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

Accordingly, RSK limited, who has been communicated of the reasons by the ARC for not having accepted his proposal or rejection of its request. Therefore, RSK Limited cannot approach to DRT against the order of ARC at this stage.

Question 3

(a) The Centra! Government is contemplating trial of a certain offence committed by TT Limited under the Companies Act, 2013. The said offence is punishable with an imprisonment of two years or more and a police report on the facts of the case has been prepared. Further, the said offence can be charged under the Code of Criminal Procedure, 1973. In the given scenario, outline a legal note as to how the trial of offences would proceed for prosecution and the Court jurisdiction in which the trial of offences would take place? ***(4 Marks)***

(b) *MNO Ltd., a foreign Joint Venture Company having its established place of business in India and following International Financial Reporting Standards (IFRS) and its financial statement being prepared in German language desires to know the following with regard to submission of its financial statements to the Registrar of Companies in India. Its area office is located at Mumbai:*

(i) Submission of financial statements in German Language;

(ii) Format of financial statements as per IFRS;

(iii) How authentication of its financial statements is to be done?

(iv) Whether the documents can be submitted at the Registrar's office at Mumbai?

(4 Marks)

(c) *The declared suspect, Mr. SP, was facing charges under the Prevention of Money Laundering Act, 2002. Mr. SP died in the midst of the proceedings. What shall happen to the confiscated property under the Act and whether a claimant with a legitimate interest in the property who suffered a loss, is entitled for claims.* ***(3 Marks)***

(d) *Mr. D was given an offer by the Company vendor, Mr. TR that if he discloses him confidential data of the Company HNI Ltd. in which he was working as an Accounts Executive, Mr. TR will pay him a huge sum of money. Mr. D accessed the computer of his Executive Director and passed on the confidential information of Company to Mr. TR in return of huge sum of money. Examine and analyse the situation and conclude whether Mr. D will be held liable under the Prevention of Money Laundering Act, 2002?* ***(3 Marks)***

Answer

(a) As per Section 435 of the Companies Act, 2013, the Central Government may, for the purpose of providing speedy trial of offences under this Act, except under section 452, established or designated Special Courts with a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more.

Further section 436 provides following legal provision that deals with trial of offences for prosecution and courts jurisdiction in which trial of offences would take place:

(i) all offences specified under sub-section (1) of section 435 (except section 452) shall be triable only by the Special Court established or designated for the area in which the registered office of the company in relation to which the offence is committed**,** or

where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned;

(ii) where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the

whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that where such Magistrate considers that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(iii) the Special Court may exercise, in relation to the person forwarded to it under clause (*b*), the to try a same power which a Magistrate having jurisdiction case, in relation to an accused person who has been forwarded to him under that section; and

(iv) a Special Court may, upon perusal of the police report of the facts constituting an offence under this Act or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial.

(b) In the light of the given facts, following are the answers:

(i) All the documents required to be filed with the Registrar by the foreign companies shall be in **English language**. If the financial statements are in German language and not in the English language, a certified translation thereof in the English language shall be annexed and submitted to Registrar [Section 381 (2)]

(ii) Format of Financial statement as per IFRS:

Rule 6 of the Companies (Accounts) Rules, 2014 provides for the consolidation of accounts of companies in the following manner:

Manner of consolidation of Accounts: The consolidation of financial statements of the company shall be made in accordance with the provisions of Schedule III of the Act and the applicable accounting standards.

(iii) Authentication of translated financial statements [Rule 10 of the Companies (Registration of Foreign Companies) Rules, 2014]:

(1) All the documents required to be filed with the Registrar by the foreign companies shall be in English language and where any such document is not in English language, there shall be attached a translation thereof in English language duly certified to be correct in the manner given in these rules.

