

## PAPER-4 – CORPORATE AND ALLIED LAWS

*Question No. 1 is compulsory.*

*Answer any five from the rest*

### Question 1

(a) *Star Ltd. declared and paid dividend in time to all its equity holders for the financial year 2014-15, except in the following two cases:*

- (i) *Mrs. Sheela, holding 250 shares had mandated the company to directly deposit the dividend amount in her bank account. The company, accordingly remitted the dividend but the bank returned the payment on the ground that there was difference in surname of the payee in the bank records. The company, however, did not inform Mrs. Sheela about this discrepancy.*
- (ii) *Dividend amount of ₹ 50,000 was not paid to Mr. Mohan, deceased, in view of court order restraining the payment due to family dispute about succession.*

*You are required to analyse these cases with reference to provisions of the Companies Act, 2013 regarding failure to distribute dividends. (4 Marks)*

(b) *You are working as the Finance Head of Super Energy Ltd. The company is in advance stage of finalizing projects of wind power generation, which will considerably improve the operational and financial strengths of the company. You have got some information that one of the directors of the company, who is involved in the project, is indulged in trading of shares of the company.*

*Write a note for internal circulation explaining insider trading of securities and consequences of contravention of the relevant provisions of the Companies Act, 2013.*

*(4 Marks)*

(c) *RPS Ltd. got its shares listed with a Stock Exchange. It has been regularly paying the listing fees. Certain information about share holding pattern etc. was asked by the Stock Exchange, which the company could not supply in the prescribed time. It was then given a further opportunity to furnish the desired information along with supporting document, but in vain, as the company did not maintain any record. What are the penalties leviable against the company under the Securities Contracts (Regulation) Act, 1956 for the failure to furnish the information? (4 Marks)*

(d) *Share holders of Hide and Seek Ltd. are not satisfied about performance of the company. It is suspected that some activities being run in the name of the company are not in the interest of the company or its members. 101 out of total 500 share holders of the company have made an application to the Central Government to appoint an inspector to carry out investigation and find out the true picture.*

*With reference to the provisions of the Companies Act, 2013, mention whether the shareholders' application will be accepted? Elaborate. (4 Marks)*

- (e) *One of the Objects Clauses of the Memorandum of Association of Info Company Limited conferred upon the company power to sell its undertaking to another company with identical objects. Company's Articles also conferred upon the directors whereby power was conferred upon them to sell or otherwise deal with the property of the company. At an Extraordinary General Meeting of the company, members passed an ordinary resolution for the sale of its assets on certain terms and authorized the directors to carry out the sale. Directors refused to comply with the wishes of the members where upon it was contended on behalf of the members that they were the principals and directors being their agents, were bound to give effect to their (members') decisions.*

*Examining the provisions of the Companies Act, 2013, answer the following:*

*Whether the contention of members against the non-compliance of members' decision by the directors is tenable?*

*Whether it is possible for the members usurp the powers which by the Articles are vested in the directors by passing a resolution in the general meeting? (4 Marks)*

**Answer**

- (a) (i) Section 127 of the Companies Act, 2013 provides for punishment for failure to distribute dividend on time. One of such situations is where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has not been communicated to her.

In the given situation, the company has failed to communicate to the shareholder Mrs. Sheela about non-compliance of her direction regarding payment of dividend. Hence, the penal provisions under section 127 will be applicable.

- (ii) Section 127, inter-alia, provides that no offence shall be deemed to have been committed where the dividend could not be paid by reason of operation of law.

In the present circumstance, the dividend could not be paid because it was not allowed to be paid by the court until the matter was resolved about succession. Hence, there will not be any liability on the company and its Directors etc.

**(b) NOTE FOR INTERNAL CIRCULATION TO ALL THE CONCERNED**

It has come to the notice of the Management that somebody is indulging in insider trading of the shares of the company. For the benefit of all the concerned, the scope and the meaning of insider trading is indicated below:

Section 195 has been introduced in the Companies Act, 2013 which provides for prohibition of insider trading in securities. According to this section:

- (i) No person including any director or key managerial personnel of a company shall enter into insider trading. But if any communication is required in the ordinary course of business or profession or employment or under any law, then the above prohibition does not apply.
- (ii) "Insider trading" means –
  - (a) An act of subscribing, buying, selling, dealing or agreeing to subscribe, buy, sell or deal in any securities by any director or key managerial personnel or any other officer of a company either as principal or agent if such director or key managerial personnel or any other officer of the company is reasonably expected to have access to any non-public price sensitive information in respect of securities of company; or
  - (b) An act of counselling about procuring or communicating directly or indirectly any non-public price-sensitive information to any person;
- (iii) "price-sensitive information" means any information which relates, directly or indirectly to a company and which if published is likely to materially affect the price of securities of the company.
- (iv) If any person contravenes the provisions of this section, he shall be punishable with imprisonment for a term which may extend to five years or with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher, or with both.

