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COMPILER

ECONOMIC LAWS - 6D

Edition-3

(Applicable for November 2022 & Onwards)

ELECTIVE Paper 6D - ECONOMIC LAWS

PREFACE

Since paper 6D is the open book exam, students may sometimes find it difficult to carry many sources to exams (say MTP, Past Questions, Significant case laws, Case study Digest, Judgements etc.,) and Students also in need of One book where in all the Questions can be find at one place for practice and ready reference before examination.

Keeping the need of students in mind I have compiled all the case laws and made efforts to ready this book.

Features:

- **I used legible font all over in order to make the book interesting to read.**
- **This book covers**
  - All MTPs Case laws till May 2022
  - All Past Exam Questions with suggested answer up to December 2021
  - All Case Studies given in Students ICAI Journals till May 2022
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  - Practice Case Studies given in ICAI Portal
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- **I have highlighted Question and Answers**
- **I used Fresh Page to start each Case Study**

Disclaimer: *I have taken care that there is no mistakes to arise in framing this book. However human error may exist.*

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ELECTIVE Paper 6D - ECONOMIC LAWS

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CASE STUDY 1

Mr. Swaran Sing Atwal is a dynamic agriculturist and an entrepreneur. Atwal family is a major shareholder, owning more than 3/4th stake, in Atwal Agro Products Limited (AAPL), which is one of the largest growers of Narma Kapas (Raw Cotton) in the country. AAPL has farms in the state of Gujarat, Rajasthan, Haryana, and Punjab respectively (i.e. in 4 out of the 8 top cotton manufacturing States in India).

Mr. Atwal also owns a couple of cotton mills, in name of Atwal Fabrics and Fashions Limited (AFFL). AFFL consume half of Kapas grown in the farms owned by AAPL and produces spindles of threads of a wide variety and high quality. More than 145,000 spindles of different sizes and weights are manufactured each month in these cotton mills. A part of these spindles are sold in the open market and the rest of them are sent to AFFL for production of fabric. The rest of the Kapas is sold in the designated open market (Mandi). For marketing of Kapas, Mr. Atwal in an individual capacity as a farmer and in a representative capacity of AAPL is a member of Kapas Kisan Union which in no way tries to limit, control, or attempt to control the production, distribution, sale, or price of goods in trade. But the union has charter in memorandum form, signed by all the members, for understanding amongst the members on common minimum aspects.

AFFL is equipped with the latest plant and machinery, apart from access to updated techniques supported by Standard Operating Procedure (SOP) and hence it is capable of producing quality fabric and garments. The fabric produced by AFFL is in high demand, not only in India, but in prominent European Countries of Germany, France, Italy, United Kingdom and Belgium and in United States and Canada. Apart from brands of fabric used in modern wear, AFFL also has an internationally recognized brand 'SS' which deals in producing fabric for Dastar (the holy Sikhs' turban), Hijab, Safa, and Pagri. This brand remains in high demand, all across the globe by customers of these wears in particular.

Atwal Internationals and Fabric Export Limited (AIFEL), a company registered in India is a subsidiary of AFFL which is responsible for booking orders, exporting materials, and ensuring the realization of proceedings from foreign orders. AIFEL has branches/liaison offices in different continents and regions. Each branch office, funds its expenditure itself, by way of managing retail outlet owned by it at its respective location and depends on AIFEL for the shortfall (if any). AIFEL's branch office in Toronto (Canada) on account of lockdown failed to make revenue as expected, hence seek foreign currency equivalent to ₹ 4.60 crores from AIFEL to meet recurring expenditures. Management at AIFEL is not confirmed whether the Exchange Earners' Foreign Currency Account (EEFC) can be used to make such remittance or not, if yes then to what extent. But finally, AIFEL used Exchange Earners' Foreign Currency Account to remit the amount in foreign currency equivalent to ₹ 4.25 crores, taking into consideration its turnover during the previous two financial years to be ₹ 39 crores and ₹ 46 crores respectively.

AFFL sales the fabrics either through its own retail outlets or through a network of distributors and retailers, who trade in other products too and are free to choose from a wide range of fabrics and garments offered by AFFL depending upon the demography of their geographical area of operations, but a common list price is maintained by AFFL for each of the countries to ensure uniformity in prices in all parts of such country. AFFL has entered into an agreement with distributors and retailers for sale of its products in the aforementioned manner. Retailers are expected not to violate the list price. AFFL realizes the fact that many of the domestic players in the hijab segment in India are price sensitive. The cost of producing a regular edition of jersey hijab is ₹ 150 and the cost of producing a premium range of amira hijab is around ₹ 500. AFFL in the past couple of years acquired the control of many such small manufacturers and sellers by purchasing their businesses, making their (AFFL) market share the largest in such segment. The prevailing price of the regular edition of jersey hijab in the Indian market runs from ₹ 300 - ₹ 500, whereas a premium range of amira hijab is available in the price range of ₹ 800 - ₹ 1000. Further, to enhance the market share in the hijab segment, AFFL decided to reduce their prices from ₹ 449 to ₹ 249 in the case of jersey hijab and from ₹ 899 to ₹ 449 in the case of amira hijab, in order to rule out the competitors who are unwilling to sell their businesses. Corresponding to the change in price by AFFL, the competitors also reduced their prices.

As per the audited financial statements of AFFL of the previous financial year, the turnover net of taxes was ₹ 5640 crores whereas the book value of assets after charging depreciation as on the reporting date was ₹ 1640 crores (including intangible assets of ₹ 90 crores). The fair market value of assets of AFFL as calculated by independent valuer is ₹ 2420 crores. AFFL believes in growth by inorganic means.

AFFL recently packed a deal of acquisition with a high growth domestic company 'Style Fabrics Limited' (SFL), which is, in its initial year of operations but has gained reasonable market share in the Indian fabric market. SFL has a turnover (Net of taxes) of ₹ 950 crores and a book value of its assets stood at ₹ 340 crores (against the fair market value of ₹ 650 crores) as on the reporting date as per the last audited

financial statements. The deal is expected to be executed in the upcoming quarter. As per the deal, AFFL will acquire control over SFL, by acquiring its shares through the stock exchange in the ratio of the prevailing market price of a share weighted by its price earning multiple.

Further, AFFL is considering the purchase of used plant and machinery but of the latest technology from Tri-Spun Ltd. which is undergoing the Corporate Insolvency Resolution Process (CIRP) in accordance to provisions of the Insolvency and Bankruptcy Code, 2016 (IBC). AFFL is waiting for the resolution plan to be unveiled, through which they can understand which plant and machinery they can buy. But in the mean-time Deputy Director as authorized from the office of Enforcement Directorate (ED) conducted a 'Search and Seizure' proceedings at the premises of the promoters of Tri-Spun Ltd. and issued a provisional attachment order of 180 days under the relevant provisions of the Prevention of Money Laundering Act, 2002, attaching properties of Tri-Spun Ltd., on the basis of findings during the search and seizure proceedings. In this order, immovable as well as movable properties including plant and machinery were provisionally attached. The Insolvency Professional, CA. Anup Mittal, who is appointed as a Resolution Professional for CIRP, of Tri-Spun limited, opposed the order of provisional attachment of assets by ED on the grounds of declaration of moratorium by the Adjudicating Authority on the assets of Tri-Spun Ltd. as per the provisions of the IBC, 2016, and made an appeal seeking the release of assets.

The Adjudicating Authority in another case pending against the promoters of Tri-Spun Ltd. passed an order in writing, confirming the attachment of their personal properties, which were believed to be involved in money laundering during the investigation as going on for a period of 180 days now. Such investigation is stayed by the court as an interim relief in an appeal by such promoters.

MULTIPLE CHOICE QUESTIONS

1. What shall be the legal validity of the order of attachment of private properties of promoters of Tri-Spun Ltd. involved in money laundering by the adjudicating authority?
   (a) Valid, because Adjudicating Authority by an order in writing can confirm the attachment of the property, which shall continue till the investigation completes.
   (b) Valid, because Adjudicating Authority by an order in writing can confirm the attachment of the property, which shall continue during the investigation for a period not exceeding three hundred and sixty-five days or the pendency of the proceedings relating to any offence under this Act before the court.
   (c) Valid, because Adjudicating Authority by an order in writing can confirm the attachment of the property, which shall continue during the investigation for a period not exceeding one hundred and eighty days or the pendency of the proceedings relating to any offence under this Act before the court.
   (d) Invalid, because Adjudicating Authority by an order in writing, can confirm the attachment of the property, which shall continue during the investigation for a period not exceeding ninety days.

2. With respect to remittance by AIFEL to meet recurring expenses of the branch office in Toronto (Canada) identify the correct statement:-
   (a) Remittance is not allowed for meeting recurring expenses of a foreign branch
   (b) AIFEL can remit an amount equal to 10% of the average profits of the previous two financial years
   (c) AIFEL can remit 15% of the average annual sales/ income or turnover of the Indian entity during the last two financial years or up to 25% of the net worth, whichever is higher
   (d) AIFEL can remit any amount out of the funds maintained in Exchange Earners' Foreign Currency Account.

3. What type of anti-competitive agreement has been entered into by AFFL with the network of distributors and retailers?
   (a) Tie-in agreement
   (b) Exclusive supply agreement
   (c) Resale price maintenance
   (d) Exclusive distribution agreement

4. Whether the acquisition of control in SFL by AFFL can be termed as a "combination" as per the provisions of the Competition Act, 2002 assuming the acquisition took place on 10.01.2021?
   (a) No, as the gross turnover of the company being acquired was below the threshold.
   (b) Yes, because the gross turnover was ₹ 6590 crores
   (c) No, because the book value of gross assets was ₹ 1980 crores as on the reporting date
   (d) Yes, because the fair market value of gross assets was ₹ 3070 crores

5. What shall be the legal validity of the provisional attachment of the movable assets of Tri-spun Ltd. assuming Tri-spun Ltd. is not going under any insolvency process?
   (a) Provisional attachment is legally valid
   (b) Invalid, because only enforcement director himself can pass the order of attachment of the property
   (c) Invalid, because only immovable property can be attached
   (d) Invalid, because provisional attachment of a property can only be for a maximum period of 90 days

DESCRIPTIVE QUESTIONS

6. Whether the appeal moved by CA. Anup Mittal, the appointed Resolution Professional of Tri-Spun Limited is tenable? Whether the assets so provisionally attached shall be released or not and provisions of which Act/ Code will prevail? Provide your answer on the basis of the relevant case law as applicable to the facts of the case.
7. Whether the charter (in memorandum form) of Kapas Kisan Union which is signed by all the members thereof can be considered as an anti-competitive agreement?
8. Can AIFEL operate Exchange Earners' Foreign Currency Account? What facility does Exchange Earners' Foreign Currency Account provide primarily and with whom the same can be opened and maintained?
9. Whether AFFL holds a dominant position in the hijab segment of the garment market? Whether the act of changing the price can be considered an abuse of the dominant position? Whether the price charged by AFFL falls within the scope of "predatory price"?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (b) Valid, because Adjudicating Authority by an order in writing can confirm the attachment of the property, which shall continue during the investigation for a period not exceeding three hundred and sixty-five days or the pendency of the proceedings relating to any offence under this Act before the court.

   Reason:
   Section 8(3) of the Prevention of Money Laundering Act, 2002 provides as under:

   Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under subsection (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall-
   (a) continue during investigation for a **period not exceeding three hundred and sixty-five days** or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and
   (b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Special Court;

   Explanation.-For the purposes of computing the period of three hundred and sixty-five days under clause (a), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.

2. (d) AIFEL can remit any amount out of the funds maintained in Exchange Earners' Foreign Currency Account.

   Reason:
   Permissible debits in the EEFC A/c:
   (i) Payment outside India towards a permissible current account transaction [in accordance with the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000] and permissible capital account transaction [in accordance with the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000].

   (ii) Payment in foreign exchange towards cost of goods purchased from a 100 percent Export Oriented Unit or a Unit in (a) Export Processing Zone or (b) Software Technology Park or (c) Electronic Hardware Technology Park

   (iii) Payment of customs duty in accordance with the provisions of the Foreign Trade Policy of the Central Government for the time being in force.

(iv) Trade related loans/advances, extended by an exporter holding such account to his importer customer outside India, subject to compliance with the Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2000.

(v) Payment in foreign exchange to a person resident in India for supply of goods/services including payments for airfare and hotel expenditure

There is no restriction on withdrawal in rupees of funds held in an EEFC account. However, the amount withdrawn in rupees shall not be eligible for conversion into foreign currency and for recredit to the account. [Reference: RBI Circular No. RBI/2006-07/192 A.P. (DIR Series) Circular No.15 dated 30.11.2006]

3. (c) Resale price maintenance

Reason:
As per explanation (e) to sub-section 4 to section 3 of the Competition Act 2002, resale price maintenance includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. In the given case the list is maintained stating the price to be charged (wherein retailers are not specifically allowed to sell at the price lower than list prices) by retailers to ensure uniform price throughout the particular nation hence resale price maintenance is practiced.

4. (a) No, as the gross turnover of the company being acquired was below the threshold.

Reason:
As per S.O. 674 (E) dated 4th March 2016, in the exercise of the powers conferred by clause (a) of Section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in the public interest, hereby **exempts** an enterprise, whose control, shares, voting rights or assets are being acquired has either **asset(s)** of the value of not more than rupees three hundred and fifty crores in India **or turnover** of not more than rupees one thousand crores in India from the provisions of section 5 of the said Act for a period of **five years** from the date of publication of the notification in the official gazette.

The exemption (**De Minimis Exemption**) period of five years ends on **3rd March 2021**. The answer will change if the acquisition takes place thereafter.

5. (a) Provisional attachment is legally valid.

Reason:
With respect to provisions contained in sub-section 1 of section 5 of The Prevention of Money Laundering Act 2002, the provisional attachment of the movable assets of Tri-spun Ltd is legally valid, assuming Tri-spun Ltd. is not going under any insolvency process.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:
The facts in the given case are similar to what was decided in the case of M/s. PMT Machines Ltd. vs The Deputy Director, Directorate of Enforcement, Delhi (FPA-PMLA-2792/DLI/2019) by Appellate Tribunal (New Delhi) on 16th September 2019. The Appellate Tribunal observed that the mortgaged properties were acquired much prior to the date of alleged offence. The date of charge of properties are also much prior to the date of alleged offence committed. Counsel appearing on banks and financial institution has informed that on the basis of their complaint an action was taken against the borrowers.

The Appellate Authority of the Prevention of Money Laundering Act, 2002 has upheld the prevalence of the IBC over the provisions of PMLA after critically considering section 5 of the Prevention of Money Laundering Act, 2002 and distinguishing the objectives of the PMLA and IBC.

The Tribunal observed that the objective behind legislating the PMLA was to deprive the offender (of money-laundering), the enjoyment of "illegally acquired" fruits of crime by taking away his right over property acquired through such means, and to obviate the threat of money laundering to the financial system of the country. The IBC on the other hand, has been enacted with the objective of consolidating and amending the laws "relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stake holders including alteration in the order of priority of payment of government dues."

Section 5 of PMLA demonstrates that the objective of the attachment is to prevent the likelihood of

concealment, transfer or dealing with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime.

The Tribunal held that this order is being passed in relation to mortgage properties in favour of banks which are not purchased from proceeds of crime. The same were purchased and mortgage with the banks prior to the of crime period. ED is not precluded to attach other private properties and all other assets of the alleged accused.

The Tribunal quashed the provisional attachment order by allowing the appeal.

Hence, in the given case, the appeal moved by CA Anup Mittal, the appointed Resolution Professional of Tri-Spun Limited is tenable on the basis of the judgement given in the case as aforementioned and the assets so provisionally attached shall be released and provisions of IBC will prevail in this specific case due to wide and greater good objective.

Answer 7:
As per sub-section 1 to section 3 of the Competition Act 2002, no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

Further sub-section 3 to section 3 explains any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which;

a. directly or indirectly determines purchase or sale prices;
b. limits or controls production, supply, markets, technical development, investment or provision of services;
c. shares the market or source of production or provision of services by way of allocation of the geographical area of the market, or type of goods or services, or number of customers in the market or any other similar way;
d. directly or indirectly results in bid-rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition.

In the case study itself it is mentioned that "For marketing of Kapas, Mr. Atwal in an individual capacity as a farmer and in a representative capacity of AAPL is a member of Kapas Kisan Union which in no way tries to limit, control, or attempt to control the production, distribution, sale, or price of goods in trade. But the union has charter in memorandum form, signed by all the members, for understanding amongst the members on common minimum aspects".

Hence, the memorandum charter of Kapas Kisan Union can't be considered as an anti-competitive agreement.

Further, the definition of 'cartel' as given in section 2(c) describes the meaning of "cartel", which includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services. Since the Kapas Kisan Union is not in any way doing the activities narrated in section 2(c), it will not be considered as a 'cartel'.

Answer 8:
Who can open EEFC A/c: All categories of foreign exchange earners, such as individuals, companies etc., including exporters; who are residents in India, may open Exchange Earners' Foreign Currency Account; Hence AIFEL can also open and operate Exchange Earners' Foreign Currency Account.

Exchange Earners' Foreign Currency Account is an account maintained in foreign currency with an Authorised Dealer Category - I bank i.e. a bank authorized to deal in foreign exchange.

EEFC A/c is a facility provided to the foreign exchange-earners, including exporters, to credit 100% of their foreign exchange earnings to the account, so that the account holders do not have to convert foreign exchange in to Rupees and vice versa, thereby minimizing the transaction costs.

Answer 9:
Dominant position or not
As per explanation (a) to section 4 "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in

its favour.

AFFL holds the largest market share in the relevant market and competitors are bound to respond to the action of AFFL by changing their prices. Hence, **AFFL holds a dominant position.**

It is to noted here that only **abuse of dominant position is prohibited** in terms of section 4(1) of the Competition Act, 2002, however, enjoying of the dominant position is not prohibited. What is called abuse of dominant position, is mentioned in section 4(2) of the Competition Act, 2002.