(2) Where any such translation is made outside India, it shall be authenticated by the signature and the seal, if any, of—

(a) the official having custody of the original; or

(b) a Notary (Public) of the country (or part of the country) where the company is incorporated:

Provided that where the company is incorporated in a country outside the Commonwealth, the signature or seal of the person so certifying shall be authenticated by a diplomatic or consular officer empowered under section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948, or, where there is no such officer, by any of the officials mentioned in section 6, of the Commissioners of Oaths Act, 1889, or in any relevant Act for the said purpose.

(3) Where such translation is made within India, it shall be authenticated by—

(a) an advocate, attorney or pleader entitled to appear before any High Court; or

(b) an affidavit, of a competent person having, in the opinion of the Registrar, an adequate knowledge of the language of the original and of English.

(iv) According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi. Hence, the documents of MNO Ltd. cannot be submitted at the Registrar's office at Mumbai.

[Following assumptions drawn within the provided informations:

1. **With respect to part (iii), an answer has been given in reference to part (i) of the question. Here, authentication is being considered to be asked of translated financial statements (from German language to English Language) as nothing is specified in the question.**
2. **In order to answer part (iii) of the question, it may be considered in independent situation, then only the authentication of its financial statement can be answered according to the Companies (Registration of Foreign Companies) Rules, 2014. According to which every foreign company shall prepare financial statement of its Indian business operations in accordance with Schedule III or as near thereto as possible for each financial year including documents that are required to be annexed should be in accordance with Chapter IX i.e. Accounts of Companies.]**

(c) According to Section 8(6) of the Prevention of Money Laundering Act, 2002, where the trial under this Act cannot be conducted by reason of the death of the accused, the **Special Court shall**, on an application moved by a person claiming to be entitled to possession of a property in respect of which an order has been passed, **pass appropriate orders regarding confiscation or release of the property**, as the case may be, involved in the offence of money-laundering after having regard to the material before it.

Where a **property stands confiscated to the Central Government** under section 8(5), **the Special Court**, in such manner as may be prescribed, may also direct the Central Government **to restore** such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may **have suffered a quantifiable loss** as a result of the offence of money laundering:

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has **acted in good faith and has suffered the loss** despite having taken all reasonable precautions and is not involved in the offence of money laundering.

Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.

In the light of above, a claimant with a legitimate interest in the property and suffered a loss is entitled for claim.

(d) As per 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.

In the instant case, Mr. D, the Accounts Executive of HNI Ltd. accessed the computer of his Executive Director and passed on the confidential information of the company to Mr. TR in return of huge sum of money which is an offence as per section 3 of the PMLA, 2002. This is a Schedule Offence under Para 22 of Part A.

Hence, Mr. D 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.

Question 4

(a) Mr. Vinod is a member of a recognised stock exchange in India for several years. The stock exchange called for a meeting on a certain date during business hours and Mr. Vinod expressed his inability to attend the meeting due to his prior unavoidable commitments out of the station. Nevertheless, he does not want to miss the opportunity of missing some of the important items in the Agenda of the meeting as well as wants to cast his vote. Because of his inability to attend the said meeting, he is contemplating to appoint his proxy for the meeting and vest power to his proxy to cast vote on his behalf. Is there any restriction in this regard as per the provisions of the Securities Contract (Regulation) Act, 1956 and SCR Rules, 1957 made thereunder?

Advise Mr. Vinod accordingly. ***(4 Marks)***

(b) Mr. Kapoor, a market intermediary was found alleged to have violated certain conditions under the provisions of the SEBI Act, 1992. The SEBI is contemplating action on the intermediary and asked for submission of certain details. Mr. Kapoor submitted the required details with a full and true disclosure in respect of the alleged violation and the Central Government wants to grant him immunity in the said circumstances. SEBI is however of the view that immunity cannot be granted and wants to prosecute Mr. Kapoor by carrying out an investigation. Examine as to how the matter will be resolved under the provisions of the SEBI Act, 1992? ***(4 Marks)***

(c) *Mr. Robin has received foreign contribution under the Foreign Contribution Regulation Act, 2010 (FCRA) and wants to utilize the amount for the administrative purposes and also to make investment in Gold Deposit Scheme of a private entity. Advise Mr. Robin in the light of the provisions of the FCRA, 2010.* ***(3 Marks)***