Accordingly, all the concerned should note that any act of insider trading will be viewed very seriously and the concerned persons should desist from carrying out any such activities.

- (c) According to section 23 A of the Securities Contracts (Regulation) Act, 1956, any person who is required under this Act or any rules made thereunder;
  - (a) to furnish any information, document, books, returns or report to a recognized stock exchange, fails to furnish the same within the time specified therefore in the listing agreement or conditions or bye-laws of the recognized stock exchange, shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less for each such failure;
  - (b) to maintain books of account or records, as per the listing agreement or conditions, or bye-laws of a recognised stock exchange and if there is failure to maintain the same, shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees whichever is less.

Therefore, in the given case, RPS Ltd. is liable under section 23A of the Securities Contracts (Regulation) Act, 1956 as it could not supply the certain information asked by the stock exchange and also did not maintain any record.

- (d) According to the Companies Act, 2013, the Central Government under section 210 (1) may order an investigation into the affairs of the company, if it is of the opinion that it is necessary to do so:
- (a) on the receipt of a report of the Registrar or Inspector under section 208;
  - (b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated;
  - (c) in public interest.

According to section 210 (3) of the Companies Act, 2013, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct.

The shareholders' application will not be accepted as under 210 of the Companies Act, 2013, Central Government may order an investigation into affairs of the company on the intimation of a special resolution passed by a company that the affairs of the company ought to be investigated and then may appoint the inspectors. Here, 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation but it is not sufficient as the company has not passed the special resolution.

- (e) **Powers of Board:** In accordance with the provisions of the Companies Act, 2013, as contained under Section 179(1), the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorized to exercise and do:

Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made there under including regulations made by the company in general meeting.

Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the members or articles of the company or otherwise to be exercised or done by the company in general meeting.

Section 180 (1) of the Companies Act, 2013, provides that the powers of the Board of Directors of a company which can be exercised only with the consent of the company by a special resolution. Clause (a) of Section 180 (1) defines one such power as the power to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking of the whole or substantially the whole or any of such undertakings.

Therefore, the sale of the undertaking of a company can be made by the Board of Directors only with the consent of members of the company accorded vide a special resolution.

Even if the power is given to the Board by the memorandum and articles of the company, the sale of the undertaking must be approved by the shareholders in general meeting by passing a special resolution.

Therefore, the correct procedure to be followed is for the Board to approve the sale of the undertaking clearly specifying the terms of such sale and then convene a general meeting of members to have the proposal approved by a special resolution.

In the given case, the procedure followed is completely incorrect and violative of the provisions of the Act. The shareholders cannot on their own make out a proposal of sale and pass an ordinary resolution to implement it through the directors.

The contention of the shareholders is incorrect in the first place as it is not within their authority to approve a proposal independently of the Board of Directors. It is for the Board to approve a proposal of sale of the undertaking and then get the members to approve it by a special resolution. Accordingly the contention of the members that they were the principals and directors being their agents were bound to give effect to the decisions of the members is not correct.

Further, in exercising their powers the directors do not act as agent for the majority of members or even all the members. The members therefore, cannot by resolution passed by a majority or even unanimously supersede the powers of directors or instruct them how they shall exercise their powers. The shareholders have, however, the power to alter the Articles of Association of the company in the manner they like subject to the provisions of the Companies Act, 2013.

## Question 2

- (a) *The auditor of Organic Foods Ltd., accepted the Certificate from Mr. Rohan who is the manager, a person of knowledge, competence and high reputation, as to the value of the stock in trade. The valuation of stock referred to above was found to be grossly overstated for several years in the balance sheets of the company. As a result of the over valuation, dividends were paid out of capital. The auditor did not examine the books of account very minutely. If they had done so and compared the amount of stock at the beginning of the year, with the purchases and sales during the year, they would have noticed the over valuation. The company subsequently went into liquidation and the auditors were sued to make good the loss caused by the wrongful payment of dividends based on the balance sheets figures. Based on the above facts, you are required to decide, with reference to the provisions of the Companies Act, 2013 and the decided case laws, the following issues:*
- (i) *Whether the Auditors of the company will be liable for the loss caused to the company by the wrongful payment of dividends based on the Balance sheets duly audited by the Auditors.*
- (ii) *What are the statutory duties of the Auditors in this regard? (8 Marks)*

(b) *Best Plastics Limited is being wound up by the Court. The Official Liquidator after realization of the assets has an amount of ₹ 28 lakhs in his hand towards payment of creditors of the company. Details of creditors are as follows:*

(i) Secured Creditors	-	₹ 20 lakhs
(ii) Workers wages	-	₹ 15 lakhs
(iii) Income Tax payable	-	₹ 2 lakhs
(iv) Unsecured Creditors	-	<u>₹ 40 lakhs</u>
Total Creditors		<u>₹ 77 lakhs</u>