Abuse of dominant position or not

As per clause (a) to sub-section 2 of section 4, there shall be an abuse of dominant position if an enterprise or a group directly or indirectly imposes unfair or discriminatory condition in purchase or sale of goods or service; or price in purchase or sale (including predatory price) of goods or service.

Undoubtedly, AFFL's decision to change the market price impacted the competitors' profitability; but this is neither discriminatory pricing nor the customers have been affected (on a contrary to this they are benefited from low prices). Hence, it can be said that **there is no abuse of dominant position** by AFFL.

"Predatory price"

As per explanation (b) to section 4 "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reducing the competition or eliminate the competitors.

Despite the new price charged is less than the prevailing market prices, even lower than the prices earlier charged by AFFL; still, the new price charged cannot be considered as predatory price because it is not below the cost price.

CASE STUDY 2

Mr. Ajit Pal Saini (APS), a former national player of hockey, has been a part of the Indian national team for four world cups and many other championships and tournaments. He led the squad for a decade and made the nation proud with the world cup title. APS is popular amongst the lovers of sports for his style of play as an offensive striker at the center-forward position. After announcing retirement from hockey at the professional level, APS came back to tri-city (Chandigarh, Panchkula, and SAS Nagar (Mohali) to settle down where APS booked a penthouse in a project of Imperial Residency Ltd. facing Sukhna Lake. In the meantime, he took a house on lease from Mr. Satinder Pal.

Although the list price of the apartment was ?1.15 crores, however, Imperial Residency Ltd., has a policy to honor defense staff and national/international sports professionals, by offering them a price equal to the cost; hence discount was promised to APS. As per the data furnished to the relevant authorities, the cost of an apartment is expected to be ?95 lakhs. Although a local friend of APS cautioned him about the bad reputation of Imperial Residency Ltd. for bad delivery or delayed possession. But the family of APS liked the location and sample apartment shown to them and APS also liked the location and was convinced with the price offered to him; hence, he booked the flat by making a down payment of ?10 lakhs as application cum advance money on 31st August 2018, as per the terms settled with Imperial Residency Ltd. and its Standard Operating Procedures (SOPs). Receipt of such down payment of ?10 lakhs was duly provided to APS.

On 4th September 2018, a written agreement to sell was entered between APS and Imperial Residency Ltd., containing the expected date of completion of construction (first week of August 2019) and possession date (1st September 2019) respectively, apart from the time-line for payments of balance cost. The legal obligations and rights of both parties are also mentioned therein.

Imperial Residency Ltd. started the construction in full swing, but after a few weeks the pace of construction work declined sharply and the timelines of the construction plan were missed out. The expected date of possession extended to 1st November 2019 but was not fulfilled. In the month of January 2020, an association of allottees (of flats and apartments in the project of Imperial Residency Ltd.) was formed to which APS also joined as a member. Association wrote many a times complaints to the management of Imperial Residency Ltd., but neither they nor their complaints were responded to.

In March 2020, a complaint was filed with the respective State's RERA Authority by the Association invoking the rights given under section 18 read with section 19 (4) of the Real Estate (Regulation and Development) Act, 2016 (RERA), seeking a refund of the amount paid, along with simple interest at the rate of 18% p.a. till the date of refund and compensation for mental agony because of failure of Imperial Residency Ltd. to give possession of the apartments and flats, in accordance with the terms of agreement for sale. The Authority as per section 37 of the aforementioned Act, directed the Imperial Residency Ltd. to execute the registered agreement for sale in favour of the members of such Association. After such direction (decision) was given by the Authority, APS, being interested in getting the refund of money along with the interest and compensation filed a complaint in an individual capacity to the respective State RERA Authority.

In the month of May 2019, to enjoy summer vacation and to view live matches of ice-hockey at IIHF World Championship, APS along with his family visited Slovakia from 10th May to 26th May. After returning back to India, APS got engaged in coaching the club activities, which he developed in a form of an academy during the winters of 2018.

APS's grandfather migrated to Jalandhar from Sialkot after the great partition during the times of independence. At Sialkot, his grandfather had a shop of sports material that was famous for its hockey sticks. The family started the same business at Jalandhar. As the sports of hockey, football and cricket became popular, the business grew multifold. The father of APS, who studied law as a profession during his college times, brought corporate touch to the business by incorporating a company named 'ALFA Sports Limited (ASL)' which was engaged in the manufacturing of wide products of various sports.

But due to stiff competition from international manufacturers and lack of infrastructure to sports goods manufacturers in the state, ASL became unprofitable and faced a cash crunch. ASL was unable to serve its debt due to which one of its financial creditor moved to NCLT with an application for initiation of Corporate Insolvency Resolution Process (CIRP) and suggested the name of CA G. S. Sikka (A qualified insolvency professional), to be appointed as an interim resolution professional on the first day of March 2020. On 12th March 2020, the Adjudicating Authority after ascertaining the existence of default accepted the application as well as appointed CA G. S. Sikka as the Interim Resolution Professional on the same day. The first

meeting of the Committee of Creditors (CoC) was held on 28th March 2020 where a simple majority of financial creditors (with infraction margins), approved the appointment of CA Naveen Sood as Resolution Professional, who is also a qualified insolvency professional.

On 31st August 2019, while placing the payment receipt of the deposit (which he paid to Imperial Residency Ltd.) in the cash locker he identified some of the foreign currency notes lying there in excess of USD 2,000, which remained unspent during his trip to Slovakia in May 2019. He immediately collected all the foreign currency notes and got it surrendered on 3rd September 2019.

On 4th September 2020, the Deputy Director along with the team from the office of Enforcement Directorate with an authority letter in this regard, reached the present resident of APS to arrest Mr. Satinder Pal (Landlord of APS). APS informed the Officials of ED that Mr. Satinder Pal had shifted to Australia and the house is given to them on rent. Office of Enforcement Directorate passed the order of attachment of said residential house, despite the fact that Enforcement Directorate was not having any sound evidence indicating the direct application of proceeds of crime involved in the procurement of said house. But they were under the belief that such a house has been acquired (by Mr. Satinder Pal) as a result of criminal activity relatable to the scheduled offence under the Prevention of Money-Laundering Act, 2002 in which Mr. Satinder Pal was involved. They formed this belief based upon the information available to them, from one of the reporting entities under section 12 of the Prevention of Money-Laundering Act, 2002. The house was acquired 12 years ago by Mr. Satinder Pal.

Due to experience in the business of sports manufacturing and having a deep understanding of the relevant legal frameworks, the father of APS was appointed as a director of Impax Sports Limited (ISL) which deals in the manufacturing and trading of sports goods through its retail chains across the Nation. For the purpose of diversification, ISL is considering the acquisition of Life-Care Wellness Limited (LCWL), a chain of fitness clubs and gyms. None of the business functions are common between the two companies, because one is a manufacturing entity whereas the other is a service provider. Both the companies are Indian companies with operations, in India only. The proposed entity after acquisition meets the criteria of 'combination' as specified under section 5 of the Competition Act 2002. Management of ISL is of view that notice to competition commission regarding information of combination is not mandatorily required in all the cases.

MULTIPLE CHOICE QUESTIONS

1. What shall be the legal validity of the appointment of CA Naveen Sood as the resolution professional of ASL at the first meeting of the committee of creditors?
   (a) Valid, because resolution confirming such appointment requires a simple majority
   (b) Invalid, because resolution confirming such appointment requires a special majority; of not less than 66% of voting share of financial creditors
   (c) Invalid, because resolution confirming such appointment requires a special majority; of not less than 75% of voting share of financial creditors
   (d) Invalid, because resolution confirming such appointment requires a special majority; of not less than 75% of total number of financial creditors

2. Do you agree with the views of the management of ISL with regards to the requirement of giving notice to the commission, disclosing the details of the proposed combination?
   (a) Yes, because giving notice is optional at the will of concerned persons and the enterprises involved therein
   (b) Partially Yes, because giving notice is mandatory, but in the case of ISL it is exempted; because both the enterprise are Indian companies
   (c) No, because giving notice is mandatory within a reasonable time
   (d) No, because giving notice is mandatory within 30 days of the date of execution of agreement for acquisition

3. Whether the appointment of CA. G S Sikka as the interim resolution professional of ASL is valid & if so, then what shall be the maximum possible date till which he can assume the office as an interim resolution professional?
   (a) Invalid, because no action under IBC can be initiated against ASL
   (b) Valid, till the date of appointment of resolution professional
   (c) Valid, till 30th March 2020
   (d) Valid, till 10th April 2020

4. What shall be the legal validity of surrendering the foreign currency by APS on 3rd September 2019?
   (a) Legally valid as he has surrendered the unused/unspent foreign exchange within a period of 180 days from the date of his return to India

(b) Legally valid, as he has surrendered the unused/unspent foreign exchange within a period of 120 days from the date of his return to India
(c) Legally invalid, as he has to surrender the unused/unspent foreign exchange within a period of 90 days from the date of his return to India
(d) Legally invalid, as he has to surrender the unused/unspent foreign exchange within a period of 60 days from the date of his return to India

5. Whether the receipt of application cum advance money by Imperial Residency Ltd. is valid in reference to the relevant provisions of RERA?
(a) Legally valid, because a written agreement to sell is entered and duly registered.
(b) Legally invalid, because the written agreement to sell is entered and registered after the date of receipt of advance money.
(c) Legally invalid, because the money so received is more than ten percent of the cost of the apartment
(d) Legally invalid, because the written agreement to sell is entered and registered after the date of receipt of advance money and also such amount is more than ten percent of the cost of the apartment

DESCRIPTIVE QUESTIONS

6. (a) Whether the Association is allowed to file a complaint on behalf of allottees (of flats and apartment in the project of Imperial Residency Ltd.) for invocation of rights vested with allottees u/s 18 read with 19(4)?

(b) Whether the complaint filed by APS with the relevant state RERA authority in individual capacity as well is tenable? Synthesis with the relevant case law as applicable.

7. (i) Whether the present residential house (owned by Mr. Satinder Pal) will be considered as proceeds of crime?

(ii) Whether the present use of the house in form of letting out to APS or keeping its possession by Mr. Satinder Pal acquired 12 years back, amounts to money laundering?

8. Whether the notice containing details of the combination can be given to the commission under the green channel by ISL?

ANSWER TO MULTIPLE CHOICE QUESTION

1. (b) Invalid, because resolution confirming such appointment requires a special majority; of not less than 66% of voting share of financial creditors.

Reason
Vide Act of 26 of 2018, with effect from 6th June 2018, 75% substituted by 66%. Hence, section 22(2) of the Insolvency and Bankruptcy Code, 2016 provides that the Committee of Creditors, may, in the first meeting, by a majority vote of **not less than sixty-six percent of the voting share** of the financial creditors, either resolve to appoint to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

2. (d) No, because giving notice is mandatory within 30 days of the date of an execution of agreement for acquisition.

Reason
Section 6(2) of the Competition Act, 2002 provides that subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, **within thirty days of-**

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the BOD of the enterprises concerned with such merger or amalgamation, as the case may be;
(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

3. (b) Valid, till the date of appointment of resolution professional

Reason
As per sub-section 1 to Section 16 of IBC 2016, the adjudicating authority **shall appoint** an interim resolution professional **on the insolvency commencement date** i.e. 12th March 2020 in the given case, hence a valid appointment. (Substituted vide act of 1 of 2020, with effect from 28th Dec 2019)

Further, as per sub-section 5, the term of the interim resolution professional shall **continue till the date of appointment of the resolution professional under section 22.** (Substituted vide act of 26 of 2018, with effect from 6th June 2018).

4. (a) Legally valid as he has surrendered the unused/unspent foreign exchange within a period of 180 days from the date of his return to India.

Reason
Regulation 7 of the Foreign Exchange Management (**Realisation, Repatriation, and Surrender of Foreign Exchange**) Regulations, 2015, provides that a person being an individual resident in India shall surrender the received/realised/unspent/unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/ purchase/acquisition or date of his return to India, as the case may be. In the instance the foreign currency has been surrendered before the expiry of 180 days.

5. (d) Legally invalid, because the written agreement to sell is entered and registered after the date of receipt of advance money and also such amount is more than ten percent of the cost of the apartment

Reason
Section 13 (1) of the RERA provide that a promoter **shall not accept a sum more than ten per cent. Of the cost of the apartment**, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

In this case, Mr. Ajit made a payment of INRs 10 lakhs, which is more than 9.5 lakhs (i.e. 10% of the cost, that is INRs 95 lakhs); on 31st august 2018, whereas written agreement was entered on 4th September and registered on 7th September 2018.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6(a)

The answer to this part of the question lies in the explanation to section 31(1) of the Real Estate (Regulation and Development) Act, 2016. It is better to refer to the relevant portion of sections 18(1) and 19(4) first.

Section 18(1) provides that if the promoter fails to complete or is unable to give possession of an apartment, plot or building-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottees wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

Section 19(4) of the RERA confirms the same, the allottee shall be entitled to claim the refund of the amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of the agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations mader thereunder.

Sec 31(1) of the RERA provides that any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder, against any promoter/allottees/real estate agent as the case may be.

Explanation to this sub-section 1: For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

Hence, the association on behalf of allottees (of flats and apartment in the project of Imperial Residency Ltd.) is allowed to file a complaint about the rights vested with allottees u/s 19(4).

Answer 6(b)

Section 31 of RERA allows a person to file a complaint. But here in the present case, the question of multiple litigations arises because APS filed a complaint against Imperial Residency Ltd. in an individual capacity, whereas he was part of the plaintiff group when the class action took place.

Case Law: Jatin Mavani Vs M/s Rare Township Pvt. Ltd. Maha RERA reg No. P51800000756, dated 14.12.2018

The facts of the given case are exactly identical to the facts of Complaint No. CC006000000055013 filed by Jatin Mavani (complainant) against Rare Township Private Limited (respondent), decided by Dr. Vijay Satbir Singh, Member, Real Estate Regulatory Authority Maharashtra (MahaRERA).

The relevant paragraphs of the order from the aforementioned case have been reproduced hereunder:

The complainant was seeking directions to the respondent to refund the amount paid by him to the respondent along with interest at the rate of 24% p.a. for the delayed possession in respect of a booking of a flat in the respondent's project known as 'Rising City-Atlanta Heights' at Ghatkopar bearing Registration No. P51800000756.

The respondent argued various grounds for disputed the claim of the complainant, one among such argument is that 'the complainant is one of the members in the association formed by the allottees of the said project had earlier filed complaint bearing No. CC006000000023888 before MahaRERA, wherein the Chairman of MahaRERA has already passed an order on 10th July 2018 and directed the respondent to execute the registered agreement for sale with the members of the complainant association viz Rising City Ghatkopar Association'. The respondent, therefore, requested for dismissal of this complaint.

The MahaRERA has examined the arguments advanced by both the parties as well as the record. In this regard, the MahaRERA has perused the order dated 10th July 2018 passed by the Chairman, MahaRERA in Complaint No. CC006000000023888 filed by one Rising City Ghatkopar Association. The record shows that the complainant was also one of the members of the said Association. The said fact has not been denied by the complainant.

Since the complainant is also a party to the said proceeding, he can't separately agitate this complaint before the MahaRERA, as it will amount to agitate multiple proceedings on the same issue, which is not permissible in RERA. In view of these facts, MahaRERA directs that the present complaint is not maintainable and therefore, the same is dismissed.

Conclusion on the basis of the above case:

Since multiple proceedings are not permissible in RERA and entertaining the complaint filed by the person in individual capacity will be considered as conduction of multiple proceedings because such complainant was also involved in joint capacity (as a member of the association) in a previous complaint made on the same party and same issue for which decision has already been given; Hence, the complaint filed by APS to the relevant state RERA authority, to register his agitation in individual capacity is not tenable.

Answer 7

(i) Through Finance (No. 2) Act 2019, w.e.f 1st August 2019, explanations are added to section 2(1)(u) and section 3 of the PML Act, which defines proceeds of crime and offence of money laundering respectively.

Explanation to Section 2(1)(u)

For removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.

Hence even if no direct nexus of application of proceeding of crime established & even property is acquired as a result of criminal activity relatable to the scheduled offence under the said act, still that property can be classified as proceed of crime.

In the given case authorities, based upon information supplied to them by reporting entity are of the firm belief that such a house is obtained (by Mr. Satinder Pal) as a result of criminal activity relatable to the scheduled offence under the said act in which Mr. Satinder Pal was involved, hence the residential house (owned by Mr. Satinder Pal) can be classified as proceed of crime.

(ii) Explanation added to section 3 is in two parts.

(i) First part says, a person shall be guilty of offence of money-laundering, if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:-

(a) Concealment; or
(b) Possession; or
(c) Acquisition; or
(d) Use; or
(e) Projecting as untainted property; or
(f) Claiming as the untainted property, in any manner whatsoever;

(ii) The second part says that, the process or activity connected with proceeds of crime is **a continuing**

activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

Hence, the fact becomes irrelevant that the house been purchased 12 years back, the offence of money laundering is of continuing nature till the time benefit is enjoyed out of proceeds of crime in any manner.

Answer 8:

Regulation 5A has been inserted to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 vide Gazette Notification dated 13th August, 2019, which contains provisions relating to notice for approval of combinations under the Green Channel. The new Regulation 5A reads as under:

(i) For the category of combination mentioned in **Schedule III**, the parties to such combination may, **at their option**, give notice in Form I pursuant to regulation 5 along **with the declaration specified in Schedule IV.**

(ii) Upon filing of a notice under sub-regulation (1) and acknowledgement thereof, the proposed combination shall be deemed to have been approved by the Commission under sub-section (1) of section 31 of the Act:

Provided that where the Commission finds that the combination does not fall under Schedule III and/or the declaration filed pursuant to sub-regulation (1) is incorrect, the notice given and the approval granted under this regulation shall be void ab initio and the Commission shall deal with the combination in accordance with the provisions contained in the Act:

Provided further that the Commission shall give to the parties to the combination an opportunity of being heard before arriving at a finding that the combination does not fall under Schedule III and/or the declaration filed pursuant to sub-regulation (1) is incorrect.";

Sub-regulation (1) to regulation 5A provides that the category of combination mentioned in Schedule III can file a notice under green channel.