(d) *A foreign company, XJD Ltd. was established by few Indians in South America. The management of the company used to donate a huge amount to the religious trust, in Mumbai, India. In the light of the Foreign Contribution Regulation Act, 2010 examine:*

(i) *Whether the donations so made by XJD Ltd. is a foreign contribution?*

(ii) *Is the acceptance of such donation by the religious trust valid?* ***(3 Marks)***

Answer

(a) Restriction of voting rights by stock exchanges [Section 7A of the Securities Contract (Regulation) Act, 1956]

The provisions of the Act states that the recognised stock exchange has the power to make rules or amend its rules to provide for the restriction on the right of a member to appoint another person as his proxy to attend and vote at a meeting of the stock exchange.

In case the recognised stock exchange wishes to amend the rules, in relation to the above clause, it must take the approval of Central Government.

Hence, in the instant case, Stock Exchange can restrict the right of Vinod to appoint proxy and proxy's right of vote at a meeting of the stock exchange, however, recognised stock exchange has the power to make rules or amend the said rule, with the approval of Central Government.

(b) Power to grant immunity [Section 24B of the SEBI Act, 1992]

The Central Government may, on recommendation by the Board, if the Central Government is satisfied, that any person, who is alleged to have violated any of the provisions of this Act or the rules or the regulations made thereunder, has made a full and true disclosure in respect of the alleged violation,

- grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act, or the rules or the regulations made thereunder or also from the imposition of any penalty under this Act with respect to the alleged violation.

Exception: Provided that no such immunity shall be granted by the Central Government in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of application for grant of such immunity.

Provided further that recommendation of the Board under this sub-section shall not be binding upon the Central Government.

Hence, the instant case, in the light of the said provision, the Central Government cannot grant immunity to Mr. Kapoor, in the circumstances provided in the question. The recommendation of SEBI is required to grant immunity. Moreover, such recommendation shall not be binding upon the Central Government.

(c) Restriction to utilize foreign contribution for administrative purpose (Section 8 of the Foreign Contribution Regulation Act, 2010)

Every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution, shall—

(a) utilise such contribution for the purposes for which the contribution has been received:

Provided that any foreign contribution or any income arising out of it shall not be used for speculative business;

Speculative activities have been defined in *Rule 4 of FCR, Rule 2011* as under:-

(i) any activity or investment that has an element of risk of appreciation or depreciation of the original investment, linked to market forces, including investment in mutual funds or in shares;

(ii) participation in any scheme that promises high returns like investment in chits or land or similar assets not directly linked to the declared aims and objectives of the organization or association.

(b) not defray as far as possible such sum, not exceeding twenty per cent of such contribution, received in a financial year, to meet administrative expenses:

Provided that administrative expenses exceeding twenty per cent of such contribution may be defrayed with prior approval of the Central Government.

In the instant case, Mr. Robin cannot utilize the foreign contribution not exceeding twenty per cent of such contribution except with prior approval of the Central Government for administrative purposes specified in the Act and cannot make investment in Gold Deposit Scheme of a private entity as this is a speculative business.

(d) As per definition of Foreign Contribution given in section 2(1)(h) of the FCRA, 2010, Foreign Contribution means the donation, delivery or transfer made by any foreign source-

(a) of any article (except given as a gift for personal use), if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be prescribed from time to time, by the Central Government by the rules made by it in this behalf;

(b) of any currency, whether Indian of foreign; security and includes any foreign security under the Foreign Exchange Management Act, 1999.

As per explanation to the section, a donation, delivery or transfer of any article, currency or foreign security so referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be

foreign contribution within the meaning of this clause.

(i) The foreign source as per the definition given in section 2(1)(j) of the FCRA, 2010 includes a foreign company. Since XJD Ltd. is a foreign company, so donation made by XJD Ltd. is a foreign contribution for the religious and charitable purpose.