*Since the available amount in the hands of Liquidator is only ₹ 28 lakhs, which is insufficient to meet the claims of all the above creditors, explain the procedure you would follow for payment of the above in accordance with the provisions of the Companies Act, 1956, assuming that the company has created a charge on all the assets of the company in favour of secured creditors.* (4 Marks)

(c) *ABC Limited has on its Board, four Directors viz. W, X, Y and Z. In addition, the company has Mr. D as the Managing Director. The company also has a full time Company Secretary, Mr. Wise, on its rolls. The financial statements of the company Balance Sheet and Statement of Profit & Loss and the Board's Report for the year ended 31<sup>st</sup> March, 2015 were authenticated by two of the directors, Mr. X and Y under their signatures.*

*Referring to the provisions of the Companies Act, 2013:*

- Examine the validity of the authentication of the Balance Sheet and Statement of Profit & Loss and the Board's Report.*
- What would be your answer in case the company is a One Person Company (OPC) and has only one Director, who has authenticated the Balance Sheet and Statement of Profit & Loss and the Board's Report?* (4 Marks)

#### Answer

(a) The problem given in question is mainly relates to the duties of the auditors. Section 143 of the Companies Act, 2013 provides that the main duty of the auditor is to make a report to the members of the company on the accounts examined by him and the balance sheet and the profit and loss account of the company and on every document which is annexed to the balance sheet or profit and loss account laid before the company in general meeting. The auditor owes a duty to the members to state whether the accounts give a true and fair view of the affairs of the company at the end of the financial year and of the profit and loss account of the year.

The duty of an auditor is to give information in direct and express terms (*Crichton's Oil Co. Re (1902) 2ch 86*) and not merely to arouse inquiry. If he discovers that any illegal or improper payments or any other papers have been made, his duty will be to make it public by reporting. The auditor occupies a fiduciary position in relation to the

shareholders and in auditing the accounts maintained by the directors, he must act in the best interest of the shareholders who are in the position of beneficiaries.

But there is a limitation relating the duties to be performed by the auditor. An auditor is not bound to be a detective and is not expected to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watchdog but not bloodhound. He is justified in believing tried servants of the company in whom confidence was placed by the company. He is entitled to assume that they are honest and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion, he should probe it to the bottom, but in the absence of anything of that kind he is only bound to be reasonably cautious and careful.

This question is related to case of *Kingston Cotton Mill Co. Re (No. 2) (1896) 2 ch 279*. In this case it was held that, the auditors were not liable. It is not auditor's duty to take stock. There are many matters in which he may rely on the honesty and accuracy of others. Further auditors do not guarantee the discovery of all frauds.

However, it is possible to hold a different view by stating that the auditor cannot escape from his responsibility by relying on the stock valuation certified by Mr. Rohan who is the manager. Though, it is not the duty of auditor to examine the books of accounts very minutely, they are supposed to examine the quantity of stock at the beginning of year with the purchases & sales and arriving at the figures of closing stock which would have become clear that there was overvaluation of stock. Thus, the auditor of the company will be responsible for the violations and shall be punishable with fine which shall not be less than ₹ 25,000 but which may extend up to ₹ 5 lakhs as per provisions of Section 147(2) of the Act.

- (b) In accordance with the provisions of the Companies Act, 1956, as contained under Section 530, payment of debts out of available funds with the Official Liquidator is to be made as per procedure laid down there under. However, Section 529A provides for overriding of the preferential payments as mentioned in Section 530. According to Section 529A, notwithstanding anything contained in other provisions of this Act or any other law for the time being in force, in the winding up of a company,
- (i) workmen's dues; and
  - (ii) debts due to secured creditors, shall be paid in priority to all other debts.

The above debts have to be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Applying the above provisions in the given case, the funds available with the Official Liquidator are not even sufficient to meet fully the dues payable to secured creditors and workers. Thus tax dues to the tune of ₹ 2 lakhs, payable to Government Authorities will not get any payment even though they are to be considered as preferential payments as per Section 530 of the Act. The Secured Creditors dues and workmen dues will get

abated equally and they get ₹ 16 lakhs and ₹ 12 lakhs respectively. The other creditors will not get anything.

- (c) In accordance with the provisions of the Companies Act, 2013, as contained under section 134 (1), the financial statements, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by at least:
- (1) The Chairperson of the company where he is authorized by the Board; or
  - (2) Two directors out of which one shall be the managing director and
  - (3) The other Chief Executive Officer, if he is a director in the company
  - (4) The Chief Financial Officer and the Company Secretary of the company, wherever they are appointed.

In case of a One Person Company, the financial statements shall be signed by only one director, for submission to the auditor for his report thereon.

The Board's report and annexures thereto shall be signed by its Chairperson of the company, if he is authorized by the Board and where he is not so authorized, shall be signed by at least two directors one of whom shall be a managing director or by the director where there is one director.