But this sub-regulation also puts a requirement of furnishing declaration specified in Schedule IV.

Schedule III is as follows:

Considering all plausible alternative market definitions, the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control:-

Do not produce/provide similar or identical or substitutable product(s) or service(s);

Are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade-in the product(s) or provision of service(s) which are at different stage or level of the production chain; and

Are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade-in the product(s) or provision of service(s) which are complementary to each other.

In the given case the primary motive of acquisition is diversification and none of the business functions are common between the two companies, because one is a manufacturing entity, where other is a service provider and hence **it falls in the category of combination mentioned in Schedule III and hence it is eligible to give notice to the commission under the green channel subject to filing the declaration specified in schedule IV.**

The contents of Schedule IV is as under:

Declaration

1. The notifying party confirms that it has furnished all the information and documents as required in Form I, as specified in Schedule II.
2. The notifying party confirms that the proposed combination falls under Schedule III and is not likely to cause adverse effect on competition.
3. The notifying party confirms that it has not made any statement which is false in any material particular or knowing it to be false; or omitted to state any material particular knowing it to be material.
4. The notifying party understands that if any of the above statements is found to be incorrect, the notice given and the approval granted, under regulation 5A, shall be void ab initio.

CASE STUDY 3

Mr. Pradeep Suri and Mr. Jitendra Joshi are friends since their school days. They are seasoned professionals and masters of their respective domains.

Mr. Suri is a civil engineer having expertise in the business of construction and development of the real estate. Alongwith the degree in the civil engineering, Suri also did Post Graduation in Finance, which gave him a reasonable understanding of financial matters.

Mr. Joshi is a pharmacy expert and a promoter of two pharmaceutical companies. Apart from this, he also holds the post of Chancellor in a private University, based in North India.

Mr. Suri is a popular name in the real estate industry. He is a promoter and director of Dreams Developers and Realtor Limited (DDRL). DDRL is well-known for making residential buildings, corporate offices, and corporate plazas with ultra-modern state of the art. Affordable housing is the need of hour, on account of rapid growth of urbanisation in the region. Mr. Suri recognised this need and came up with an aspirational project, LIGHT (Low Income Group Housing Township); an affordable housing scheme.

Project LIGHT will comprise of 8 wings of 6 floors each, including the ground floor. Each floor will have an independent apartment with a carpet area equivalent to 80 square meters. The base area to be developed is 125% of the carpet area, which includes a parking area and a garden. After considering the market and economic conditions that emerged due to the widespread threat of COVID-19, the Board of DDRL collectively decided that rather starting the entire project at one go; the project should be broken down into phases (each wing represent a phase) and shall implement the project LIGHT in a phased manner.

At the board meeting, it is also decided to perform some major renovations and redevelopment work at one of the projects named, 'AWAS' which was completed by DDRL in the year 2015, completion certificate regarding which was obtained before the enforcement of RERA. Due to under-ground wiring of fibre-optical wires on the side of roads, the roads and drainage system got damaged badly and DDRL became liable to fix it as part of the sale agreement. Hence, at the request of residents (buyers) at AWAS, DDRL decided to do the necessary renovations on the roads and drainage system and also a certain amount of re-development works in the area of community hall, for the purpose of operationalise it, which was left half-constructed; due to some legal aspects at that time. Some of the flats that remained unsold at AWAS will be advertised for sale after re-development.

The father of Mr. Suri fell ill and was diagnosed with the chronic disease of cancer. Mr. Suri immediately made necessary arrangements to send his father for treatment to the world's best-known hospital for curing cancer in Houston, Texas (US). One of the old friends of Mr. Suri's wife is working there as a nurse. Mr. Kunal, an Indian resident, and nephew of Mr. Suri, accompanied with his father as an attendant to Houston.

A sum of USD 400,000 was credited to the hospital in Houston, against the estimation given by doctors under the seal of the hospital. USD 200,000 is also remitted to Mr. Kunal for meeting his expenses as an attendant for taking care of his father. One of the properties owned by DDRL was suspected to be 'Benami' under the Prohibition of Benami Property Transactions Act, 1988, regarding which Mr. Suri got the notice to furnish the information within 10 days from the date of receipt of the notice. In order to make travelling and other necessary arrangements for sending his father to Houston, Mr. Suri failed to respond the notice to the Authority.

Amongst the two pharmacy companies of which Mr. Joshi is a promoter, one is Prism Pharma Limited (PPL). PPL is supplying API (Active Pharmaceutical Ingredients) to other pharmaceutical companies. One amongst such buyers was Gelix Pharma Limited. Gelix Pharma Limited didn't make payment to PPL, despite giving multiple reminders. Finally, PPL issued a demand notice under section 8 of IBC, 2016, demanding payment of the operational debt in respect of which default had occurred. No response to such demand notice was given due to which PPL made an application under section 9 of IBC, 2016 which got admitted by the adjudicating authority initiating the corporate insolvency resolution process (CIRP). Adjudicating authority made an order appointing the interim resolution professional and declaring a moratorium. In the first meeting of the committee of creditors, the interim resolution professional is resolved to be appointed as the resolution professional by a vote of 70% of the voting share of the financial creditors. One of the directors of Gelix Pharma Limited, who has given a personal guarantee against one of the borrowings of the company is very happy after the declaration of moratorium under section 14 of IBC, 2016 because he believes, now no legal action can be taken against him also. From the draft resolution plan, it seems clear to PPL, that their dues will hardly be satisfied and hence they apply to NCLT for withdrawal of their application filed earlier.

Ms. Ankita Joshi, daughter of Mr. Joshi is studying international business at the University of Sheffield, London (UK), and Mr. Joshi remitted an amount equivalent to USD 275,000 in foreign currency through an authorised dealer (without any permission from RBI) to her daughter for her university fees and personal expenses during the financial year. University fees were approximately USD 100,000 during the year. This spring semester she completed her master program and returned back to India under the 'Vande Bharat mission'. She joined the same university as a director in which her father is a chancellor.

Ms. Ankita bought a luxurious apartment for herself at a cost of ₹ 1.15 crores out of the funds sponsored for the trust of the university. On the same day, the property was shown to be purchased at a price of ₹ 35 lakhs to the sub-registrar of properties in order to save stamp duty on it and the property was duly registered in the name of Ms. Ankita; the fair value on the date of registration date was ₹ 1.20 crores. The transaction came in the scanner of authorities and the said transaction was declared as 'Benami Transaction' and Ms. Ankita was accused as a 'Benamidar' in the final order passed under the relevant provisions of the Prohibition of Benami Property Transactions Act, 1988. The fair market value of the property on the date of the order was ₹ 1.40 crores.

MULTIPLE CHOICE QUESTIONS

1. Whether PPL can withdraw the application earlier filed by it under section 9 of the IBC, 2016 before the adjudicating authority?
   (a) Yes, at the sole discretion of Adjudicating Authority, either on application by the applicant (PPL in this case) or suo-moto
   (b) Yes, at the sole discretion of Adjudicating Authority, but only at the application from the applicant (PPL in this case)
   (c) Yes, by adjudicating authority, but only at the application from the applicant (PPL in this case) with the approval of 66% of the voting share of the committee of creditors.
   (d) Yes, by adjudicating authority, but only at the application from the applicant (PPL in this case) with the approval of 90% of the voting share of the committee of creditors.

2. What shall be the maximum penalty with which Ms. Ankita can be punished for being a 'Benamidar'?
   (a) Rigorous imprisonment of seven years or a fine of ₹ 35 lakhs
   (b) Rigorous imprisonment of seven years or a fine of ₹ 30 lakhs
   (c) Rigorous imprisonment of seven years and a fine of ₹ 35 lakhs
   (d) Rigorous imprisonment of seven years and a fine of ₹ 30 lakhs

3. Whether DDRL is required to register the real estate project 'LIGHT' under RERA?
   (a) Yes, every real estate project needs to be registered
   (b) No, because each phase is considered a stand-alone real estate project and phase-wise registration is required and here in each phase only one wing will be constructed (6 apartments to be constructed in a wing in an area of 100 square meters only).
   (c) Yes, because in aggregate 48 units to be constructed considering all phases
   (d) No, registration under RERA is exempt in the case of the housing project for the low-income group

4. Whether there is any violation of law by Mr. Joshi in respect of remittance of an amount equivalent to USD 275,000 in foreign currency to his daughter Ms. Ankita during the financial year and if yes, then what shall be the penalty that may be levied?
   (a) Mr. Joshi doesn't violate the law, because he remitted the amount through authorised dealer
   (b) Mr. Joshi violates the law, the penalty levied may be up to USD 25,000
   (c) Mr. Joshi violates the law, the penalty levied may be up to USD 75,000
   (d) Mr. Joshi violates the law, the penalty levied may be up to USD 200,000

5. How many registrations DDRL needs to take under RERA for its projects as aforementioned if any of them are required to be registered?
   (a) One
   (b) Two
   (c) Nine
   (d) Need not to register at all.

DESCRIPTIVE QUESTIONS

6. Whether the credence of the director of Gelix Pharma Limited that 'section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) would apply to the personal guarantor as well' is valid? Support your answer with the relevant case law as applicable.

7. Whether Mr. Suri is required to take the prior approval of the apex bank in India, for remitting money to Houston for treatment of his father and stay of Mr. Kunal as an attendant?

8. What are the consequences of failure to respond to the notice from the relevant authority under the

Prohibition of Benami Property Transactions Act, 1988, by Mr. Suri? Does it make any difference that Mr. Suri was engaged in making necessary arrangements to send his father to Houston who was diagnosed with cancer?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Yes, by Adjudicating Authority, but only at the application from the applicant (PPL in this case) with the approval of 90% of the voting share of the committee of creditors.
   Reason
   Section 12A of the Insolvency and Bankruptcy Code 2016, provides that Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of 90% voting share of the committee of creditors, in such manner as may be specified.

2. (d) Rigorous imprisonment of seven years and a fine of ₹ 30 lakhs
   Reason
   As per section 53(2) of The Prohibition of Benami Property Transactions Act, 1988, whoever is found guilty of the offence of Benami transaction referred to in sub-section (1) shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five percent of the fair market value of the property.

   Here, in the given case the fair market value of property, on the date of Registry, as given in the case law, is ₹ 1.20 crores. 25% of it comes to ₹ 30 lakhs.

3. (c) Yes, because in aggregate 48 units to be constructed considering all phases
   Reason
   Section 3(2)(a) of Real Estate (Regulation and Development) Act 2016, exempts the registration of those real estate projects where the area of land proposed to be developed does not exceed 500 square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases.

   Project LIGHT consists of 48 units in 800 square meters of land, (which exceeds the minimum apartment of 8 and the area of 500 Sq. Meter to claim exemption from Registration)

4. (c) Mr. Joshi violates the law, the penalty levied may be up to USD 75,000
   Reason
   As per item number viii in part 1 to schedule III of Foreign Exchange Management (Current Account Transactions) Rules 2000 individuals can avail of foreign exchange facility within a limit of USD 250000 without prior approval of RBI for the purpose of studies abroad.

   Further sub-section 1 to section 13 of the Foreign Exchange Management Act 1999, provides if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction, or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an 5 uthorization is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable

   More than USD 250,000 can also be remitted for studies abroad if it is so required by University abroad. Since the university fee is mere around USD 100,000, hence Mr. Joshi can't avail of the exchange facility in excess of the limit prescribed under the liberalised remittance scheme i.e. 250000 without prior approval of RBI.

   Thus, contravention is of USD 25000 (275000 less 250000 = 25000) so the penalty up to the thrice of the sum involved in such contravention comes to 75000 (25000*3=75000)

5. (c) Nine
   Reason
   Explanation to section 3 of Real Estate (Regulation and Development) Act 2016, which says where the real estate project is to be developed in phases every such phase shall be considered a stand-alone real estate project and the promoter shall obtain registration under this Act for each phase separately.

   Further, clause © of sub-section 2 to section 3 exempt registration only in case of those projects only those renovation/repair and re-development projects, which does not involve marketing, advertising selling, or new allotment of any apartment, plot, or building.

   Since in LIGHT there are 8 Wings having independent apartments and in AWAS there is 1 project, to the total is 9 projects which requires the registration.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

Issue under consideration

The Director of Gelix Pharma Limited holds credence that section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) would apply to personal guarantor as well, as a result of which no proceedings against the personal guarantor and his property should be taken after the declaration of the moratorium.

Relevant case law

Validity of directors' credence can be denied based upon the decision given in the case of State Bank of India vs. V. Ramakrishnan (Supreme Court, Civil Appeal No. 3595 of 2018, dated 14th August, 2018), wherein the facts are largely similar to the present case, except the application was moved under section 10 of IBC rather section 9.

Hon'ble Supreme Court first considered the fact that different provisions of the Insolvency and Bankruptcy Code are applicable to the insolvency of different categories of persons. Section 96 and 101 of the Code provide for separate provision for a moratorium for the personal guarantor. Whereas section 14 deals with corporates.

The Apex Court also observed that different provisions of law brought into effect on different dates and some of the provisions were not yet (on the date of the judgment) enforced. Provisions pertaining to sections 96 and 101 have not been brought into force.

Further, the Apex court made observations on relevant sections. The court observed that Section 14 of the Code authorizes Adjudicating Authority to pass an order of moratorium during which there is the prohibition on the institution of suits or continuation of pending suits against the corporate debtor, transfer of property of the corporate debtor, or any action to foreclose or enforce any security interest.

The Apex Court narrated the out come of the Report of Insolvency Law Committee dated 26.03.2018, which provided the following facts :

"(iv) to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-àvis the moratorium on the assets of the corporate debtor, it has been recommended to clarify by way of an explanation that **all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed under the Code";**

"The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Sec 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only."

Section 14(3) was substitute by the Act No. 26 of 2018 (w.e.f. 06.06.2018). Now **the amended section 14(3)(b) states that the provisions of section 14(1) shall not apply to a surety in a contract of guarantee to a corporate debtor.**

Hence, the credence of the Director of Gelix Pharma Limited that 'section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) would apply to the personal guarantor as well' is not tenable.

Answer 7:

The amount credited (remitted) to hospital in Houston:

The item (vii) of Para 1 of Schedule III to the Foreign Exchange Management (Current Account Transactions) Regulations 2000, prescribes that remittance up to USD 250,000 can be made without prior approval of RBI for the purpose of medical treatment abroad.

Further, it is provided, under point 7(g) to part A (resident individual) of the Liberalized Remittance Scheme that authorised dealers may release foreign exchange up to an amount of USD 250,000 or its equivalent per financial year without insisting on any estimate from a hospital/doctor. Amount exceeding the above limit i.e. USD 250,000, in foreign exchange may be released by the authorised dealer under general permission based on the estimate from the doctor in India or hospital/doctor abroad.

Hence, Mr. Suri doesn't require specific prior approval from RBI, because the remittance of medical expenditure of USD 400,000 is against the estimate from the hospital in Houston as provided under the Liberalized Remittance Scheme.

The amount remitted to Mr. Kunal to meet his expenditure.

Item (vi) of Para 1 of Schedule III to the Foreign Exchange Management (Current Account Transactions) Regulations 2000, prescribes that remittance up to USD 250,000 can be made without prior approval of RBI for accompanying as attendant to a patient going abroad for medical treatment.

Under point 7(g) to Part A (resident individual) of Liberalized Remittance Scheme, it is also provided that an amount up to USD 250,000 per financial year is allowed to a person for accompanying as attendant to a patient going abroad for medical treatment/check-up.

Hence Mr. Suri doesn't require specific prior approval from RBI for remitting USD 200,000 to Mr. Kunal for meeting his expenditure.

Answer 8

Section 54A of the Prohibition of Benami Property Transactions Act, 1988, explains the penalty in case of failure to comply with notices or furnish information.

Sub-section 1 of the said section provides that any person who fails to

(i) comply with summons issued under sub-section (1) of section 19; or

(ii) furnish information as required under section 21, shall be liable to pay a penalty of **twenty-five thousand rupees for each such failure.**

Hence, the consequences of such failure to respond to the notice may cause a levy of penalty of ₹ 25000 to Mr. Suri.

Further sub-section (2) provides that the penalty under sub-section (1) shall be imposed by the authority who had issued the summons or called for the information.

Obeying the principles of natural justice sub-section 3 provides that no order under sub-section (2) shall be passed by the authority unless the person on whom the penalty is to be imposed has been given an opportunity of being heard, hence Mr. Suri will have the opportunity to explain the causes of the delay.

Proviso to sub-section 3 provides, no penalty shall be imposed if, such person proves that there were good and sufficient reasons which prevented him from complying with the summons or furnishing information.

Hence, Mr. Suri may make a request in writing to the concerned Authority, explaining the whole of situation, along with the documentary proof/ evidences that he was busy in making arrangements for the treatment of his father abroad. If the Authority gets convinced with the explanation of Mr. Suri, it may waive the imposition of the penalty in terms of the proviso to section 54A(3) of the Act.

CASE STUDY 4

Mr. Biswa Ranjan Mohanty is a chemical engineer by profession who belongs to a farmer's family based in a village near Berhampur city on the eastern coastline of Ganjam district of Odisha. He did his masters in Industrial Chemistry and was employed with United Phosphorus Ltd. (UPL) in its Agrochemical Division at Dahej plant in South Gujarat. His father passed away in the winters of 2015 and thereafter he came back to his native place. He discovered many changes in Berhampur since he left the place for employment; an industrial township was established in the outskirts of the city and many more things have been changed like the city got a new railway station. The Rangeilunda airstrip which is located 9 kms east of Berhampur, developed into a fully operational domestic airport.