(ii) **Person having a definite cultural, economic, educational, religious or social programme [Section 11(1) of the FCRA, 2010]-** shall not accept foreign contribution unless such person obtains a certificate of registration from the Central Government.

In the instant case, as nothing is mentioned in the question regarding certificate of registration by religious trust (in Mumbai), it can be assumed that certificate has not been taken and if such religious trust accept donation from XJD Ltd., it shall not be valid.

Question 5

(a) OTP Limited was ordered to be wound up by the Tribunal. A provisional liquidator for the purpose was appointed. Despite the same, some parties want to pursue certain legal proceedings against the Company. The Company contends that on winding up order being passed, all suits and other legal proceedings come to an end. Advise the parties as per the relevant provisions relating to winding up as contained in the Companies, Act, 2013.

(4 Marks)

(b) Two groups of shareholders in a Company complained to the Registrar regarding the conduct and state of affairs of the company and accordingly, the proceedings of the case are before the Tribunal. Since the proceedings in the case is taking a long time, the shareholders approached you to advise alternative resolution of disputes outside the regulatory jurisdiction and also the time frame by which the proceedings can be completed. They also have a doubt that after hearing the final verdict, whether it will be binding on them and whether it can be referred to the next level of Court. You are requested to suitably advise as per the provisions of the Companies Act, 2013. ***(4 Marks)***

(c) Mr. J was proposed to be appointed as a resolution professional for the Corporate Insolvency Resolution Process (CIRP) initiated against BMR Ltd. Mr. R, a relative of director of BMR Ltd. is a partner in the insolvency professional entity in which Mr. J is a partner. In the light of the given facts, examine whether Mr. J is eligible for appointment as Resolution Professional for the conduct of the CIRP as per the Insolvency and Bankruptcy Code, 2016? ***(3 Marks)***

(d) Committee of creditors of XYZ Ltd. (Corporate Debtor) consists of financial creditors of ₹ 245 crore and operational creditors of ₹ 25 crore. They appointed a resolution professional Mr. P in their first meeting held on 5th September 2020. Resolution professional issued a notice for a meeting to be held on 10th November to approve a resolution plan with respect to management of affairs of company but notice was not given to operational creditors. Meeting was conducted on 10th November and resolution plan was

approved by committee of creditors by not less than 75% of financial creditors. Referring to the provisions of the Insolvency and Bankruptcy Code, 2016, examine:

(i) whether meeting was valid as notice was not given to operational creditors?

(ii) whether resolution plan approved will be binding on all creditors and the corporate debtor? ***(3 Marks)***

Answer

(a) According to section 279 of the Companies Act, 2013, when a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:

Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.

In the given question, some parties of OTP Limited (which was ordered to be wound up by the Tribunal) want to pursue certain legal proceedings against the company.

In the light of the facts of the question and provisions of law, the parties which want to pursue certain legal proceedings against the company can do so only with the leave of the Tribunal and subject to such terms as the Tribunal may impose.

(b) According to section 442(2) of the Companies Act, 2013, any of the parties to the proceedings may, at any time during the proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the Mediation and Conciliation Panel.

The Mediation and Conciliation Panel shall follow such procedure as may be in Rule 11 of *the Special Courts (Companies Mediation and Conciliation) Rules, 2016,* and dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

Any party aggrieved by the recommendation of the Mediation and Conciliation Panel may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

Thus, the group of shareholders can apply to the Mediation and Conciliation Panel. Further, after the hearing of the final verdict, the group of shareholders may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

(c) As per Regulation 3 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, an insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process against a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

Explanation- A person shall be considered independent of the corporate debtor, if he:

(a) is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company;

(b) is not a related party of the corporate debtor; or

(c) is not an employee or proprietor or a partner:

(i) of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm, in the last three financial years.

As per the given facts, Mr. J was proposed to be appointed as a resolution professional for the insolvency resolution process initiated against BMR Ltd. Whereas, Mr. R, a relative of director of BMR Ltd. is a partner in the insolvency professional entity in which Mr. J is partner.