- (i) In the given case, the Balance Sheet and Profit & Loss Account have been signed by Mr. X and Mr. Y, the directors. In view of the provisions of Section 134 (1), the Managing Director Mr. D should be one of the two signatories. Since the company has also employed a full time Secretary, he should also sign the Balance Sheet and Profit & Loss Account. Therefore, authentication done by two directors is not valid.
- (ii) In case of OPC, the financial statements should be signed by one director and hence, the authentication is in order.

### Question 3

- (a) (i) *In the annual general meeting of XYZ Ltd., while discussing on the matter of retirement and reappointment of director Mr. X, allegations of fraud and financial irregularities were levelled against him by some members. This resulted into chaos in the meeting. The situation was normal only after the Chairman declared about 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, 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)*

- (ii) *CB Ltd., an unlisted company, having a paid up equity share capital of ₹ 6 crore consisting of 60 lakh equity shares of ₹ 10 each, proposes to reduce the denomination of equity shares to ₹ 2 per share and make an initial public offer at a premium of ₹ 98 per share.*

*Examine whether it is possible for the company to go ahead with these proposals under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements), Regulations, 2009? (4 Marks)*

- (b) *Queens Limited is a company listed at Bombay Stock Exchange. Company's Articles empower the Board of Directors to appoint additional director. The Board of Directors, therefore, appoints Mr. K. as the additional director. It may, however, be pointed out that earlier, the proposal to appoint Mr. K. as a director on the Company's Board was rejected by the members at the company's Annual General Meeting.*

*Examine the provisions of the Companies Act, 2013, answer the following:*

- (i) *Whether Mr. K's appointment as additional director by the Board of Directors is valid?*
- (ii) *Whether the Company's Annual General Meeting can appoint Mr. K. as the additional director when the proposal to appoint comes before the meeting for the first time?*
- (iii) *In case the AGM of the company is not held within the stipulated time, decide whether Mr. K. who was appointed by the Board as additional director, for the first time, can continue to act as a director? (8 Marks)*

#### Answer

- (a) (i) 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 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 of the company or of a person authorized by the Central Government in this behalf.

(ii) Under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, an issuer making an initial public offer, subject to the provisions of the Companies Act, may determine the face value of the equity shares in the following manner:

(a) If the issue price per equity share is five hundred rupees or more, the issuer shall have the option to determine the face value at less than ten rupees per equity share;

Provided that the face value shall not be less than one rupee per equity share;

(b) if the issue price per equity share is less than five hundred rupees, the face value of the equity shares shall be ten rupees per equity share:

Here, the issue price is ₹ 100 (₹ 2 + ₹ 98) and face value is ₹ 2. It is not possible for the company to issue shares having a face value of less than ₹ 10 per share if the issue price is ₹ 100 because as per the SEBI (ICDR) Regulations, 2009, if the issue price is less than ₹ 500 per share, the face value shall be ₹ 10 per share.

Hence, it is not possible for CB Ltd., to go ahead with the above proposal.

(b) Problem as asked in the question is based on the provisions of the Companies Act, 2013 as contained under section 161 (1) according to which :

(A) The Articles of a company may confer upon its Board of Directors the power to appoint any person as an additional director at any time.

(B) A person, who fails to get appointed as a director in a general meeting of the company cannot be appointed as an additional director in the same company.

(C). Additional director shall hold office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier.

In the given case, the answers to sub-questions are:

(i) The appointment of Mr. K. as additional director by the Board of Directors is not valid because before appointing him as an additional director, the proposal to appoint Mr. K. as a director on the Company's Board was rejected by the members at the company's Annual General Meeting.

(ii) The power to appoint additional directors vests with the Board of Directors and not with the members of the company. The only condition is that the Board must be conferred such power by the articles of the company. Therefore, in the present case, the company's Annual General Meeting cannot appoint Mr. K. as the additional director when the proposal to appoint comes before the meeting for the first time because the company's Articles empower the Board of Directors to appoint additional director.

(iii) In case the AGM of the company is not held within the stipulated time, Mr. K. cannot continue as additional director, since he can hold the office of directorship only 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. Such an additional director shall vacate his office latest on the date on which the annual general meeting ought to have been held under Section 96 of the Companies Act, 2013. He cannot continue in the office on the ground that the meeting was not held or could not be called within the time prescribed.

#### Question 4

- (a) *Elaborate the provisions of the Companies Act, 2013 regarding Notice of Board Meeting. Draft a notice for the first meeting of the Board of Directors of India Timber Ltd. (8 Marks)*
- (b) (A) *DJA Company Limited, incorporated under the provisions of the Companies Act, 2013, has two subsidiaries – AJD Limited and AMR Limited. All the three companies have prepared their financial statements for the year ended 31<sup>st</sup> March, 2015. Examining the provisions of the Companies Act, 2013, answer the following:*
- (i) *In what manner the subsidiaries – AJD Limited and AMR Limited shall prepare their Balance Sheet and Profit & Loss Account?*
  - (ii) *What would be your answer in case the DJA Limited – the holding company, is not required to prepare consolidated financial statements under the Indian Accounting Standards?*
  - (iii) *What shall be your answer in case one of the subsidiary company's financial statements do not comply with the Accounting Standards?*
  - (iv) *To what extent is the Central Government empowered to exempt a company from preparing the financial statements in compliance with the Indian Accounting Standards? (4 Marks)*
- (B) *Mr. S, a member of MN Ltd., obtained an order from the Securities and Exchange Board of India (SEBI) against the company. But the company failed to redress the grievance of Mr. S within the time fixed. Consequently, SEBI imposed penalty on the company. The company, however, did not pay the penalty also. State how the penalty can be recovered from the company? (4 Marks)*