Mr. Mohanty joined his brother-in-law's business 'Krishna Organics & Chemicals Limited' (KOCL), where he looked after its Productions and Operations Division. The financial condition of KOCL was not sound and in the next couple of years due to the increased cost of labour and roaring competition, it became unprofitable. Mr. Mohanty suggested many ways to attain operational efficiency, but his brother-in-law is more interested and devoted to his newly started real estate business. He is even dictating the board members of KOCL to pass a resolution through which inter-corporate loans up to the maximum possible amount can be advanced to his real estate business, which is in the form of a private limited company named 'Vinayak Construction Private Limited' (VCPL).

In the year 2018, KOCL made a default in repayment of financial charges for the first time, and by the closure of 2019, the working capital of the company got soaked-up completely and it made default in payment of work-man dues also. Finally, NCLT ordered the Corporate Insolvency Resolution Process (CIRP) against KOCL on 21st February 2020, on the admission of an application made by a financial creditor and on the same date appointed Mr. Mukand Bharara as an interim resolution professional, as proposed in the application.

Mr. Mukand collected the claims against the corporate debtor and thereafter formed a committee of the creditors on 10th March 2020. One amongst the claimants was Aramax Limited, which is both a financial as well as operation creditor of KOCL. Mr. Mukand placed Aramax Limited in the committee of creditors with voting rights only equal to the proportion of the financial debts to the total financial debts. The first meeting of the committee of creditors was conducted on 20th March 2020.

In the recent past but prior to the initiation of CIRP, KOCL used to import a couple of raw materials; which were dutiable. It was found that customs duty worth ₹ 74.57 lakhs was evaded by KOCL through making false declarations.

One among the major buyers of KOCL is 'M/s Krishna Export' (KE), a partnership firm, in which the brother-in-law of Mr. Mohanty is a partner along with other family members. KOCL used to transfer goods to KE at a transfer price derived, based upon the cost plus margin. KE exported these abroad. KE holds an active export licence and IEC (Code) with Directorate General of Foreign Trade (DGFT) KE was reconstituted, brother-in-law of Mr. Mohanty retired from the firm and simultaneously Mr. Mohanty is admitted to the partnership firm.

Spices and herbs are grown in the farms owned by Mr. Mohanty's family. Since these can be easily exported and that's too at prices higher than what they fetch in the domestic market, hence Mr. Mohanty decided to expand the operations of KE; in terms of exporting the spices and herbs along with other organic chemicals. An application was sent to the Spices Board of India. KE after the reconstitution exported its first shipment (of herbs) on 10th April 2020 on a credit basis to a buyer in South Africa. The invoice was dated 8th April 2020. Export documents and declarations are duly filled and the name of authorised dealer is also mentioned in the export declaration.

Considering the need for quality education for his children and other elementary facilities for life such as health, transportation, etc., Mr. Mohanty decided to buy a new house in the city; as their ancestral house is in a village near farms. Mr. Mohanty identified a property with a value of ₹ 80 lakhs, but his savings & pockets don't allow him to manage this much sum. He fell short by ₹ 10-12 lakhs. Mr. Mohanty does not favour borrowing a loan to acquire the property, because it will cause him an extra financial burden in form of interest.

After a few weeks, he told his desire to his mother about purchasing the property in the town. His mother out of her savings gave him the shortfall money and thereafter, Mr. Mohanty entered into an 'Agreement to sell' with the present owner and the property was registered in the name of Mr. Mohanty and his wife as joint owners with equal share. Mr. Mohanty and his family shifted to the new home. Mr. Mohanty wishes that his Mother shall also stay with them, but his mother decided to stay back in the same village house

where she came in as bride after the marriage and spent her entire life afterward that. She occasionally visits the new house of Mr. Mohanty, either during festivals or whenever she came to town for a health checkup or any other reason.

VCPL, the company of brother in law of Mr. Mohanty, is growing significantly in a short span of time. VCPL also does the construction of large civil infrastructural projects apart from housing projects. There are 5-6 major projects ongoing at present apart from a few minor projects. VCPL got an award recently for on time deliveries from the State Real Estate Association.

Around three years back, VCPL developed a housing project 'NIWAS' near the coast-line area, the possession of which was delivered in-between the months of August'18 to October'18. An association of allottees was formed to manage the daily affairs and security aspects of NIWAS which was registered as a resident society. In the project NIWAS, the principles of design, layout, measurements, ground preparation, space arrangement, and spatial geometry were applied carefully by the architect. The plan was also approved at that time by the local urban development authorities after soil testing and other inspections. Recently, a major structural defect was discovered by the residents, and the same was brought to the notice of the secretary of the resident society. The secretary after deliberation with other executive members of the society and considering it a life-threatening matter in case if any mishap occurs due to the structural defect, wrote a letter (dated 10th September 2020) to the developer 'VCPL' bringing the matter to their notice and seeking immediate action. At the first instant, the letter was not responded back by VCPL. In the next week, a reminder letter was sent in which the signatures of all the allottees were mentioned along with the unique allotment numbers and the dates of allotment respectively. Copies of agreements of sale were attached with it wherein it is mentioned that any repairs in the society will be at the cost of allottees but repairs necessitated due to defects whether structural or otherwise will be the responsibility of VCPL without any cost. This time, the letter was taken into notice by VCPL and on 24th September 2020, the company replied to the letter acknowledging its responsibility to rectify such defects without any charges. It was also mentioned in the reply letter that the repair work will start in a week time and is expected to take 20-25 days to finish.

MULTIPLE CHOICE QUESTIONS

1. Within how many months KE shall realise and repatriate the full export value pertaining to its first shipment (of herbs)?
   (a) Six Months
   (b) Nine Months
   (c) Twelve Months
   (d) Fifteen Months

2. Till which date the meeting of the committee of creditors of KOCL shall be conducted?
   (a) 13th March 2020
   (b) 17th March 2020
   (c) 25th March 2020
   (d) 8th April 2020
3. By which date KE shall submit the relevant export documents to the authorised dealer regarding its first shipment (of herbs)?
   (a) 17th April 2020
   (b) 24th April 2020
   (c) 1st May 2020
   (d) 8th May 2020
4. Whether making false declarations to evade customs duty by KOCL constitute an offence under the Prevention of Money Laundering Act, 2002 (PMLA)?
   (a) False declaration under customs laws shall not constitute an offence under the PMLA
   (b) False declaration under customs laws shall always constitute an offence under the PMLA
   (c) False declaration under customs laws shall constitute an offence under the PMLA Prevention of Money Laundering Act, 2002 if the value involved in the offence is ₹ 30 lakhs or more
   (d) False declaration under customs laws shall constitute an offence under the PMLA if the value involved in the offence is ₹ 1 crore or more
5. For how many years from the date of handing over the possession of the project 'NIWAS' the responsibility for rectifying any structural defect or any other defect is of the promoter (VCPL) and within how many days he needs to rectify the same without any further charges?
   (a) 2 years and 30 days
   (b) 2 years and 60 days
   (c) 5 years and 30 days
   (d) 5 years and 60 days

DESCRIPTIVE QUESTIONS

6. What will be the maximum time limit available with KE for realisation and repatriation of full export value of its first shipment in the following independent cases:-
   (a) If a shipment is exported to its warehouse situated in South Africa instead of the direct buyer
   (b) If KE is Export Oriented Unit under Foreign Trade Policy

Can this period be extended? If yes, what will be the maximum length of extension?

7. (a) Whether Aramax Limited despite being a single entity/person, can be claimant as both financial as well as operational creditor simultaneously; if no then on what basis it shall be classified in either one (i.e. either financial creditor or operation creditor)?

   (b) In continuation to (a) above, whether Aramax Limited can be included in the committee of creditors or will it be excluded? In case, if it is included then what will be the quantum of its voting rights as against its outstanding debt?

   (c) Whether Mr. Mukand has correctly executed all the procedural aspects of the IBC laws in relation to the committee of creditors, to the extent of information as aforementioned in the given case law?

8. Whether the transaction of purchasing the property by Mr. Mohanty in the joint name of himself and his wife with the partial consideration provided by his mother can be considered as a 'Benami transaction'. Support your opinion with the relevant case law as applicable.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Fifteen Months

   Reason
   Considering the representations from exporters and trade bodies, in view of the outbreak of pandemic COVID- 19, vide A.P. (DIR Series) Circular No. 27 dated 1st April 2020 (RBI/2019-20/206), it has been decided, in consultation with the Government of India, to increase the present period (nine months as per sub-regulation 9(1) of Foreign Exchange Management (Export of Goods & Services) Regulations, 2015) of realization and repatriation to India of the amount representing the full export value of goods or software or services exported, from nine months to fifteen months from the date of export, for the exports made up to or on July 31, 2020;

   Here, in the given case the date of export is 10.04.2020 so 15 months will elapse on 10.07.2021. Any export made after 31.07.2020 the dead line shall be 9 months for the realization of the full export value.

2. (b) 17th March 2020

   Reason

   Section 22(1) of the IBC provides that the first meeting of the committee of creditors (CoC) shall be held within seven days of the constitution of the committee of creditors. In the given case, the CoC was formed on 10.03.2020, so the first meeting of the CoC may be held on any day between 11.03.2020 to 17.03.2020. The last date being the 17.03.2020.

3. (c) 1st May 2020

   Reason
   Regulation 10 of the FEM (Export of Goods & Services) Regulations, 2015 provides that the documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, within 21 days from the date of export, or from the date of certification of the SOFTEX form. In the given case, the date of export is 10.04.2020, so the last date comes as 01.05.2020.

4. (d) False declaration under customs laws shall constitute an offence under the PMLA if the value involved in the offence is ₹ 1 crores or more.

   Reason
   Section 2(1)(y)(ii) of the PMLA provides that Scheduled offence means the offences specified under Part B of the Schedule if the total value involved in such offences is One Crore rupees or more.

   Under Part B of the Schedule, the offence under the Customs Act, 1962 is mentioned. Section 132 of the Customs Act deals with the False declaration, False document, etc.

5. (c) 5 years and 30 days

   Reason
   Section 14(3) of RERA provides that in case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

Thus, as per section 14(3) of the RERA the promoter is liable to make repairing of structural defect upto 5 years from the date of handing over possession to the allottees and such defects should have been rectified within 30 days.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

If shipment is exported to a warehouse abroad:

Regulation 9 of the FEM (export of Goods & Services) Regulations, 2015 deals with the matter relating to the period within which export value of goods / software/service to be realised. It reads as under:

(1) The amount representing the full export value of goods/ software/ services exported shall be realized and repatriated to India within 9 months from the date of export, provided-

(a) that where the goods are exported to a warehouse established outside India with the permission of the RBI, the amount representing the full export value of the goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods;

(b) further that the RBI, or subject to the directions issued by that Bank in this behalf, the authorized dealer may for a sufficient and reasonable cause shown, extend the period of 9 months or 15 months, as the case may be.

Hence, if the first shipment of herbs) is exported to a warehouse situated in South Africa then the full export value shall be realized and repatriated within a period of fifteen months from the date of export i.e. on or before 10th July 2021 (15 months from 10th April 2020).

If KE is an export-oriented unit (EOU):

Regulation 9(2)(a) of the FEM (export of Goods & Services) Regulations, 2015 provides that where the export of goods / software / services have been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months from the date of export.

Further proviso to Regulation 9(2)(a) says that the Reserve Bank, or subject to the directions issued by the Bank on this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the said period. Hence, extension is possible.

Hence, the maximum time limit available for realisation and repatriation is 9 months from the date of export i.e. on or before 10th January, 2021 (9 months from 10th April, 2020).

Extension of the time period:

As per Regulation 9(1)(b) and proviso to Regulation 9(2)(a) as aforementioned, RBI or the authorised dealer subject to directions issued by RBI may extend the said time period, for a sufficient and reasonable cause shown. However, there is no maximum time limit of extension is mentioned, that can be granted under regulation 9.

Answer 7

Answer to the part (a) and (b) of the question lies in sub-section 4 of section 21 of Insolvency and Bankruptcy Code 2016.

As section 21(4), where any person is a financial creditor as well as an operational creditor

(1) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor.

(2) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(a) Yes, Aramax Limited despite being a single entity/person can be both a financial creditor as well as an operational creditor.

There is no need to classify Aramax Limited in either of the categories (i.e. either financial creditor or operation creditor). Aramax Limited can be a creditor of both categories simultaneously. The only requirement is to segregate the amount of financial debt and operation debt owed from Aramax

Limited by the KOCL.

(b) Yes, Aramax Limited can be included in the committee of creditors, as per clause (a) to section21 (4). Further section 21(2) also provides that all the financial creditors shall be part of the committee of creditors.

Aramax will get voting rights, only in proportionate to the extent of financial debts owed to it by KOCL.

(c) Mr. Mukand has correctly executed the procedural aspects of the law with respect to the inclusion of the claimant, Aramax Limited in the committee of creditors. However, Mr. Mukand has failed to conduct the first meeting of the committee of creditors within seven days of its constitution as per provisions contained in section 22(1) of the IBC, 2016 i.e. on or before 17th March 2020 and whereas the first meeting was conducted on 20th March 2020.

Answer 8:

As per clause (A) to section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, Benami transaction means a transaction or an arrangement -

(a) where a property is transferred to or is held by, a person and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

Except when the property is held under clause (iii) of the Act by any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual.

It is important to consider the Apex Court judgment in the landmark case of 'Pawan Kumar Gupta vs. Rochiram Nagdeo', AIR 1999 SC 1823. The word provided used in section 2(a) (substituted with 2(9) w.e.f 1st Nov 2016) shall not be constructed narrowly. So even if the appellant landlord had availed himself of the help rendered by his father for making up the sale consideration that would not make the sale deed a benami transaction so as to push it into the forbidden area envisaged section 3(1) of the Act. Court also took the example of a purchaser of land, who might have availed himself of the loan facility from the bank to make up the purchase money.

In the lights of the decided case law, as aforementioned respectively, the shortfall amount as provided by his mother, will not push it into the forbidden area, and hence, the transaction cannot be considered as a 'benami transaction'. But here it is worth noting that said case was decided and judgment was pronounced well prior to changes incorporated in the Prohibition of Benami Property Transactions Act 1988 w.e.f 1st Nov 2016 vide S.O. 3289(E), dated 25th October 2016). Prior to this date section 2(a) defines the benami transaction as 'means any transaction in which property is transferred to one person for a consideration paid or provided by another person'. This barometer is wide enough and not able to act as a true litmus test. Since the genuine exception (like exception i to iv of section 2(9)(A) also not mentioned in law at then, hence court tried to remove genuine hardship through its judgement; but in no manner, it was intended to go beyond.

In the Mangathai Ammal (Died) through LRs and Others vs Rajeswari (Civil Appeal 4805 No. of 2019, dated 9th May, 2019), the Apex Court held that "While considering a particular transaction as benami, the intention of the person who contributed the purchase money is determinative of the nature of transaction".

In this case the Court relied upon its owen judgment held in Jaydayal Poddar v. Bibi Hazra (Mst.) (1974) 1 SCC 3 and opined that though the question whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances:

(1) the source from which the purchase money came;
(2) the nature and possession of the property, after the purchase;
(3) motive, if any, for giving the transaction a benami colour;
(4) the position of the parties and the relationship if any, between the claimant and the alleged benamidar;
(5) the custody of the title deeds after the sale and
(6) the conduct of the parties concerned in dealing with the property after the sale

The house purchased by Mr. Mohanti and registered in the name of himself and his wife by taking partial contribution from his mother shall not be treated as benami transaction, **if following conditions are satisfied**:

(a) The cost of the house is Rs. 80 lakh, out which Rs.20 lakh has been contributed by his mother. If the mother is having independent source of earning and have accumulated savings to her credit, she may give the amount to his child Mr. Mohanty for purchase of property. This is covered by Section 9(A)(b)(iii) of the PBT Act.

(b) Mr. Mohanty has contributed Rs. 60 lakh, which he can show his accumulated earnings from the income of know sources. He may produce the ITRs of the previous years and bank entries to satisfy the authority. This is also covered by Section 9(A)(b)(iii) of the PBT Act.

(c) The registry of the house can be got in the joint name of husband and wife. Here if wife is having income from the known sources, then to that extant her contribution is considered and for rest amount Mohanti has to show. Else the entire amount may the savings of Mohanti alone, even though the registry can be made jointly in the name of husband and wife as per Section 9(A)(b)(iii) of the PBT Act.

CASE STUDY 5

Mr. Keshav Ganesh Balakrishnan (KGB) is a dynamic information technology (IT) professional with expertise in developing security software for use of defence staff and others. He was part of a team that developed the initial indigenous radar system for defence services. Mr. Raju Ganesh Balakrishnan is the younger brother of KGB and is a doctor by profession who went to the United States around ten years back. Balakrishnan family has its roots in Kerala where Mr. Ganesh Balakrishnan, father of KGB, was a school teacher (since, when it was 'Travancore').

Around a decade back, KGB got his latest posting at DRDOs' headquarter as a joint project director and he was also appointed as a cyber-security advisor to the PM office. KGB got furnished accommodation from the office itself. Post-retirement, KGB wants to settle in NCR (National Capital Region), only because both his children are working there. KGB booked an apartment for him and his family to live in after his retirement in 'Silver Oak Residency' in Greater Noida. Only one and half months are pending for the retirement of KGB.