Since, Mr. R is the partner in insolvency professional entity in which Mr. J is a partner, so, Mr. J is not eligible for appointment as Resolution Professional as he is not independent of the corporate debtor.

(d) **(i)** According to section 24 of the Insolvency and Bankruptcy Code, 2016, the notice of meeting of committee of creditors, among others, shall be served on operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

In the given question, since the aggregate dues of operational creditor is less than 10% of the debt i.e. [(25/270)*100], hence the meeting was valid even if the notice was not given to operational creditors.

(ii) Section 24 also provides that, all the decisions of the committee of creditors shall be taken by vote of minimum 66% of the voting share of the financial creditors. Where any action is taken without seeking the approval of the committee of creditors, such action shall be void.

Section 31 provides that if the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors, it shall by order approve the

resolution plan which shall be binding on the corporate debtor and its employees, members, creditors.

In the given question, since the resolution plan was approved by not less than 75% of financial creditors, it shall be binding on creditors and the corporate debtor (assuming that all other conditions are fulfilled).

Question 6

(a) The composition of the Board of Directors of XYZ Limited, an unlisted public company, consists of 8 directors. Mr. Amir, one of the non-executive directors of the company, is a resident of Singapore and therefore, has registered his address in Singapore with the Company for communication and record purposes. The Articles of Association of the Company confers approval of the Board of Directors for promoting eligible person to the coveted position of General Manager in any stream of the organization. Accordingly, a draft Board resolution for promoting Mr. Amrish as General -Manager (Finance) with effect from the date of approval by the Board has been initiated on 1st March, 2021 and except Mr. Amir, it was circulated to 3 directors by hand delivery through a special messenger, 2 directors by courier, 2 directors by email. The draft resolution was approved by four directors on March 5, 2021, two directors on March 7, 2021 and finally by the Chairman of the Board on March 10, 2021. In the light of the provisions of the Companies Act, 2013 (the Act) examine and decide the following:

(i) What shall be the date of approval of the Board for giving effect to the promotion order of Mr. Amrish?

(ii) Is there any violation of the provisions of the Act in not circulating the draft resolution to Mr. Amrish?* ***(4 Marks)***

OR

PQR Limited, incorporated on 1st April, 2016, an unlisted Public Company has provided the following data from its audited financial statements.

(₹ in crore)

Financial Year	*Paid up share capital as on 31st March*	*Turnover for the year ended*	*Aggregate of outstanding loans, debentures and deposits as on 31st March*
2016-17	*5*	*100*	*60*
2017-18	*5*	*110*	*55*
2018-19	*7*	*·95*	*50*
2019-20	*7*	*90*	*45*
2020-21	*7*	*75*	*40*

* Mr. Amrish to be read as Mr. Amir

During the FY 2020-21, the liquidity of the Company was highly affected due to closure of the business on account of Covid-19 pandemic. The aggregate outstanding loans, debentures and deposits increased from ₹45 crore as on 31st March 2020 to ₹60 crore as on 30th September 2020 and dropped down to ₹40 crore as on 31st March 2021. There was no such increase in the aggregate of outstanding loans, debentures and· deposits during the earlier financial years. PQR Limited, which was obligated to constitute an Audit Committee in the Financial Year 2017-18 decided to dismantle it in the FY 2021-22. Now, taking into account the above inputs and in the light of the· provisions of the Companies Act, 2013 (the Act) examine:

(i) *Whether the company has complied with the provisions of the Act and the rules made thereunder in dismantling the Audit Committee?*

(ii) *What will be your answer in case PQR Limited is a subsidiary of RST Limited, a listed entity?* ***(4 Marks)***

(b) *As on 31-3-2021, Mr. K. Muthusamy is holding directorship in 4 listed Companies, 4 unlisted Public Companies and 4 Private Limited Companies. He has obtained two Director Identification Number (DINs) allotted to him inadvertently. Out of the 12 directorships, he holds 10 with the DIN allotted to him first and the rest with the DIN allotted to him later. He wants to surrender one of his DINs, but to keep all his 12 Directorships. In the light of the relevant provisions of the Companies Act, 2013, examine the following:*