#### Answer

- (a) **Notice of Board Meeting:** Notice of Board Meeting is required pursuant to Section 173(3) of the Companies Act, 2013. According to this section, a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Further, a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

In case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

The *Companies (Meetings of Board and its Powers) Rules, 2014*, further provides that the notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means.

On receiving such a notice, a director intending to participate through video conferencing or audio visual means shall communicate his intention to the Chairperson or the company secretary of the company. He shall give prior intimation to the effect sufficiently in advance so that the company is able to make suitable arrangements in this behalf.

If the director does not give any intimation of his intention to participate that he wants to participate through the electronic mode, it shall be assumed that the director shall attend the meeting in person.

As per section 173(4) of the Companies Act, 2013, every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of ₹ 25,000.

#### Draft Notice

India Timber Limited

Address: \_\_\_\_\_

Dated \_\_\_\_\_

To

Mr. \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_ (each director to be addressed individually)

Dear Sir,

Notice is hereby given that first meeting of the Board of Directors will be held at the registered office of the company at.....(address).....(place) on.....(day), the .....(date) at.....AM/PM.

You are requested to make it convenient to attend the meeting. An option is also available to you to participate in the Board Meeting through video conferencing or audio visual means. Kindly communicate your preference in this regard.

A copy of the agenda of the meeting is enclosed for your perusal.

Yours faithfully,  
For India Timber Ltd.

(Secretary)

Encl: A copy of agenda of the meeting.

- (b) (A) (i) In accordance with the provisions of the Companies Act, 2013, as contained under section 129(3) and (4):

Where a company has one or more subsidiaries, it shall, in addition to its own financial statements prepare a consolidated financial statement of the company and of all the subsidiaries in the same form and manner as that of its own. The consolidated financial statements shall also be laid before the AGM of the company along with the laying of its own financial statement. The company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiaries in Form AOC-1. For the purpose of consolidated financial statements, 'subsidiaries' shall include associate company and joint venture.

- (ii) According to *Companies (Accounts) Rules, 2014*, the consolidation of financial statements of the company shall be made in accordance with the provisions of Schedule III to the Act and the applicable accounting standards. However, for a company which is not required to prepare consolidated financial statements under the Accounting Standards, it shall be sufficient if the company complies with provisions of consolidated financial statements provided in Schedule III to the Act. The provisions applicable to the preparation, adoption and audit of the financial statements of a holding company shall, mutatis mutandis, also apply to the consolidated financial statements.
- (iii) If the financial statements of a company do not comply with the accounting standards, the company shall disclose in its financial statements the following viz.
- (a) The deviation from the accounting standards,
  - (b) The reasons for such deviation, and
  - (c) The financial effects, if any, arising out of such deviation.
- (iv) The Central Government may, on its own or on any application by a class or classes of companies, by notification, exempt any class or classes of companies from complying with any of the requirements of this Section or the rules made thereunder, if it is considered necessary to grant such exemption in

the public interest. Any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.

- (B) According to Section 28A of the Securities and Exchange Board of India Act, 1992, if a person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any direction of the Board for refund of monies or fails to comply with a direction of disgorgement order issued under section 11B or fails to pay any fees due to the Board, the Recovery Officer may draw up under his signature a statement /certificate in the specified form specifying the amount due from the person and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes, namely:
- (a) attachment and sale of the person's movable property;
  - (b) attachment of the person's bank accounts;
  - (c) attachment and sale of the person's immovable property;
  - (d) arrest of the person and his detention in prison;
  - (e) appointing a receiver for the management of the person's movable and immovable properties.

The expression 'Recovery Officer' means any officer of the Board who may be authorized by general or special order in writing, to exercise the powers of a Recovery Officer. The Recovery Officer shall be empowered to seek the assistance of the local district administration while exercising the powers.