Silver Oak Residency is developed based upon the European style of the architect with lush green gardens and a landscape capable of amusing anyone irrespective of age. There is plenty of other common areas available to resident allottees. The project was started on time and development also took place as per the time mention in the plan furnished to the relevant state RERA authority. Sujata Builders and Developers (P) Ltd. (developer of the project 'Silver Oak Residency') is known for its quality construction and timely possession. After completion of construction activities & provisioning of civic infrastructures such as water, sanitization, and electricity, Sujata Builders and Developers (P) Ltd. obtained an occupancy certificate on 31st August 2020 from the competent authority for Silver Oak Residency permitting the occupation of the building. The same was informed to the allottees (KGB being one of these allottees) immediately on the same day for the physical occupation of the property by issuing a letter as well as through mail & SMS. KGB obtains the superannuation age on 14th August 2020 and is supposed to retire on the last working day of August 2020. But on the 10th August, his tenure was extended by another six months because some of the projects for which he is a project director are on the verge of maturity. As his service period got extended KGB decided to take physical possession of the apartment after his retirement only.

Sujata Builders and Developers (P) Ltd. got Completion Certificate on 16th November 2020 for the project, Silver Oak Residency. An association of allottees was formed in the month of July 2020, which was registered on 5th September 2020 as a resident society. Documents, including plans and possession of common area including park and landscapes, were handed over to such resident society on 28th December 2020. Local laws are silent on the provisions relating to handing over the possession of documents and common areas.

KGB was married to Heena Kachroo, an IRS officer. Kachroo family is a joint family with persons from four generations and is presently staying in Delhi, but has roots in Kashmir. The father of Heena, Mr. Rajesh Kachroo was also a bureaucrat who later turned into a statesman figure. He migrated to Delhi in the early 70s. Kachroo family inherited the undivided estate from their lineal ascendants which in their testaments was transferred in the favour of the undivided family. Uncle of Mr. Rajesh Kachroo is acting as the Karta of the undivided family, but substantial financial control lies in the hands of Mr. Rajesh Kachroo.

Mr. Rajesh Kachroo bought a farmhouse in the valley of Kashmir during the winters of 2019 & 2020 in his personal name, where he wishes to establish his party office. The entire family continued to stay in their house situated in Delhi and have never visited the farmhouse since its purchase. The fair market value of the property as of the date of registration was INRs 2.25 crores. The large portion of the purchase consideration to acquire this property was paid out of the funds realised from such impartial estate of the undivided family.

Since, Mr. Rajesh Kachroo is a public figure, holding immovable property of such a huge value might create unnecessary issues and so he transferred the farmhouse property to the pool of the impartial estate of the undivided family.

Sister of KGB, Ms. Swapnika is married to G V Reddy, who is a promoter of a company named 'SR Auto Part Limited' which is engaged in the business of manufacturing automobile parts and is an exclusive supplier to the country's largest four-wheel manufacturer. The demand for four-wheelers declined sharply in the last 5 years. The last couple of years were the worst for the industry, which affected the businesses of many auto-part suppliers and SR Auto Part Limited being one amongst them. In the later part of 2019, on account of failure to serve the debt, the corporate insolvency resolution process was initiated against SR Auto Part Limited by the adjudicating authority on an application from the concerned financial creditors.

G V Reddy is keen to survive the business and is eagerly waiting for a resolution plan from the resolution professional; but in the first meeting of the committee of creditors, the interim resolution professional was appointed as the resolution professional intimated the adjudicating authority of the decision of the committee of creditors to liquidate SR Auto Part Limited with only seventy-one percent of voting share of the financial creditors. G V Reddy challenged such a decision of the financial creditors by writing a letter to the adjudicating authority.

Ms. Swapnika is a management consultant in Marcus Port & Shipping Limited which is an associate company of Anandy Holding Limited which holds forty percent of the voting rights in Marcus Port & Shipping Limited (40% stake was acquired on 10th April 2018) and so it is having a right to appoint four out of total ten directors at the board of Marcus Port & Shipping Limited. The management and daily affairs of the Marcus Port & Shipping Limited are purely independent. Marcus Port & Shipping Limited is contributing a major portion to the group profits.

Marcus Port & Shipping Limited is willing to enter the domain of operation of airports alongside the sea-port business because the market of domestic travel has been multifold in a previous couple of years and is yielding juicy profits to the airport operators. Hence, in the first week of September, it acquires the air-port of the financial capital of the country along with one subsidiary company from the BMR Group.

Presently, no one stays at the ancestral house of the Balakrishnan family, which is situated in Kerala (India). Mr. Raju Ganesh Balakrishnan is staying in Texas along with his wife and children. His family has got citizenship in the United States. The needs of the family are growing as children are getting older, hence Mr. Raju decided to buy a more spacious house for his family, for which he required money and so he requested his elder brother KGB to help him. Considering the needs of his younger brother and his own decision to settle in NCR, KGB decided to sell the house; despite being attached to the ancestral house very much. This is the only immovable property in India in which Mr. Raju holds interest. As per the testament (will) of their father, the property of Ganesh Balakrishnan was divided into four equal parts (one part for KGB, one for Raju, another one for Swapnika, and the last for the trust of school, where he was a teacher). After the sale of the property, the sale proceeds were shared accordingly. The house was sold to a local, who converted the building into a resort and leased the same to a travel and tourism company of Hong-Kong for a period of 4 years without permission from RBI. Raju contacted the Indian branch of his local bank in the state (Texas) to remit the money. The banker gave him certain forms to fill, which he was unable to understand. He decided to take consultancy from a Chartered Accountant.

MULTIPLE CHOICE QUESTIONS

1. Within how much time period, KGB shall take physical possession of the apartment at Silver Oak Residency?
   (a) At any time as per his convenience, but he needs to inform the same to the developer in writing.
   (b) At any time before the date of receipt of completion certificate i.e. by 16th November 2020.
   (c) Within two months from the date of issue of occupancy certificate i.e. by 31st October 2020.
   (d) Within 30 days from date of issue of occupancy certificate i.e. by 30th September 2020.

2. Whether the transaction of acquiring the property in form of a farmhouse by Mr. Rajesh Kachroo in his own name out of the fund utilised from the impartial estate of the undivided family amounts to a 'benami transaction'?
   (a) No, because the Prohibition of Benami Property Transactions Act, 1988 doesn't apply to Jammu and Kashmir. Hence, as the property lies in the valley of Kashmir is out its preview.
   (b) No, because the purchase of property by a member of HUF from the known sources of the HUF for his own benefit does not amount to a benami transaction.
   (c) Yes, because if the property is purchased out of the funds of the undivided family, it shall be registered in the name of Karta.
   (d) Yes, because if the property is purchased out of the funds of the undivided family, it shall be for the benefit of all the members of the undivided family.

3. Whether Sujata Builders and Developers (P) Ltd. has validly handed over the relevant documents and the possession of the common area to the resident society of Silver Oak Residency within the required time frame?
   (a) No, because in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees within six months from the date of occupancy certificate i.e. 30th December 2020.
   (b) No, because in the absence of any local law, the promoter shall hand over the necessary documents and plans, including common areas, to the association of the allottees at any time after the completion of the project.

(c) Yes, because in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees within 30 days from the date of occupancy certificate i.e. 30th September 2020
(d) No, because in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees within 30 days from the date of completion certificate i.e. 15th December 2020, while the builder handed over on 28.12.2020.

4. Whether the decision was taken by the committee of creditors of liquidation of SR Auto Part Limited is legally valid?
(a) Legally invalid, because the decision of liquidation of SR Auto Part Limited can only be taken by NCLT
(b) Legally invalid, because the decision of liquidation of SR Auto Part Limited can be taken by a committee of creditors only after the resolution plan presented by the resolution professional is rejected.
(c) Legally invalid, because the decision of liquidation of SR Auto Part Limited is taken by the committee of creditors with a voting share of less than 75%
(d) Legally valid.

5. Whether the act of leasing out the resort for a period of 4 years without permission from RBI to the Hong-Kong based travel and Tourism Company is valid?
(a) Legally valid
(b) Illegal, because no person resident outside India is allowed to acquire an interest in immovable property in India whether in form of lease otherwise.
(c) Illegal, because no person of Hong-Kong is allowed to acquire an interest in immovable property in India whether in form of lease or otherwise.
(d) Illegal, because no person resident outside India is allowed to acquire an interest in immovable property in India in any form in any manner without prior permission of RBI whether in form of lease or otherwise.

DESCRIPTIVE QUESTIONS

6. Whether Mr. Raju Ganesh Balakrishnan is allowed to transfer his interest in the ancestral house of his family in Kerala? If so, can he repatriate the sale proceeds of such property outside India?

7. As per section 5 of the Competition Act 2002, if any enterprise or group merge or acquire an interest in another enterprise, which create a resulting entity with assets or turnover over the threshold limit is considered as a formation combination, which may adversely affect the competition in the relevant market sphere. Whether Marcus Port & Shipping Limited and Anandy Holding Limited is a 'group' as per the Competition Act, 2002 for purpose of an application under section 5?

8. Whether the property acquired in own name by Mr. Rajesh Kachroo utilized funds realised from the undivided estate of the undivided family and then transferring it to pool of the impartial estate of the undivided family can be considered as a benami transaction as suspicion arises with respect to the purpose and nature of the transaction. How do you see the present transaction? Highlight the commonly applicable circumstances which guide, whether a transaction is benami or not? Is there any litmus test to determine whether the transaction is benami or not?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) Within two months from the date of issue of occupancy certificate i.e. by 31st October 2020

Reason

Section 19(2) of RERA provides that every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

In the given case the occupancy certificate was obtained on 31.08.2020, so the possession should have been taken within a period of two months i.e. up to 31.10.2020.

2. (b) No because the purchase of property by a member of HUF from the known sources of the HUF for his own benefit does not amount to benami transaction

Reason

Section 2(9)(A)(b)(i) reads as under:

"Benami transaction" means, a transaction or an arrangement where the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by a Karta, or member of HUF, as the case may be, and the property is held

for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the HUF.

3. (d) No, because in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees within 30 days from the date of completion certificate i.e. 15th December 2020, while the builder handed over on 28.12.2020.

Reason

The proviso to Section 17(2) provides that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the completion certificate.

In the given case, the completion certificate was obtained on 16.11.2020 and the 30 days period runs from 16.11.2020 which comes to 15.12.2020. While the builder handed over the documents on 28.12.2020, i.e. late submission.

4. (d) Legally valid

Reason

Section 33(2) of the IBC provides that were the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent. of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

The Explanation to section 33(2) states that for the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under subsection (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

Thus, the CoC have the powers to approve for the liquidation at any time as provided by section 33(2) and its explanation.

5. (a) Legally valid

Reason

Regulation 9 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 deals with the matter relating to the Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries. It provides that no person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea (DPRK) without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years. In this case, the lease of the immovable property is given to Hong Kong Based travel agency for 4 years only, hence no permission is required from RBI.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

As per sub-section 5 to section 6 of the Foreign Exchange Management Act 1999, a person resident outside India may hold, own, transfer, or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India. Hence, Mr. Raju is allowed to transfer his interest in the ancestral house.

Further, regulation 8 to the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 authorises the repatriation of sale proceeds from the transfer of immovable property in India. It says a person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section. However, if such a person is a Non Resident Indian or a Person of Indian Origin (as defined in Foreign Exchange Management (Remittance of Assets) Regulations, 2016) resident outside India, he/ she can utilise the remittance facilities available under the Foreign Exchange Management (Remittance of Assets) Regulations, 2016, as amended from time to time;

Further, the regulation provides that in the event of sale of immovable property other than agricultural land/ farmhouse/ plantation property in India by a Non- Resident Indian or an Overseas Citizen of India, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following

conditions are satisfied, namely:

- the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of his acquisition or the provisions of these Regulations;
- the amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in Foreign Currency Non-Resident Account or out of funds held in Non-Resident External account;
- In the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

Since all the above mentioned conditions are met in the given case (or expected to meet based upon data given in question), hence, after obtaining general or specific permission from the central bank, as required, he can repatriate the receipt to outside India. Mr. Raju can also utilise the remittance facilities available under the Foreign Exchange Management (Remittance of Assets) Regulations, 2016.

Answer 7

As per explanation (b) to section 5 of the Competition Act, 2002, "group" means two or more enterprises which, directly or indirectly, are in a position to:

(i) exercise twenty-six percent or more of the voting rights in the other enterprise; or
(ii) appoint more than fifty percent of the members of the board of directors in the other enterprise; or
(iii) control the management or affairs of the other enterprise-;

Condition (i) - Fulfilled

Anandy Holding Limited holds forty percent of the voting rights in Marcus Port & Shipping Limited.

Condition (ii) - Not fulfilled

Only 4 out of a total of 10 directors can be appointed by Anandy Holding Limited, which is less than fifty percent of the members of the board of directors.

Condition (iii) - Not fulfilled

Since the management and affair of Marcus Port & Shipping Limited are purely independent.

Condition (ii) and (iii) are not satisfied but as condition (i) is getting satisfied, hence, Marcus Port & Shipping Limited and Anandy Holding Limited is a 'group' as per the Competition Act, 2002 for the purpose of application of section 5I.

Students are advised to note

Marcus Port & Shipping Limited and Anandy Holding Limited together were not considered as 'group' for purpose of section 5 of the Competition Act, 2002 till 3rd March 2021 despite meeting condition (i).

vide S.O. 673(E) dated 4th March 2016, in the exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in the public interest, hereby exempts the 'Group' exercising less than fifty percent of voting rights in other enterprises from the provisions of section 5 of the said Act for a period of five years with effect from the date of publication of this notification in the official gazette. The date of publication of this notification in the official gazette is 4th March 2016, hence S.O. 673(E) dated 4th March 2016 is effective till 3rd March 2021.

Answer 8

No, there is no litmus test to decide whether the transaction is benami or not, it's a subjective matter of judgement based upon the facts and circumstances of each case individually. Although a definition is provided in sub-section 9 of section 2 of the Prohibition of Benami Property Transactions Act, 1988, that only covers tripartite benami transactions.

In the present case, till the property was acquired, it was a tripartite transaction, but not a benami transaction, because it got covered in exception point no. (i) of the definition of 'benami transaction' under section 2(9)(A)(b) of the said Act. But the act of transferring the property to a pool of impartial estate of the undivided family is a bipartite transaction, which is nowhere defined as a benami transaction in the entire Act.

In the Mangathai Ammal (deceased) through LRs and others vs Rajeswari (civil appeal 4805 of 2019), the apex court held that "While considering a particular transaction as benami, the intention of the person who contributed the purchase money is determinative of the nature of the transaction. The intention of the person, who contributed the purchase money, has to be decided on the basis of the surrounding circumstances; the relationship of the parties; the motives governing their action in bringing about the transaction and their subsequent conduct, etc."

While pronouncing judgement in Mangathai Ammal (supra), the apex court made reference to precedence established through its earlier judgements (pronounced in the different cases), and reaffirm that while considering whether a particular transaction is benami in nature, the following six circumstances can be taken as a guide:

1. The source from which the purchase money came;
2. The nature and possession of the property, after the purchase;
3. Motive, if any, for giving the transaction a benami colour;
4. Position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
5. Custody of the title deeds after the sale; and
6. Conduct of the parties concerned in dealing with the property after the sale.

It is worth noting, the apex court said the above indicia are not exhaustive and their efficacy varies according to the facts of each case.

Thus, all these factors are required to be considered in determining whether the transaction undertaken by Mr. Rajesh is benami or not as these types of transactions are not covered under the definition of 'Benami transaction'.

CASE STUDY 6

Mr. Madan Mohan Mishra is an Indian resident who migrated to Barnala (Punjab) from Darbhanga (Bihar) around two decades back for employment with Trident India Limited (TIL), after completion of his Master's in Business Management from IIM. During his engineering program, he studied production, operations, and quality. Mr. Mishra joined TIL as an Assistant Manager (Operations) and got numerous promotions based upon his performance. A year ago, Mr. Mishra was elevated from the position of Vice President (Plant Operations) of Barnala Plant and transferred to Sehore district of Madhya Pradesh as a Plant Head of Budhni (Madhya Pradesh) Plant. Mr. Mishra is also a member of Committee on Financial Matters at TIL, as an employee's representative.

TIL is a multi-product manufacturing company headquartered in Ludhiana (Punjab). One of its products - terry towel is in high demand abroad and around 60% of its production is exported majority in Europe followed by the United States. TIL established a branch office in central London recently and is in the process of getting its scripts listed on the LSE (London Stock Exchange). TIL made a bid for a textile plant there, the deal is expected to mature in six months' time. It will be a whole cash deal and the funds will be arranged through ECB (External Commercial Borrowings) in Euro currency. TIL is eligible to receive FDI.

Mr. Mishra after shifting to Budhni stayed at the company's guest house for a couple of weeks and then took an apartment on rent in the nearby area. But the family of Mr. Mishra is looking for purchasing their own house and in that process, they identified the housing project 'Nirmal Awas' in Hoshangabad, on the bank of Narmada River; which is just 8-10 km. away from the Budhni plant. Mr. Mishra applied to Chauhan Developers and Infrastructure Limited (CDIL), the promoter of 'Nirmal Awas' for a 3 BHK apartment. It is the first housing project for CDIL. The project was duly registered with the relevant State Authority under RERA, 2016. The price of the apartment will be calculated based upon the carpet area at a rate of ₹ 3,000 per square feet. There are 3 categories of apartments developed under 'Nirmal Awas' namely 2BHK, 3BHK floors, and independent villas respectively. Each category has a standard size.