(i) *Which DIN sourced by Mr. K. Muthusamy be surrendered?*

(ii) *What procedure he needs to follow and what actions will be done by the Central Government in this regard?*

(iii) *In what way can he keep all his 12 Directorships with one DIN?* ***(4 Marks)***

(c) *Party A and Party B entered into a contract for construction of residential apartments. The contract contained an arbitration clause whereby all disputes between the parties would be submitted to an arbitrational tribunal consisting of a sole arbitrator Mr. C. There was a dispute in settling the bills of the civil engineers involving a substantial amount and accordingly, the parties decided to refer the matter to arbitration. Mr. C was orally informed about his appointment as an arbitrator on 01-06-2019. Subsequently, a written appointment letter dated 15-06-2019 was sent to him which was received by him on 18-06-2019. In the light of the above facts, explain under the provisions, of Arbitration and Conciliation Act, 1996:*

(i) *The date within which the arbitrational award shall be made.*

(ii) *For what period can the parties, by consent, extend the period for making the award?*

(3 Marks)

(d) *SLX International Ltd., a foreign trade creditor, having its office in New York wants to file a petition under the Insolvency and Bankruptcy Code, 2016 on default of a debtor in India. It moved a petition under Section 9 of the Code seeking commencement of insolvency*

process. The foreign company was not having any office or bank account in India. Because of this, it could not submit a "certificate from financial institution" as required under the Code. Examine whether the petition is admissible under the Insolvency & Bankruptcy Code, 2016? ***(3 Marks)***

Answer

(a) Requirements to pass resolution by circulation [Section 175 (1)]: A resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation in case:

- the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be,
- at their addresses registered with the company in India,
- by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and
- has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

Provided that, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting of the Board.

Rule 5 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include e-mail or fax.

Further, para 6.3.2 of the Secretarial Standard 1 which is mandatory in terms of section 118(10) of the Companies Act, 2013 provides that 'The Resolution, if passed, shall be deemed to have been passed on the last date specified for signifying assent or dissent by the Directors or the date on which assent from more than two-third of the Directors has been received, whichever is earlier, and shall be effective from that date, if no other effective date is specified in such Resolution.

In the instant case, the draft board resolution for promoting Mr. Amrish as General Manager was circulated to 7 directors at their addresses registered with the company in India.

(i) Out of 7 directors, 4 directors approved the resolution on 5th March, 2021 and two directors on 7th March, 2021 which meets the requirement of two-third of the directors mentioned in SS1. Hence, the appointment of Mr. Amrish as General Manager deemed to be effective from 7th March, 2021. His appointment was subject to noting in the next Board meeting.

(ii) There is no violation of the provisions of the Act in not circulating the draft resolution to Mr. Amir as he has registered his address in Singapore with the company for

communication and record purposes and Section 175 clearly talks about circulating the resolution to the directors who have registered their address with the company in India.

Alternate Answer

Requirements to pass resolution by circulation [Section 175 (1)]: A resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation in case:

- the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be,
- at their addresses registered with the company in India,
- by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and
- has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

Rule 5 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include e-mail or fax.

In the instant case, the draft board resolution for promoting Mr. Amrish as General Manager was circulated to 7 directors at their addresses registered with the company in India.

(i) Out of 7 directors, 4 directors approved the resolution on 5th March, 2021. Hence, the appointment of Mr. Amrish as General Manager deemed to be effective from 5th March, 2021 as the resolution for his appointment was approved by majority on 5th March, 2021 (4 directors out of 7). His appointment was subject to noting in the next Board meeting.

(ii) There is no violation of the provisions of the Act in not circulating the draft resolution to Mr. Amir as he has registered his address in Singapore with the company for communication and record purposes and Section 175 clearly talks about circulating the resolution to the directors who have registered their address with the company in India.