#### Question 5

- (a) *A and B were appointed as first directors on 4<sup>th</sup> April, 2014 in Sun Glass Ltd. Thereafter, C, D and E were appointed as directors on 6<sup>th</sup> July 2014 and F, G and H were also appointed as directors on 7<sup>th</sup> August 2014 in the company. In the Annual General meeting (AGM) of the company held after the above appointments, A and B were proposed to be retired by rotation and re-appointed as directors.*

*At the AGM, resolution for A's retirement and re-appointment was passed. However, before the resolution for 'B' could be taken up for consideration, the meeting was adjourned. In the adjourned meeting also, the said resolution could not be taken up and the meeting was ended without passing the resolution for B's retirement and re-appointment.*

*In the light of above and with reference to relevant provision of the Companies Act, 2013, answer the following:*

- (i) *Whether proposals for retirement by rotation and re-appointment of A and B only were sufficient?*
- (ii) *What will be the status of B as a director in the company?* (8 Marks)

- (b) *Robertson Ltd. is a company registered in Thailand. Although, it has no place of business established in India, yet it is doing online business through telemarketing in India. Whether it will be treated as a Foreign Company under the Companies Act, 2013? Explain.* (4 Marks)
- (c) (i) *The mango producers in Lucknow have entered into an arrangement among them whereby they have decided not to sell the mango below certain price. This arrangement has been made in writing but not intended to be enforced by any legal proceedings. Referring to the provisions of the Competition Act, 2002, examine whether the said arrangement shall fall within the jurisdiction of the term "agreement" within the meaning of the said Act.*
- (ii) *The coconut producers in Tirunelveli (Tamil Nadu) have formed an association to control the production of coconuts. Referring to the provisions of the Competition Act, 2002, examine whether the said association to control the production of coconuts shall fall within the jurisdiction of the term 'Cartel' under the provisions of the said Act.* (4 Marks)

#### Answer

- (a) According to section 152(6)(a)(i) of the Companies Act, 2013, unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation.

Further, section 152(6)(c) of the Act states that at the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

Section 152(6)(d) further states that the directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

Section 152(7) (a) provides that if the vacancy of the director retiring by rotation, is not so filled-up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

Section 152 (7)(b) further provides that if at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not

to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless:

- (a) at that meeting or at the previous meeting a resolution for the re-appointment of such director has been put to the meeting and lost;
- (b) the retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be so re-appointed;
- (c) he is not qualified or is disqualified for appointment;
- (d) a resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or
- (e) section 162 is applicable to the case.

- (i) In the given case there are total 8 directors, out of which A and B were appointed as first directors of Sun Glass Ltd.

As per the provisions of section 152 of the Companies Act, 2013, the number of directors liable to retire by rotation at the next Annual General Meeting are 2 [1/3 of (2/3 of 8)].

Therefore, in the given case, 2 directors will be liable to retire by rotation at the next AGM of the Company, which in this case will be A and B as they are who have been longest in office since their last appointment. Thus, the proposals for retirement by rotation and re-appointment of A and B only were sufficient.

- (ii) According to section 152(6)(c), at the annual general meeting, one-third of rotational directors shall retire from office. Thus, B shall retire at the Annual General Meeting in which he was due to retire even though it was adjourned without the resolution for B's retirement could have been taken up.

Further, at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting as he does not fall in the category of any of the exceptions mentioned in section 152(7)(b). Hence, B will be deemed to be re-appointed as a director in the company.

- (b) According to section 2(42) of the Companies Act, 2013, "foreign company" means any company or body corporate incorporated outside India which –
  - (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
  - (b) conducts any business activity in India in any other manner.

According to the *Companies (Registration of Foreign Companies) Rules, 2014*, "electronic mode" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to –

- (a) business to business and business to consumer transactions, data interchange and other digital supply transactions;
- (b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities in India or from citizens of India;
- (c) financial settlements, web based marketing, advisory and transactional services, data base services and products, supply chain management;
- (d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and
- (e) all related data communication services whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

Looking to the above description, it can be said that being involved in business activity through telemarketing, Robertson Ltd., will be treated as foreign company.

- (c) (i) In accordance with the provisions of the Competition Act, 2002, as contained under Section 2(b), an agreement includes any arrangement or understanding or action in concert :
  - (A) whether or not, such arrangement, understanding or action is formal or in writing; or
  - (B) whether or not, such arrangement, or undertaking or action is intended to be enforceable by legal proceedings.

In the given case, the understanding reached among the mango producers not to sell below a certain price shall amount to an agreement as defined under Section 2(b) notwithstanding the fact that though the arrangement is in writing but not intended to be enforced by legal proceeding.

- (ii) In accordance with the Provisions of Section 2(c) of the Competition Act, 2002, the term 'Cartel' includes an association of producers, sellers, distributors, traders or service providers who, by agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of or trade in goods or provision of services.

The term 'cartel' has an inclusive meaning. Thus, an association formed to control the production of coconuts is within the aforesaid definition of a cartel. Hence, the association of coconut producers in Tirunelveli in the given case will be considered as a cartel under the provisions of the Act.