3 BHK apartment is comprising with a gross area of 1200 square feet, including external walls and internal partition walls equal to 3% and 4% of the gross area of the apartment, respectively; and also including a balcony of 24 square feet and an open terrace area of 40 square feet for the exclusive use of allottee of the apartment independently. Allotments of all 140 apartments were done in the month of February 2020 to the respective allottees which included Mr. Nayak who had applied for two apartments and got the same in his own name; and Mr. Gautam who had applied for three apartments, got one in his him name, another in the name of his elder son, who is minor and another one in the name of his business firm; which will be used as a guest house for guests related to his business. Rest all had applied for a single apartment or villa. Due to nationwide lockdown, the majority of labour working at 'Nirmal Awas' being casual workers moved back to their villages. CDIL realised that it would be difficult to complete the project by December' 2020 (due-date committed for possession) and after some efforts and waiting for a couple of months, the company decided to transfer the project to Jignesh Shah Estate Developers (JSED), a renowned name for developing residential projects. The allottees of 93 apartments, including Mr. Nayak and Mr. Gautam, agreed for such transfer of the project because they already had put a huge sum for the apartments promised to them and hence the allottees of 93 apartments gave their consent by raise of hands to CDIL to transfer its rights and liabilities in Nirmal Awas to JSED. CDIL notified the said transfer to the relevant State Authority under RERA within 30 days of transferring the project. JSED is willing to re-allot the apartments after taking charge from CDIL and it also filed an application to the relevant State Authority under RERA for an extension of 3 months quoting such transfer of project as a major reason.

In order to fulfill social needs, Mr. and Mrs. Mishra joined the local resident club, which is in the form of association of persons. Individual members have contributed to the expenses of the club, and have voluntarily formed an executive committee for the management of the club of which Mr. Mishra is also a part. Such an association owns a resort where the club activities takes place, members can play tennis, swim or read books in the library at the resort. Occasional get-to-gathers and kitty parties are also hosted there by members after prior notice to the Principal Officer of the association who is also the General Secretary of the Executive Committee.

The initiating officer has reasons to believe based upon the evidence available to him that such a property is benami in nature and hence he issued a show-cause notice, served to Mr. Mishra, by post, at his current residential address in Budhni. Mr. Mishra thought, as he is a member of the association, perhaps that's why he got the notice. But another club member who retired from a PSU as a law officer, five years back, suggested that he needs to answer to the officer concerned that the notice is not served properly. He told him that in case of association of persons notice can be addressed and served to the Principal Officer only and that too as a 'dasti notice' as mentioned in Code of Civil Procedure, 1908.

As mentioned earlier that, TIL is planning to raise funds through ECB. TIL figures out that there will be two-three months gap between the flotation of money and packing the deal of acquiring the textile plant in London. Considering the transaction cost involved, TIL decided to park the funds for such time abroad only. TIL is considering various alternatives to park such funds. The Committee on Financial Matters asked Mr. Mishra to present his views on Central Banks' Guidelines.

The Authorised Dealer Category I bank, with whom TIL is maintaining an Exchange Earners' Foreign Currency Account (EEFC), has sought more information than in previous transactions i.e. when-so-ever export proceeds realisation takes place or export-related details and documents are furnished to them under Foreign Exchange Management (Export of Goods & Services) Regulations 2015. TIL finds the same bit irritating, in response to which banker explains to TIL; that they are bound to Enhance Due Diligence, in case of specified transactions.

One of the subsidiaries of TIL was pushed for the Corporate Insolvency Resolution Process by the financial creditors. The decision of the NCLT of admitting the application of financial creditors and appointing of the interim resolution professional was challenged on the grounds that the application of financial creditor under section 7 of IBC, 2016 was made after the expiry of the limitation period. The appellate authority (NCLAT) relying upon the credence that the provisions of the Limitation Act, 1963, is not applicable to the applications made under IBC, 2016, rejected the appeal that challenged the decision of NCLT of admitting the application. In the meantime, the interim resolution professional was appointed as resolution professional under section 22. But later, the committee of creditors found his performance not acceptable, and in one of its meetings passed a resolution with 73% of the voting share of the financial creditors to replace him with another insolvency professional whose consent was taken in writing prior to such meeting and a copy of the resolution along with the proposed name of the insolvency professional was furnished to NCLT.

MULTIPLE CHOICE QUESTIONS

1. Since the price of the apartment is based upon the carpet area, it becomes important to correctly measure the same. What shall be the carpet area of the 3 BHK apartment in Nirmal Awas?
   (a) 1164 Square feet
   (b) 1136 Square feet
   (c) 1100 Square feet
   (d) 1052 Square feet

2. With reference to the explanation given by the banker to TIL with respect to seeking more information, which of the following is not a specified transaction?
   (a) Any transaction in foreign exchange
   (b) Any transaction in any high-value imports or remittances
   (c) Any transaction in any high-value exports or remittances
   (d) Any transaction where there is a high risk or money-laundering or terrorist financing

3. What shall be the legal validity of the notice issued to Mr. Mishra by the Initiating Officer?
   (a) Valid, because Mr. Mishra is a member of the association, and notice can be served through the post
   (b) Valid, because Mr. Mishra is part of an executive committee and notice can be served through the post
   (c) Invalid, because Mr. Mishra is not a principal officer of the association
   (d) Invalid, because notice is served through the post to Mr. Mishra

4. Which amongst the following is not a valid alternative available with TIL to park the funds abroad?
   (a) Deposit the funds with a foreign bank rated not less than AA by S&P
   (b) Deposit the funds with a foreign bank rated not less than Aa3 by Moody
   (c) Deposit the funds with a foreign branch of an Indian bank abroad
   (d) Treasury bills of one-year maturity rated not less than A by Fitch

5. What shall be the validity of the decision taken by the committee of creditors to replace the resolution professional?
   (a) Valid
   (b) Invalid, because resolution professional once appointed under section 22 can't be replaced
   (c) Invalid, because resolution professional once appointed under section 22 can be replaced by the committee of creditors with 75% of the voting share.
   (d) Invalid, because resolution professional once appointed under section 22 can only be replaced by NCLT.

DESCRIPTIVE QUESTIONS

6. (a) Whether the transfer of rights and liabilities in the project 'Nirmal Awas' by CDIL to JSED is legally valid?

   (b) Whether JSED is allowed to re-allocate the allotments already done in the project 'Nirmal Awas' by CDIL?

   (c) Whether the application moved by JSED to seek an extension of time on the grounds of delay on account of transfer of project is maintainable?

7. (a) With reference to admissibly of application for ongoing CIRP in case of one of the subsidiaries of TIL, state your opinion on whether the credence of NCLAT is correct?

   (b) Will it make any difference if the application is moved by an Operational creditor?

Support your opinion with interpretation and application of the relevant provisions of law and legal precedence.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) 1100 Square feet

   Reason
   Section 2(k) of RERA provides the definition of Carpet Area. It means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.
   Calculation: 1200 Sq Ft - [3% of 1200 =36 External wall + 24 Sq Ft of Balcony + 40 Sq Ft of open terrace]
   =1200 - [36+24+40]
   =1200 - [100]
   =1100 Sq Ft.

2. (c) Any transaction in any high-value exports or remittances

   Reason
   The explanation attached to Section 12AA(4) of the PML Act provides the meaning of 'Specified transaction'. It states that 'Specified transaction' means-
   (a) any withdrawal or deposit in cash, exceeding such amount;
   (b) any transaction in foreign exchange, exceeding such amount;
   (c) any transaction in any high value imports or remittances;
   (d) such other transaction or class of transactions, in the interest of revenue or where there is a high risk or money-laundering or terrorist financing,
   as may be prescribed.
   Thus, as per the definition of 'specified transaction', among the four options given I the above MCQ, the options (c) which states that 'Any transaction in any high-value exports or remittances' do not come, since in the explanation the words used are 'any transaction in any high value imports or remittances'

3. (b) Valid, because Mr. Mishra is part of an executive committee and notice can be served through the post

   Reason
   Section 128(2)(a) of the Civil Procedure Code, 1908 (CPC) provides that in particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely:- (a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service.

   Further section 68 of the PML Act provides that no notice, summons, order, document or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of his Act shall be invalid, or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such notice, summons, order, document or other proceeding if such notice, summons, order, document or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.

   Since Mishra is part of the executive committee of such association, so notice can be served by post to him as per the provisions of CPC and PML.

4. (d) Treasury bills of one-year maturity rated not less than A by Fitch

Reason

The RBI has issued Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations, vide No. RBI/FED/2018-19/67 FED Master Direction No.5/2018-19, dated 26.03.2019 (updated as on 12.04.2021).

The para 4.1. of the aforesaid Master Direction provides as under:

Parking of ECB proceeds abroad: ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilisation. Till utilisation, these funds can be invested in following liquid assets

(a) deposits or Certificate of Deposit or other products offered by banks rated not less than AA (-) by Standard and Poor/Fitch IBCA or Aa3 by Moody's;
(b) Treasury bills and other monetary instruments of one-year maturity having minimum rating as indicated above and
(c) deposits with foreign branches/subsidiaries of Indian banks abroad.

Here, in the given options of the MCQ, the options (a), (b) and (c) are correct. As regards the option (d) is concerned, it is written as 'Treasury bills of one-year maturity rated not less than A by Fitch', while as para 4.1. (b) of the Master Direction the rating of the TB should not be less than the rating Fitch IBCA.

5. (a) Valid

Reason

Section 22(2) of the IBC provides that the committee of creditors (CoC), may, in the first meeting, by a majority vote of not less than sixty-six per cent. of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

In the given case the CoC in its meeting passed a resolution with 73% of the voting share to replace the existing IP to another IP. Hence the action of the CoC is valid.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

(a) No, the transfer of an interest in the project 'Nirmal Awas' by CDIL to JSED is not legally valid due to the following three reasons.

1. Consent of 2/3 allottees is not taken.
2. Consent given by allottees is not in writing.
3. Prior written approval from the state authority under RERA is not taken.

As per section 15(1) of Real Estate (Regulation and Development) Act 2016, the promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority.

It is also important to consider explanation to the said sub-section, which says that for the purpose of this sub-section, the allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

Explanation simply implies that Mr. Nayak and Mr. Gautam will be counted as 2 allottees rather than 5 in totality which makes the total allottees 137 in number. 2/3rd of 137 will be 91.33. Here 91.33 shall be considered as 92.

Note - here reasonable interpretation (of law) shall be constructed, 2/3 allottees shall be read as at least 2/3 allottees and shall be round-up.

Further consent by allottees of 93 apartments, including Mr. Nayak and Mr. Gautam, becomes the consent from only 90 allottees by the virtue of the explanation to section 15(1) as quoted above, and 90 is less than the required number i.e. 92. Moreover, the in the case study, no where it is mentioned that prior written approval of the State RERA Authority has been taken. Hence for these 3 reasons (as mentioned above) the transfer is not valid.

(b) JSED is not allowed to re-allocate the allotments for the project 'Nirmal Awas' because as per proviso to sub-section 1 to section 15 of the Real Estate (Regulation and Development) Act 2016. It provides that any such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

(c) The application moved by JSED to seek an extension of time on the grounds of delay on account of transfer of project is not maintainable as per the provisions of section 15(2) of the Real Estate (Regulation and Development) Act 2016. It provides that on the transfer or assignment being permitted by the allottees and the Authority under section 15(1), the intending promoter shall be required to comply with all the pending obligations under the provisions of this Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.

The proviso attached to section 15(2) further clarifies the position. It states that any transfer or assignment permitted under provisions of this section shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder.

Thus, Section 15 puts restrictions on the promoter from making any kind of amendment or alteration in any plans that have already been sanctioned.

Answer 7

(a) No, the credence of NCLAT (Appellate Authority) is not admissible, because as per section 238A[1] of Insolvency and Bankruptcy Code 2016 the provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.

[1] Section 238A is inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, (w.e.f. 06.06.2018).

Hence applications moved under sections 7 and 9 are time-bound and must be filed within the limitation period.

In the case of Dena Bank (Now Bank of Baroda) Vs. S.Shivakumar Reddy and Anr. [Civil Appeal No. 1650 of 2020 dated 4th August, 2021], the Supreme Court of India quoted that the insolvency Committee of the Ministry of Corporate Affairs, Government of India, in a report published in March 2018, stated that the intent of the IBC could not have been to give a new lease of life to debts which were already time barred. Thereafter Section 238A was incorporated in the IBC by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (Act 26 of 2018), with effect from 6th June 2018. [Para 97]

(b) In section 238A, the words 'proceedings or appeals before the Adjudicating Authority' is used, hence it does not make any difference for the applicability of the provisions of Limitation Act, 1963, in case the application is moved by the operational creditor under section 9. The answer will remain the same i.e. the credence of NCLAT (Appellate Authority) will still be not admissible.

In the case of Dena Bank (Now Bank of Baroda) Vs. S.Shivakumar Reddy and Anr. [Civil Appeal No. 1650 of 2020 dated 4th August, 2021], the Supreme Court of India stated that the right to initiate CIRP and a petition under section 7 or 9 (Section 9 deals with the CIRP by Operational Creditor) of the IBC is required to be filed within the period of limitation prescribed by law, which would be 3 years from the date of default by virtue of Section 238A of the IBC read with Article 137 to the Schedule to the Limitation Act, 1963, unlike delay in filing a suit. [Para 140]

Thus, the Apex Court in this case has already mentioned Section 7 or 9, hence there will not be any change in the answer and the law of limitation shall apply in initiation of CIRP either by financial creditor or operational creditor.

CASE STUDY 7

Dr. Mridula Maurya is a self-made business woman ranked amongst the top ten influential business leaders of the country as per the latest edition of a globally renowned business journal. Ms. Mridula is a CMD (Chairperson-cum-Managing Director) of 'Sanjivini Healthcare Limited (SHL)', a chain of multispecialty hospitals having presence in 45 metro and urban cities of India, covering more than 20 states. Dr. Mridula is a cardiologist with wide experience in interventional cardiology.

The management of SHL was considering in-organic means to diversify, through which they can also enhance their operational efficiency. After tones of discussion, deliberation, and consultancy, it was decided that SHL will acquire substantial control in 'Vigor Path Labs (VPL)', a chain of complete diagnostic centres and pathology labs in almost all the major cities of the country, including the cities where there are branches of SHL. VPL offers a broad range of tests on blood, urine, and other human body viscera. The use of VPL labs as in-house labs for testing will enhance the operational efficiency of SHL.

The proposed acquisition of control in VPL by SHL will result in creation of a combination under section 5 of the Competition Act, 2002, so notice was furnished to the Commission (CCI) for approval on 10th March 2020. The Commission was of the opinion that the combination has an adverse effect on competition but such adverse effect can be eliminated by suitable modifications to such combination, hence the Commission proposed appropriate modifications to the combination which were informed to SHL and VPL on 12th March 2020. SHL accepted some of the modifications suggested and for the remaining modifications, it submitted its suggestions/amendments back to the Commission on 25th March, 2020. Thereafter the Commission has neither issued directions nor passed any order approving/rejecting the combination.

A substantial share in VPL is owned by Mr. Raghuvir Rajput and his family. The family of Mr. Raghuvir is settled in London, his children and grandchildren are born and brought up there, even holding a British passport as they are British citizens. Mr. Raghuvir along with his brother-in-law, Mr. Nawal Kishore is running various businesses in India. Mr. Raghuvir commutes frequently between Britain and India.

First amongst these businesses is of pharmaceuticals named 'RN Pharma Lab Limited (RNPLL)' having two major departments API and CRAMS. The API unit of RNPLL imports a major amount of raw ingredients from China. RNPLL regularly clears the invoices within the stipulated credit period, which is usually lesser than the time limit prescribed by the Regulator. RNPLL also imported some of the materials from a supplier based in Vietnam for the very first time under a deferred payment arrangement of three and half years.

Due to delay in realisation of revenue, RNPLL was in financial distress, further lock-down due to COVID-19 hit the liquidity. Outstanding dues in respect of imports are nearly USD 2.4 million. RNPLL is seeking an extension for the period of import settlement from the authorised dealer with respect to one of its major import transactions (PO G-212) where the date of the invoice was 7th April 2020, the date of shipment was 10th April 2020, date of IGM and arrival at the port was 14th April 2020 and Bill of Entry was furnished on 15th April 2020. RNPLL is hopeful for immediate recovery as well as improvement in both top and bottom lines apart from its financial liquidity because the pharmacy business has a great opportunity to revive by developing a vaccine for COVID-19.

Another business is of real estate development named 'Fair Deal Developers and Realtors (FDDR)'. The major reason for venturing into such a real estate business is the operating experience of Mr. Nawal Kishore on the same. Mr. Nawal Kishore is basically a civil contractor who himself is a promoter of Consort Infra and Construction Limited (CICL). He knows the operational aspects well but is not equally good in the financial and legal aspects of the business. CICL got a government contract through a tender, upon which stay is imposed after agitation from farmers, whose lands were acquired for such contract. Around 20-22% of work is completed, but the invoice can only be raised after completion of first stage (i.e. 25% work), that's too after obtaining a certificate from a government engineer. Hence, the entire amount spent so far by CICL for 20-22% of construction work is blocked. Other projects of CICL are also impacted by shoot-up prices of construction materials and non-availability of labour at competitive prices which resulted in an overrun of budget. These factors resulted in failure to servicing of debts on time. Finally, CICL was pushed to Corporate Insolvency Resolution Plan (CIRP) due to occurring of default on 5th March 2020. The resolution process took more time than expected, hence an extension to the prescribed time limit was sought by the resolution professional based upon the resolution passed by the committee of creditors. The Adjudicating Authority granted an extension of further 75 days to the resolution professional to complete CIRP. Resolution professional again filed another application for granting an extension of further 80 days.

FDDR is developing its second housing project. Based upon its experience out of the first project, it decided to make certain changes in the building layout and specification, which were not originally in the sanctioned plan. Hence, permission from 78 out of 150 total allottees was taken in advance in writing approving the

changes. One amongst the 78 allottees, had got allotment of two apartments. A letter from the authorised architect with the recommendation of the changes has been obtained in advance. FDDR comes under the scanner of Initiating Authority in respect of one of its property which is alleged to be 'benami'. The Initiating Officer after recording the reasons in writing served a show-cause notice that 'why the property should not be treated as benami property', on the principal officer of FDDR. The initiating officer believes that he must conduct an investigation in order to fetch some conclusive pieces of evidence against FDDR regarding the benami nature of the property.