OR

(a) Companies required to constitute an Audit Committee [Section 177 (1) and Rule 6]: Following companies are required to constitute an Audit Committee:

(i) every listed public company;

(ii) public companies having paid up share capital of 10 crore rupees or more;

(iii) public companies having turnover of 100 crore rupees or more;

(iv) public companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

Clarification: *Explanation* to Rule 4 (1) clarifies that the paid-up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

(i) In the instant case, PQR Limited was obligated to constitute the Audit Committee in the Financial year 2017-18 as it was having turnover of Rs. 100 crore and aggregate of outstanding loans, debentures and deposits of Rs. 60 crore on 31st March, 2016.

Now, the company has ceased to fulfill the three conditions related to paid up share capital, turnover and aggregate of outstanding loans, debentures and deposits for three consecutive years (as on 31st March, 2018, 31st March 2019 and 31st March 2020). Hence, the company is not required to constitute Audit committee in the financial year 2021-22.

Hence, the company has complied with the provisions of the Act and rules made thereunder in dismantling the Audit Committee.

(ii) If PQR Limited is a subsidiary of RST Limited, a listed entity:

PQR Limited is a subsidiary of RST limited, a listed entity, is not to be considered as listed company unless registered in the recognized Stock exchange. Also since PQR Limited is a subsidiary and not a wholly –owned subsidiary, no exemption is given to PQR limited under the prescribed class of companies under Rule 4 for constitution of Audit committee. Therefore, PQR Limited has to comply with the provisions of the Act and rules made thereunder for constitution of the Audit Committee.

However, the answer will remain same in this case also.

(b) (i) Prohibition on obtaining more than one DIN: According to Section 155, no individual, who has already been allotted a DIN under section 154, shall apply for, obtain or possess another DIN.

Mr. K. Muthusamy can hold the DIN which was allotted to him first and he can surrender the DIN which was allotted to him subsequently.

(ii) Rule 11 of the Companies (Appointment and Qualification of Directors) Rules, 2014 lays down the procedure for **cancellation or surrender or deactivation and re-activation of DIN.**

Accordingly, the Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received along with prescribed fee from any person, cancel or deactivate the DIN in case the DIN is found to be duplicated in respect of the same person provided the data related to both the DINs shall be merged with the validly retained number.

(iii) To keep all the 12 directorships with one DIN: In compliance with Rule 11 by Mr. K Muthusamy, on surrender of 2nd DIN, data related to both the DINs shall be merged with the valid DIN. Thereby all 12 directorships shall migrate with DIN 1.

(c) As per section 23 of the Arbitration and Conciliation Act, 1996 (the Act), the statement of claim and defence under the pleading before the arbitrational Tribunal, shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

Here in the given instance, Mr. C was orally informed about his appointment as an arbitrator on 1.6.2019. Though communicated through written appointment letter dated 15.6.2019 received by 18.6.2019.

Accordingly, in the first case:

(i) Arbitrational award shall be made within 12 months from 17.12.2019 i.e. 17.12.2020.

(ii) As per section 29 A of the Arbitration and Conciliation Act, 1996, the award has to be made within 12 month from the period mentioned in section 23(4) of the Act. However this period can be extended by 6 months on consent of the parties by the court. Hence, it can be extended upto 17-06-2021.

(d) As per section 9 of the Insolvency and Bankruptcy Code, 2016, after the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under section 8(1), if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under section 8(2), the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

The application shall be filed by the operational creditor, besides with the other documents, 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.

According to the facts, since SLX International Ltd., a foreign trade creditor, was not having any office/bank account in India and so not submitted a certificate from financial institution. In line with section 9, where financial institutions having bank accounts in India, there only, it will be required to submit the certificate confirming that there is no payment of an unpaid operational debt by the corporate debtor. Here in the given case, its not mandatory to submit the said certificate. So, petition filed by SLX International Ltd., is admissible with the furnishing of other requisite documents and in compliances with requirements of the section.