#### Question 6

- (a) *Ideal Producer Co. Ltd. was incorporated on 1<sup>st</sup> April, 2009. Its paid up capital of ₹ 10 Lakh consists of 1 lakh equity shares of ₹ 10 each held by 100 individuals. There are 6*

directors on its Board. Referring to the provisions of the Companies Act, 1956, answer the following:

- (i) What is the quorum for the Annual General Meeting?
  - (ii) What is the quorum for the Board Meeting?
  - (iii) The Board of Directors wants to co-opt one expert in the field of agronomics, as Director on its Board. Whether is it permissible?
  - (iv) Is it obligatory for this company to have internal audit of its accounts for Financial Year 2015-16? (8 Marks)
- (b) (i) Mr. Gambler has been arrested for a cognizable and non-bailable offence punishable for a term of imprisonment for more than three years under the Prevention of Money Laundering Act, 2002. He seeks your advise as to how can he be released on bail. Advise him. (4 Marks)
- (ii) What is the object of Constituting Panel for Mediation and Conciliation under the Companies Act, 2013? Who can file application for mediation and conciliation? (4 Marks)

#### Answer

- (a) (i) As per section 581 Y of the Companies Act, 1956, unless the Articles requires a larger number, one fourth of the total number of members of the producer company shall be the quorum at a general meeting. In this case, the company has got 100 members and hence, the quorum is 25.
- (ii) Section 581 V of the Companies Act, 1956, provides that the quorum for a meeting of the Board shall be one third of the total strength of directors, subject to a minimum of three.
- In the given case,  $\frac{1}{3}$  of 6 directors comes to 2, but minimum required is 3, hence, the quorum will be 3 directors for a board meeting.
- (iii) Section 581 P of the Companies Act, 1956, empowers the Board of Directors of a producer company to co-opt one or more experts as director, but not exceeding one fifth of the total number of directors. As there are 6 directors in the given case, hence, co-opting one expert on the Board will be in order.
- (iv) Yes, as per section 581 ZF of the Companies Act, 1956, every producer company is required to have internal audit of its accounts carried out by a Chartered Accountant at such intervals and in such manner as may be specified in the Articles.
- (b) (i) In accordance with the provisions of the Money Laundering Act, 2002, as contained under Section 45, the offences under the Act shall be cognizable and non-bailable. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence punishable for a term of imprisonment of more than 3

years under Part A of the Schedule shall be released on bail or on his own bond unless:

The public Prosecutor has been given an opportunity to oppose the application for such release and

Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

In case of any person who is under the age of 16 years or in case of a woman or in case of a sick or infirm person, the Special Court can direct the release of such person on bail.

Mr. Gambler may refer the above section 45 so that he can be released on bail.

- (ii) Under section 442 of the Companies Act, 2013, it is provided that the Central Government shall maintain a panel of experts for mediation between the parties during pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under the Act. In common parlance, mediation means intervention of some third party in a dispute with the intention to resolve the dispute. Similarly, conciliation means the powers of adjusting or settling disputes in a friendly manner through extra judicial means. The object behind the panel is to dispose the matter pending before the Government / Tribunal as mentioned above.

Filing of application: Application for mediation and conciliation can be made by:

- (A) any parties to the proceedings (It shall be accompanied with such fees and in such form as may be prescribed)
- (B) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, suo moto refer any matter pertaining to such proceeding to such number of experts as it may deem fit.

### Question 7

Attempt any **four**:

- (a) *India Exports Limited engaged in the export of software products to U.S. One party in U.S. to whom the company exported certain products failed to pay the amount due for these exports resulting into non repatriation of amount to India. The Adjudicating Authority on coming to know about this, levied a penalty on India Exports Limited under the provisions of the Foreign Exchange Management Act, 1999. The company seeks your advice as to which authority, to whom it can make an appeal against the decision of Adjudicating Authority. State also, the time limit within which the appeal can be lodged.*

(4 Marks)

- (b) *What do you understand by 'public interest'? Explain, giving suitable examples, about its relevance under the Companies Act, 1956.*

(4 Marks)

- (c) Under Section 31 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, certain situations have been specified in which the provisions of this Act are not applicable. You are required to mention any four of such situations. (4 Marks)
- (d) Explain the usefulness of following terms in interpreting / construing a statute:
- (i) Preamble
  - (ii) Use of Foreign Decisions (4 Marks)
- (e) Bharat Insurance Company issued a policy having sum assured of ₹ 5 lakhs on the life of Ms. Nirmala. While obtaining education loan of ₹ 4 lakh for higher studies, Ms. Nirmala assigned the above insurance policy in favour of the Bank providing the loan. Who, in this case, will be called the 'policy holder' under the Insurance Act, 1938 and why? Explain. (4 Marks)

#### Answer

- (a) In accordance with the provisions of the Foreign Exchange Management Act, 1999, as contained under Sections 17 and 19 appeals against orders of Adjudicating Authority can be made by India Exports Ltd., If the Adjudicating Authority is Assistant Director of the Enforcement or Deputy Director of Enforcement, appeal will lie to Special Director (Appeals). Further appeal shall lie with Appellate Tribunal for Foreign Exchange against the order of Adjudicating Authority and the Special Director (Appeals). However, if the Adjudicating Authority is senior to the Assistant Director of Enforcement or Deputy Director of Enforcement, then the appeal shall lie directly to the Appellate Tribunal.