While traveling in India, unfortunately, the car of Mr. Raghuvir met a road accident; smashed into HMV. Highway patrol rush to the accident site took the injured to the nearby hospital, including Mr. Raghuvir; where he was declared as, brought dead, by doctors. Mr. Nishankh Rajput, son of Mr. Raghuvir Rajput came to India, along with other family members to perform his last rites. The rest of the family apart from Mr. Nishankh Rajput returned back to London. Mr. Nishankh Rajput stays in India to execute the testament of the will of his deceased father.

Mr. Nishankh Rajput who is the nominee to his deceased father in his bank account in India approached the bank for the closure of the account and withdrawal of the amount. Considering Mr. Nishankh Rajput is a beneficial owner, the bank asked him to verify his identity by showing Aadhaar card. Since Mr. Nishankh Rajput didn't have an Aadhaar card, hence he showed other proof of his identity. The banker showed sympathy with him but denied to provide any service until the Aadhaar card furnished as proof of identity.

MULTIPLE CHOICE QUESTIONS

1. Whether FDDR is legally authorised to make changes in building layout and specification?
   (a) Yes, FDDR is legally authorised to make any sort of changes, because it has obtained a letter from authorised architect with the recommendation of changes in advance.
   (b) Yes, FDDR is legally authorised to make any sort of changes, because it has obtained written consent from the majority of allottees in advance.
   (c) No, FDDR is not legally authorised to make any sort of changes, because once the plan is sanctioned, no changes in building layout and specification are allowed, unless the authority under RERA approves so.
   (d) No, FDDR is not legally authorised to make any sort of changes, because it has obtained written consent from less than 2/3rd of the allottees in advance.

2. On which date, the combination of SHL and VPL, shall be deemed to have been approved by the commission?
   (a) 6th October
   (b) 18th October
   (c) 20th October
   (d) 5th November

3. Whether the extension of the period of the resolution process can be granted again by the adjudicating authority on the subsequent application by the resolution professional?
   (a) Yes, for the entire 80 days.
   (b) Yes, but only for 75 days, because CIRP shall mandatorily be completed within a period of 330 days
   (c) Yes, but only for 15 days, because the aggregate of all extension periods granted can't be more than 90 days
   (d) No

4. Which of the following scope of actions can be undertaken by the initiating officer against FDDR under the Prohibition of Benami Property Transactions Act 1988?
   I Impound, II Investigation, III Provisional attachment, IV Attachment, V Confiscation
   (a) I, II, and III
   (b) I, II, and IV
   (c) I, III, and V
   (d) I, III, and IV

5. Which of the following options are correct with respect to importing by RNPLL from the Vietnam-based supplier under the deferred payment arrangement?
   I Such deferred payment arrangement will be treated as trade credit because its term is less than 5 yrs
   II Such deferred payment arrangement will be treated as normal borrowings, because of the duration of 3 and half years
   III Authorised dealer may give a guarantee in respect of deferred payment arrangement
   IV Authorised dealer can't give a guarantee in respect of deferred payment arrangement
   (a) I and III
   (b) I and IV
   (c) II and III
   (d) II and IV

DESCRIPTIVE QUESTIONS

6. With respect to imports made by RNPLL, please answer the following questions:-

(a) What is the time limit for settlement of import payments on account of normal imports from China?
(b) Can authorised dealer grant extension of the time period in case of settlement of import payment for PO G-212?
(c) If yes, specify the date till what extension can be granted by the authorised dealer; if no, who can grant so?

7. Whether the initiating officer is authorised to conduct an investigation on his own against FDDR? Does he require any approval for the same?

8. It is really appreciable that the banker showed sympathy with Mr. Nishankh but whether the banker is legally correct for denying to provide any service to Mr. Nishankh in absence of furnishing an Aadhaar Card as proof of identity?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) No, FDDR is not legally authorised to make any sort of changes, because it has obtained written consent from less than 2/3rd of the allottees in advance

Reason

Section 14(1) of the RERA provides that the proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

Section 14(2)(ii) provides that notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

In the given case, the FDDR has obtained permission from 78 out of 150 total allottees which is less than 2/3rd, hence FDDR is not legally authorized to make any structural changes.

2. (b) 18th October

Reason

Student must note, in the explanation to sub-section 11 to section 31 of the Competition Act, 2002, no-doubt word 30 working days are written, but the reasonable construction is required to understand the intention of the legislator. If the response by parties or commission is made in a period less than 30 working days; then such period shall be excluded rather entire 30 days given under respective sub-section (6 and 8).

3. (d) No

Reason

The proviso to section 12(3) of the IBC provides that any extension of the period of CIRP under this section shall not be granted more than once.
In the given case, the extension has already been granted, so no extension for the second time shall be given.

4. (a) I, II, and III

Reason

Section 23 of the Prevention of Benami Transaction Act, 1988 provides that the Initiating Officer, after obtaining prior approval of the Approving Authority, shall have power to conduct or cause to be conducted any inquiry or investigation in respect of any person, place, property, assets, documents, books of account or other documents, in respect of any other relevant matters under this Act.

Section 24(3) of the Act provides that where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as may be prescribed, for a period not exceeding ninety days from the last day of the month in which the notice under sub-section (1) is issued.

Thus, an Initiation Officer can do the (I) Impounding, (II) Investigation; and (III) Provisional Attachment of the property.

5. (a) I and III

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

(a) As per clause (i) to para B5.1 (section II) of Master Direction - Import of Goods and Services, RBI/FED/2016-17/12 dated 1st January 2016 (updated as on 07.12.2021), remittances against imports should be completed within six months from the date of shipment, except in cases where amounts are withheld towards the guarantee of performance, etc. Further, in view of the disruptions due to outbreak of COVID- 19 pandemic, with effect from May 22, 2020, the time period for completion of remittances against normal imports (except in cases where amounts are withheld towards guarantee of performance etc.) has been extended from six months to twelve months from the date of shipment for such imports made on or before July 31, 2020.

Hence, the time limit for settlement of import payments on account of normal imports made by RNPLL from China is 6 months respectively.1

1 However, as per RBI circular:- RBI/2019-20/242 (A.P. (DIR Series) Circular No.33) dated 22nd May, 2020, in view of the disruptions due to the outbreak of COVID- 19 pandemic, it has been decided to extend the time period for completion of remittances against such normal imports (except in cases where amounts are withheld towards the guarantee of performance etc.) from six months to twelve months from the date of shipment for such imports made on or before July 31, 2020.

(b) As per clause (i) to para B5.4 (section II) of Master Direction - Import of Goods and Services, RBI/FED/2016-17/12 dated 1st January 2016 (updated as on 07.12.2021), which reads as under:

AD Category - I banks can consider granting extension of time for settlement of import dues up to a period of six months at a time (maximum up to the period of three years) irrespective of the invoice value for delays on account of disputes about quantity or quality or non-fulfilment of terms of contract; financial difficulties and cases where importer has filed suit against the seller. In cases where sector specific guidelines have been issued by Reserve Bank of India for extension of time (i.e. rough, cut and polished diamonds), the same will be applicable.

(a) As per sub-clause (b) of clause (ii) to para B5.4 (section II) of Master Direction - Import of Goods and Services, RBI/FED/2016-17/12 dated 1st January 2016, which provides as under:

While granting extension of time, AD Category -I banks must ensure that:

a. The import transactions covered by the invoices are not under investigation by Directorate of Enforcement / Central Bureau of Investigation or other investigating agencies;

b. While considering extension beyond one year from the date of remittance, the total outstanding of the importer does not exceed USD one million or 10 per cent of the average import remittances during the preceding two financial years, whichever is lower; and

c. Where extension of time has been granted by the AD Category - I banks, the date up to which extension has been granted may be indicated in the 'Remarks' column.

In the case of RNPLL, outstanding dues against imports are nearly USD 2.4 million. Hence the authorise dealer category I bank can grant an extension up to a maximum of one year in case of PO G-212 from the date of shipment i.e. 9th April 2021 (one yr from 10th Apr, 2020). However, with reference to the concerned regional office of the Reserve Bank of India, a further extension can be granted.

Answer 7

As per section 23 of the Prevention of Benami Property Transactions Act, 1988, the Initiating Officer, after obtaining prior approval of the Approving Authority shall have the power to conduct or cause to be conducted any inquiry or investigation in respect of any person, place, property, assets, documents, books of account or other documents, in respect of any other relevant matters under this Act.

Explanation.-For the removal of doubts, it is hereby clarified that nothing contained in this section shall apply and shall be deemed to have ever applied where a notice under sub-section (1) of section 24 has been issued by the Initiating Officer.

Hence, the initiating officer is not authorised to conduct an investigation on his own.

He requires prior approval of the Approving Authority but as per the explanation added to section 23, it is hereby clarified that nothing contained in section 23 shall apply and shall be deemed to have ever applied where a notice under sub-section (1) of section 24 has been issued by the Initiating Officer.

In the present case, a show-cause notice that 'why the property should not be treated as benami property' under section 24 (1) is already served on the principal officer of FDDR. Hence, the investigation can't be conducted at all even with the prior approval of the Approving Authority.

Answer 8

Section 11A(1) of the PML provides that every Reporting Entity shall verify the identity of its clients and the beneficial owner, by-

(a) authentication under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016) if the reporting entity is a banking company; or
(b) offline verification under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016); or
(c) use of passport issued under section 4 of the Passports Act, 1967 (15 of 1967); or
(d) use of any other officially valid document or modes of identification as may be notified by the Central Government in this behalf:

As per section 11A(3) of the Prevention of Money Laundering Act 2002, the use of modes of the identification under sub-section (1) shall be a voluntary choice of every client or beneficial owner who is sought to be identified and no client or the beneficial owner shall be denied services for not having an Aadhaar number.

Hence, the banker is legally incorrect for denying to provide any service to Mr. Nishankh in absence of furnishing of Aadhaar card as proof of identity.

CASE STUDY 8

Mr. Pushpendra Meena is a popular name and face among the farmers of the region where he belongs. He is also a big name in the local politics and is considered as a farmers' leader as well. He usually raises his objections to government policies, which are detrimental to the interest of farmers. He is recently in the news because he is critically resisting the recently promulgated ordinances by the government with respect to farm, farmer and agriculture produce. These ordinances are a severe jolt for farmers and middle-class households of the country as per Mr. Meena. He also highlighted the remarks of the competition commission indicating the possible adverse effect on fair competition and unfair price which may prevail due to limit-less hoarding. Such remarks were part of the opinion furnished by the commission during the last week of August 2020 in response to the reference made to it during the 3rd week of July 2020 (the week when ordinances were promulgated). He alleged that the government is ignoring the opinion of the competition commission while enacting the legislation based upon these ordinances.

Mr. Ramesh Kataria is a renowned name in the business world, engaged in the businesses of agro-product, real-estate, and transport respectively. The agro-product business, Kataria Agro Limited (KAL) has a presence all across the globe. Considering the afore-mentioned ordinances, the management at KAL which largely rests in the hands of Mr. Kataria being the CMD (Chairman-cum-Managing Director), decided to acquire land for establishing large cold-storage facilities. Mr. Ramesh Kataria along with other designated officers of KAL, during the search of land for the cold storage facility, came across a piece of land which Mr. Ramesh Kataria found suitable for his farmhouse. Such land was owned by Mr. Noor Mohamad Khan. Another piece of land was selected for cold-storage facilities.

The piece of land which Mr. Kataria selected for his farmhouse was purchased for ₹ 4.12 crores in the name of his wife Mrs. Pushpa Kataria from Mr. Noor Mohamad Khan, out of the funds diverted from KAL. Through annual information return of high-value financial transactions, such a transaction of Mr. Kataria came into the knowledge of the Assistant Commissioner of Income Tax (ACIT) ranging in the jurisdiction in which Mr. and Mrs. Kataria fall into and he issued show-cause notices to both Mr. and Mrs. Kataria under 'the Prohibition of Benami Property Transaction Act 1988' respectively. Further, based upon the response submitted, ACIT issued another notice to him and Mrs. Kataria summoning them to appear at his office and he also compelled the production of books of accounts and records evidenced on an affidavit.

Just a week, prior to the issue of the aforementioned show-cause notices by the ACIT, the land that was purchased in the name of Mrs. Kataria was sold for ₹ 4.20 crores because Mr. Kataria was in immediate need of money to pump it into his transport business. Part of the consideration was paid by the buyer in cash. Out of the sale proceeds, ₹ 2 crores were injected into his transport business. The increase in the cost of operations has made the transport business unprofitable. The transport business failed to revive despite an injunction of ₹ 2 crores. After several occasions of defaults in payments and repayments to financial creditors, finally, the business collapsed. An application for a fast-track corporate insolvency resolution process was duly filed with the authority and a resolution professional was appointed for the same. The resolution professional finding it difficult to complete the resolution process within the prescribed time limit discusses the same with the creditors in the committee meeting due to which the committee instructed him to seek an extension from the adjudicating authority by way of passing of a resolution to give effect to the instruction with 68% voting share of the creditors who are also in majority in terms of numbers.

Out of the sale proceeds of ₹ 4.20 crores, an amount equivalent to USD 2,80,000 is remitted to Mr. Prince Kataria (son of Mr. and Mrs. Kataria) in foreign currency, who is going abroad for employment. Further, approximately an amount of ₹ 14 lakhs is kept in cash by Mrs. Kataria in her possession at home. Since in meantime, as they have received a show-cause notice from the ACIT; hence, in anticipation of the search they settled the cash by making advance payment of ₹ 12 lakhs in cash to Impax Elevators which is going to install the lift in their current house and remaining ₹ 2 lakhs were deposited in the bank account of their driver directly as an advance salary for 10 months.

Mr. Kataria was found to be indulged in some Hawala transactions, as per the reliable and conclusive pieces of evidence available with the Assistant Director, Mr. Kataria was part and party of a series of transactions that involved a significant amount of illicit money in foreign currency and he also assisted in its integration phase. The Assistant Director doesn't have any arrest warrant against Mr. Kataria, but in the belief that Mr. Kataria might become untraceable later on, he arrested Mr. Kataria on 21st September at 10.30 in the morning, and instead of taking him to the Judicial Magistrate, the Assistant Commissioner took Mr. Kataria to the special court on 22nd September at 4.15 PM, after traveling for 6 hours to the court.

Pushpa Builders and Infra Limited (PBIL) is a company promoted by Mr. Kataria in the early 2000s. Since then PBIL delivers many world-class residential housing projects. Currently, 3 projects are ongoing. One of

these is 'Green Valley Apartments' which was started around 10 years ago. 'Green Valley Apartments' are located in foothills and facing towards the lake, these features made it a big hit. The applications received for the apartments were three times more than its allotment capacity. The allottees of Green Valley Apartments were given apartments not under a transaction of 'sale', but under an 'agreement of lease' wherein the apartments were leased out to the allottees for a period of 499 years. Mr. Meena, also being one of the allottees paid consideration equal to 99.99% of the sale price of the apartment to get the lease, like the other allottees. It was also agreed that as per the terms of agreement of the lease, each year ₹ 12 will be paid to PBIL as a lease rental, which is obviously, a negligible amount.

As per the 'Agreement of Lease' executed between the allottees and PBIL, the project was to be completed and the possession of the apartments was to be handed over to the allottees within a period of 24 months from the date of the agreement. However, the same did not happen due to occurring of some legal issues as a result of action initiated by the national green tribunal on the basis of a complaint registered regarding the heights and dimensions of the approved project. Allottees held their nerves and waited for the dispute to get resolved because their financial interest in the project was huge as all the consideration was already paid. Finally, that issue was resolved and thereafter multiple rounds of communication from allottees took place, but largely they were unanswered. Around 6 years had passed since the date of the allotment when the Real Estate (Regulation and Development) Act 2016 (RERA) came into force. PBIL was also bound to register Green Valley Apartments as per the provisions of the RERA. Soon after PBIL registered the project with the state RERA authority, the allottees approached the 'Adjudicating Authority' with an application under section 18 of the RERA, 2016, for compensation along with interest for every month of the delay in handing over the possession of the apartments and also for various other reliefs. PBIL defends against the claim made by the allottees, by arguing that section 18 is applicable to 'promoter' and not 'lessor' and since the apartments in Green Valley Apartments are allotted in lease form, hence relief prescribed under RERA is not completely available to the allottees (lessees).

MULTIPLE CHOICE QUESTIONS

1. Whether arrest of Mr. Kataria by the Assistant Commissioner is legally valid?
   (a) The arrest is not valid because the assistant commissioner is not empowered to arrest without a warrant
   (b) The arrest is not valid because Mr. Kataria was taken to the special court rather than to the judicial magistrate
   (c) The arrest had a flaw i.e. failure to present the accused to the special court within 24 hours of the arrest.
   (d) The arrest is legally valid in all aspects.

2. Can the adjudicating authority grant extension to the resolution professional in the present case for the purpose of completion of fast track CIRP?
   (a) Yes, adjudicating authority is bound to grant an extension, if seek by resolution professional at his own
   (b) Yes, because the resolution professional is instructed to do so by the committee of creditors, with resolution supported by a majority number of creditors
   (c) Yes, because the resolution professional is instructed to do so by the committee of creditors, with resolution supported by creditors holding a voting share of more than sixty-six percent.
   (d) No, the extension cannot be granted.

3. Who can be considered as the beneficial owner with respect to the deposit made of ₹ 2 lakhs in the bank account of the driver directly as an advance salary for 10 months as per the provisions of the Prevention of Money Laundering Act, 2002?
   (a) KAL
   (b) Mr. Kataria
   (c) Mrs. Kataria
   (d) Driver

4. Who can be considered as the benamidar with respect to purchasing a piece of land for ₹ 4.12 crores from Mr. Noor Mohamad Khan, out of the funds diverted from KAL?
   (a) Mr. Kataria
   (b) Mrs. Kataria
   (c) Mr. Noor Mohamad Khan
   (d) KAL

5. With respect to the enactment of the legislation, based upon the promulgated ordinances by the government, what shall be the relevance of commissions' opinion on the same for the government?
   (a) It's the discretion of the government to make reference to the commission prior to making any law or policy on competition or any other matter
   (b) The commission in the present case fails to furnish its opinion in response to a reference made to it within the prescribed period and hence its opinion becomes time-barred and irrelevant

(c) Government, if in any case, makes a reference, then it is bound by the opinion furnished by the commission in that case.
(d) The Commission can furnish its opinion sou moto.