#### APPEAL TO SPECIAL DIRECTOR (APPEALS)

Appeal against order of Assistant Director of Enforcement or Deputy Director of Enforcement can be filed with Special Director (Appeals) under section 17 within 45 days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. The Special Director (Appeals) can condone the delay in filing the appeal if he is satisfied that there was sufficient cause for not filing the appeal within the stipulated time. Special Director (Appeals) will hear the parties and then pass the order. Copy of the order shall be sent to the concerned parties and the Adjudicating Authority.

#### APPEAL TO APPELLATE TRIBUNAL:

Appeal against the order of Adjudicating Authority being senior to Assistant Director of Enforcement or Deputy Director of Enforcement or against the order of Special Director (Appeals) can be made to the Appellate Tribunal for Foreign Exchange, 1999 within 45 days from the date on which the copy of the order was made by such Adjudicating Authority or Special Director (Appeals) is received by the aggrieved person. In this case also, the delay can be condoned by the Appellate Tribunal. In case of an appeal against the order imposing penalty, the applicant has to deposit the amount of such penalty with

the authority prescribed by the Central Government. However, the Appellate Tribunal may waive such deposit to mitigate the likely hardship that may be caused to the appellant. After hearing of the appeal, the Appellate Tribunal shall pass the order.

Tribunal is the final fact finding authority and no appeal lies against the facts determined by the Tribunal.

Therefore, India Exports Ltd., can go for appeals as stated above.

- (b) The expression 'public interest' implies general welfare of the society. Whatever furthers the general interest of the community is to be considered as 'public interest'. It pervades interest of the general public in matters where regard for the social good is of prime importance. A thing is said to be in public interest where it is or can be made to appear to be contributive to the general welfare, rather than to the special privileges of a class, group or individual. A company is treated as a legal person, hence, public interest has been taken care of in the company law.

The following provisions of the Companies Act, 1956 convey the relevance of the concept of public interest in the context of company law –

- (i) Section 396 empowers the Central Government to provide for compulsory amalgamation of companies into a single company in the public interest.
  - (ii) Section 250 (3) and (4) impose restrictions on share transfer where as a result thereof a change in the composition of the Board of Directors is likely to take place.
  - (iii) Under section 397 and 398, shareholders can file application to Company Law Board (NCLT) where affairs of the company are conducted in a manner prejudicial to public interest.
  - (iv) Under Section 408, the Central Government is empowered to appoint directors to safeguard public interest.
  - (v) Under Section 394, the Court is empowered to refuse its sanction to any compromise or arrangement, considering public interest.
- (c) Under Section 31 of the SARFAESI Act, 2002, the situations in which the provisions of this Act do not apply are as follows:
- (i) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 or any other law for the time being in force ;
  - (ii) a pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872;
  - (iii) Creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934;
  - (iv) Creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958;

- (v) any conditional sale, hire-purchase or lease or any other contract in which no security interest has been created;
- (vi) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930
- (vii) any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act or sale under the first proviso to sub section (1) section 60 of the Code of Civil Procedure, 1908;
- (viii) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;
- (ix) any security interest created in agricultural land;
- (x) any case in which the amount due is less than twenty percent of the principal amount and interest thereon.

- (d) (i) **Preamble:** The preamble expresses the scope, object and purpose of the Act more comprehensively than the Long Title. The preamble may recite the ground and the cause of making a statute and the evil which is sought to be remedied by it.

Like the Long Title, the preamble of a Statute is a part of the enactment and can legitimately be used for construing it. However, the preamble does not over-ride the plain provision of the Act but if the wording of the statute gives rise to doubts as to its proper construction, e.g. where the words or phrase has more than one meaning and a doubt arises as to which of the two meanings is intended in the Act, the preamble can and ought to be referred to in order to arrive at the proper construction.

In short, the preamble to an Act discloses the primary intention of the legislature but can only be brought in as an aid to construction if the language of the statute is not clear. However, it cannot override the provisions of the enactment.

- (ii) **Use of Foreign Decisions:** Foreign decisions of countries following the same system of jurisprudence as ours and given on laws similar to ours can be legitimately used for construing our own Acts. However, prime importance is always to be given to the language of the Indian statute. Further, where guidance can be obtained from Indian decisions, reference to foreign decisions may become unnecessary.
- (e) As per section 2(2) of the Insurance Act, 1938, 'Policy holder' includes a person to whom the whole of the interest of policy holder in the policy is assigned once and for all, but does not include an assignee thereof whose interest in the policy is defeasible or is for the time being subject to any condition. As per the given facts, Ms. Nirmala assigned insurance policy in favour of Bank. As of consequence, Bank becomes assignee. According to the above given definition of policy holder, assignee is excluded from its preview. Thus, in the given case, Ms. Nirmala will be the Policy holder.