DESCRIPTIVE QUESTIONS

6. Mr. Kataria is having suspicions regarding the powers of the Assistant Commissioner of Income Tax (ACIT). Please elaborate the powers of ACIT to him and also determine whether the ACIT is authorised under the Prohibition of Benami Property Transactions Act, 1988, to;
   (a) Summon Mr. and Mrs. Kataria to appear in front of his office,
   (b) Compel to produce books of accounts, and
   (c) Receive and record evidence on affidavits.

7. Provide your opinion (must be supported by legal provision and precedence) on the following;
   (a) Determine the nature of the transaction with respect to the remittance to Mr. Prince Kataria in foreign currency that resulted in contravention under the provisions of the Foreign Exchange Management Act, 1999 and the regulations issued thereunder and also determine the amount involved in the contravention.
   (b) What will be the amount of maximum penalty that can be levied for contravention identified in part (a) above? Whether there is any minimum limit prescribed?
   (c) Whether the offence committed in part (a) above is compoundable in nature? If yes, please state the relevant authority, who is authorised to do so.

8. With respect to the argument advanced by PBIL to defend itself against the claim made by the allottees, answer the following questions (opinion must be supported by legal provision and precedence);
   (a) Whether an 'Agreement to Lease' with a structure in which a huge amount is charged upfront followed by negligible lease rentals for an exceptionally long lease period tantamount to 'sale'?
   (b) Whether the allottees in the present case can claim a remedy under section 18 of the RERA through the adjudicating authority?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) The arrest is legally valid in all aspects

Reason

Section 19 of the PML Act provides that If the Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession, reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

2. (c) Yes, because the resolution professional is instructed to do so by the committee of creditors, with resolution supported by creditors holding a voting share of more than sixty-six percent.

Reason

Section 56(2) of the IBC provides that (3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that fast track corporate insolvency resolution process cannot be completed within a period of ninety days, it may, by order, extend the duration of such process beyond the said period of ninety days by such further period, as it thinks fit, but not exceeding forty-five days:

Section 58 provides that the process for conducting a corporate insolvency resolution process under Chapter II shall apply to this Chapter IV.

Section 12(2) provides that the resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 66% of the voting shares.

In the given case the instruction with 68% of voting share of the creditor are given to the RP for getting extension from the NCLT, so the NCLT may consider the request for the extension.

3. (d) Driver

Reason

Section 2(1)(fa) of the PML Act defines 'Beneficial Owener" as “an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person”.
In the given the driver's account was credited, so he shall be treated as beneficial owner.

4. (b) Mrs. Kataria

Reason

Seciton 2(10) of the Prevention of Benami Transactions Act, 1988 provides the meaning of benamindar. It means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

In the given case, the property was purchased in the name of Mrs Kararia by her husband.

5. (a) It's the discretion of the government to make reference to the commission prior to making any law or policy on competition or any other matter

Reason

Section 49(1) of the Competition Act, 2002 provides that the Central Government may, in formulating a policy on competition (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.

Section 49(2) states that the opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government or the State Government, as the case may be] in formulating such policy.

From the language/ wordings of section 49(1) the word used is 'may' , so the Central / State Government may refer the CCI for its opinion, but it is not bound to make reference to the CCI.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

Section 19(1) of the Prohibition of Benami Property Transactions Act 1988 (PBPT Act), deals with the powers of authorities. It provides that the authorities shall, for the purposes of this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely;

(a) discovery and inspection;
(b) enforcing the attendance of any person, including any official of a banking company or a public financial institution or any other intermediary or reporting entity, and examining him on oath;
(c) compelling the production of books of account and other documents;
(d) issuing commissions;
(e) receiving evidence on affidavits; and
(f) Any other matter which may be prescribed.

Further, as per section 19(2) of the PBPT Act, all the persons summoned under subsection (1) shall be bound to attend in person or through authorised agents, as any authority under this Act may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.

Section 19(3) of the PBPT Act provides that every proceeding under sub-section (1) or (2) shall be deemed to be a judicial proceedings within the meaning of Section 193 & 228 of the Indian Penal Code, 1860.

Section 18(1) of PBPT Act provides the list of authorities, which are (a) the initiating Officer; (b) the Approving Authority; (c) the Administrator; and (d) the Adjudicating Authority.

As per section 2(19) of the PBPT Act, "Initiating Officer" means an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the Income-tax Act, 1961. Hence, ACIT is authorised to practice the powers vested under section 19(1) of the Prohibition of Benami Property Transaction Act 1988.

Hence, ACIT is authorised to issue summons to Mr. and Mrs. Kataria to appear in front of his office, compel to produce books of accounts, and receive/record evidence on affidavits respectively under the provisions of the Prohibition of Benami Property Transaction Act, 1988 as aforementioned.

Answer 7

(a) As per rule 5 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, read with Liberalized Remittance Scheme, for purpose of transactions mentioned in Schedule III, an individual can avail of foreign exchange facility within the limit of USD 250,000 only during a particular financial year. Any additional amount in excess of the said limit requires prior approval of RBI.

In the present case, remittance of an amount for the purpose of 'going abroad for employment' is a current account transaction mentioned as Item number 1(iii) to Schedule III of the aforementioned rules and hence the amount equivalent to USD 2,80,000 remitted to Mr. Prince Kataria in foreign currency resulted into contravention as the amount remitted is more than the maximum amount of remittance allowed during a particular financial year i.e. USD 2,50,000.

The amount involved in the contravention is USD 30,000 (i.e. USD 2,80,000 -USD 2,50,000).

(b) As per section 13(1) of the Foreign Exchange Management Act 1999, if any person contravenes any provision of this act, or contravenes any rule, regulation, notification, direction, or order issued in exercise of the powers under this act, or contravenes any condition subject to which authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable or where the amount is not quantifiable then penalty will be up to ₹ 2 lakhs.

Since the amount involved in the contravention is quantifiable i.e. USD 30,000, hence the maximum amount of penalty will be USD 90,000 (i.e. 3 times of USD 30,000). No, the minimum limit is not prescribed.

(c) As per section 15(1) of the Foreign Exchange Management Act 1999, any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days (180 days) from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

Hence, the offence committed above is compoundable in nature and the relevant authority for the same is the Director of Enforcement or officer authorised on this behalf by the Central Government.

Answer 8

(a) The facts of the present case are similar to the case decided by the Bombay High Court [in Civil Second Appeal (Stamp) No. 9717 of 2018, dated 7th August, 2018], 'Lavasa Corporation Ltd vs. Jitendra Jagdish Tulsiani'. Hence, in order to answer the question let us discuss first, what the court had observed and pronounced in the said case.

In this the as per the 'Agreements', the Respondents have booked the apartments on the basis of lease for the period of 999 years in the Township Scheme of the Appellant. They had paid most of the consideration amount, which is, approximately, to the extent of 80% of the sale price. They have also paid substantial amount towards the stamp-duty and the registration charges.

Appellant, however, on its appearance before the Adjudicating Authority, challenged the very applicability of the provisions of the RERA to the 'Agreements of Lease' entered into by the parties contending inter alia that, the Respondents are the 'Lessees', as the 'Agreements' entered into between the parties are clearly the 'Agreements of Lease' and not an 'Agreement of Sale'. Therefore, such 'Agreements of Lease' being specifically excluded from the ambit of the RERA, the Adjudicating Authority under the RERA has no jurisdiction to entertain the complaints.

It is submitted by him that, the parties had entered into the 'Agreements of Lease', knowing fully well that those were the 'Agreements' to book the apartment "on lease for 999 years" in the project of the Appellant. The definitions given in the 'Agreements of Lease' also clearly indicate and prove that it was purely a transaction of lease and not of sale. It is submitted that, the 'Agreements' nowhere use the terms 'sale', 'sale-consideration' or 'purchase price', but, the 'lease' and 'rent'. The term 'Rent' is defined to mean, 'the yearly rent amount payable by the customer to the Appellant-Lavasa, once the lease is actually granted in respect of the apartment'. As per Clause No.5.1 of the Lavasa.doc Agreement, the "Annual Lease Rent" is fixed at Rs.1/- only, for the said apartment. Clause No.7 defines the "Rent" as "yearly rent" of Rs.1/- for the lease of the said apartment'. Clause No.9.1 of the Agreement also states that, possession was to be given, subject to the Respondents making timely payment of the deposit amount against the "lease premium" installments for the ultimate "grant of lease" of the said apartment.

The Court held that Here the Hayden's Rule of Suppression of Mischief needs to be applied with full force and if that Rule is applied, then the provisions of the RERA are required to be held as equally applicable to the long term leases, like the present one of "999 years"; or, where the substantial amount of consideration is already obtained by the 'Developer'.

Merely because the Legislature has excluded the allotment, when it is given on rent, it does not exclude the long term lease like the present one. That will be defeating and frustrating the object of the Act and

hence, it has to be held that the Appellate Tribunal has rightly held that, so far as the present case is concerned, considering the long term lease of '999 years', it would definitely amount to sale.

Court held that the developer was also fully aware that the lease agreement for giving possession of the apartments to the purchaser for the lease period 999 years (at lease rental of Rs.1 per year) was in the nature of the sale. Therefore, the developer could not contend that the Adjudicating Authority established under the RERA had no jurisdiction to entertain the complaints filed by the purchaser under section 18. Thus, the Appellate Tribunal rightly held that the complaint under section 18 filed by the purchaser before the Adjudicating Authority was maintainable and the Adjudicating Authority was having the jurisdiction to entertain and decide the complaints.

(b) Section 18(1) of the RERA provides that If the promoter fails to complete or is unable to give possession of an apartment, plot or building,-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

Hence, in the present case, 'Agreement to Lease', with a structure wherein the apartments are leased out to the allottees for a period of 499 years who have already paid consideration equal to 99.99% of the sale price of the apartment to get it on lease and have also agreed to pay ₹ 12/- each year to PBIL as lease rentals, signed between PBIL and allottees tantamount to sale as the facts of the present case are similar to the case law as discussed above.

The project Green Valley Apartments is also registered under RERA and hence, the allottees are eligible to claim a remedy under section 18 of the RERA, 2016, through the adjudicating authority as considering the substance of the structure of the 'Agreement to Lease', it is a sale transaction and not a lease transaction.

CASE STUDY 9

Mr. Amanat Ali is an information technology professional and currently residing in Mumbai. He first came to Mumbai around 25 years back to join 'Terabyte Consultancy Limited (TCL)', as an Assistant Manager - Business Development. At that time, TCL was in its early years of operations, but over the period of time, it expanded its product/service range and market reach apart from a significant improvement in customer response time through the introduction of innovative techniques. TCL's ethical work culture and employee-friendly policies allowed it to retain employees for a longer duration. Mr. Ali is still serving TCL as a Vice President -Branding & Innovation. TCL is famous for its office utility software, which is also in high demand abroad. Around 40% of the top-line is contributed by export. TCL exported one of its software, which was transmitted over the electronic media on 30th June 2020, for which the invoice was generated and issued on 25th June 2020.

Mr. Ali and his team developed software, a couple of years back, which was capable to act as a testing portal to conduct online exams. The software with the help of artificial intelligence automatically generated pop-up at the screen of candidates' device that he/she is not viewing towards the camera and a similar pop-up also gets generated at the screen of the invigilator (who invigilate digitally from the control room, through the camera of candidates' device and control of screen). In this manner software actually reduced the scope of using unfair means to a large extent during the online exam, even for candidates appearing in online exams from remote locations. The said software passed the QC test and performance during dry-run at Quick-fix, was found acceptable and was finally launched. This was the first time TCL has developed any testing software.

Mr. Murthy, Vice President-Strategy & Marketing at TCL, appreciated the usage of the software in the lights of the changing scenario in the education sector, considering the need for such testing software in the times of digital education. But he also witnessed the presence of many active players in the market who were (at then) already rendering service of conducting the online exam for testing agencies either at their own location (test centres) or remote location; hence, it was not easy for TCL to penetrate in the market and capture reasonable share.

TCL entered a 'usage-based fee agreement' with the leading colleges in different cities to use their respective computer lab facilities. In this manner, TCL also got equipped with testing centres in different cities. Against the competitors, they had the leverage of AI-equipped testing software. TCL, against the prevailing market prices of ₹ 600/- and ₹ 320/- per candidate for the conduct of online tests at the centre and remote respectively, offered and charged the price of ₹ 500/- and ₹ 250/- respectively. Since TCL has its own server and other IT facilities including human resources, hence after covering the directly attributable and overhead (for shared services) costs, it earns tiny profits too, which are substantially lesser than the TCL's average rate of earning. After 2 years of the grand success of testing software in the market, TCL market share reached 54% in the online testing segment. Many small and immature players had to quit during this period. Only those who reduced their prices (and were able to cover their operating costs with such reduced prices) were able to survive.

Current VP-Marketing of TCL decided to shoot up prices to ₹ 580/- and ₹ 300/- per candidate for online tests at the centre and remote respectively. TCL successfully managed to retain a 47% market share. The loss of market share was compensated by high profits due to enhanced prices, hence the bottom line improved a bit.

Mr. Liaquat Ali, the younger son of Mr. Amanat Ali, who holds an Indian passport moved abroad for higher studies and research in the field of building things (generally materials and devices) on the scale of atoms and molecules (nano-technology) and molecular biology. After completing his studies, he was offered a role as a teaching assistant at the prestigious University of Cambridge, which he gratefully accepted. There he met Ms. Nusrat, a research scholar in data science who is a British resident. Both got married to each other during the calendar year that just ended.

The family of Mr. Liaquat basically belongs to Hyderabad. Despite the fact, Ms. Nusrat never has been to India, she was tempted by the Indian culture and traditions and wanted to settle in India. Mr. Liaquat purchased an apartment in Hyderabad in the joint name of himself and his Khatoon-E-Khanah (wife), after around six months of their marriage. The payment was made through a debit entry to a non-resident account maintained by Mr. Liaquat. This apartment is their first owned immovable property.

The apartment is in Deccan Residency Towers - II, which is currently under construction. Deccan Residency Towers are promoted and developed by Deccan Real Estate and Infra Limited (DREIL). DREIL decided to develop the Deccan Residency Towers in 3 separate phases. DREIL registered the project with State RERA Authority while planning for Deccan Residency Towers - I (which is currently on the verge of completion).

The MD at DREIL is very enthusiastic about branding and digital marketing. He is of the opinion that DREIL is eligible to advertise and accept the applications for allotment of flats and apartments at Deccan Residency Towers - II either themselves or through real estate agents, without fresh registration, hence started marketing in full swing. Mr. Liaquat booked an apartment through Mr. Miraj who is a registered real estate agent under RERA and he charged a lump-sum amount as the commission which is equal to 1.25% of the cost of the apartment.

The payments which DREIL received from allottees against the flats and apartments at Deccan Residency Towers - I was kept in a separate bank account with a scheduled bank, to the extent of 85% only (because due to recent lock-down, the remaining amount is used by DREIL to meet general expenditure) and as such the deposited amount was gradually used to meet the construction cost and cover the land cost of Deccan Residency Towers - I.

Ms. Saba, who is the daughter of Mr. Amanat Ali, is working as a medical professional in AIIMS Rishikesh. Mr. Amanat Ali visited her daughter on her birthday and finds the PG house where her daughter is staying is not fully equipped. Considering an investment perspective (including the price of resale) and the comfort for her daughter, he bought the studio apartment by making payment of ₹ 19.99 lakhs, registered in the name of Ms. Saba. The price of the apartment is equal to the fair market value. Mr. Amanat Ali purchased another house in Hyderabad in the name of his mother because after retirement he also wishes to settle in Hyderabad. This house is within walking distance from Deccan Residency Towers - II. The deal of the house was negotiated for ₹ 1.25 crores, due to mild recession whereas the fair market value of such house is ₹ 1.40 crores on the date of registration, but now the same has fallen to ₹ 1.30 crores.

MULTIPLE CHOICE QUESTIONS

1. With respect to the payments received from allottees against flats and apartments at Deccan Residency Towers - I, DREIL is -
   (a) Guilty, because the separate account shall be maintained with a commercial bank
   (b) Guilty, because less than 90% amount is deposited to such separate account
   (c) Guilty, because the amount so deposited in a separate account is also used to cover land cost
   (d) Not guilty

2. The real estate agent, Mr. Miraj, is -
   (a) Guilty, because he facilitated the sale of an apartment in a non-registered project
   (b) Guilty, because the commission charged by him is more than 1% of the cost of the apartment.
   (c) Not Guilty, because he is registered under RERA
   (d) Not Guilty, because he facilitated the sale of an apartment in a registered project

3. Whether the price of ₹ 500/- and ₹ 250/- respectively charged by TCL can be considered as a predatory price?
   (a) Yes, because these are lower than the prevailing market price
   (b) Yes, because these are lower in comparison to prices it started charging two years later
   (c) Yes, because these contribute tiny profits which are lesser than the average rate of return of TCL
   (d) No, because these are more than the costs

4. Whether the immovable property acquired by Mr. Liaquat Ali, in the joint name of himself and his wife is valid?
   (a) The acquisition is valid because payment is made through a debit entry to a non-resident account maintained by Mr. Liaquat.
   (b) The acquisition is valid because the property is acquired jointly
   (c) The acquisition is valid because it's the single immovable property they own
   (d) The acquisition is invalid

5. By which date TCL must realise the full export value of software and repatriate same to India with respect to the export of software that was transmitted over the electronic media?
   (a) 25th March 2021
   (b) 30th March 2021
   (c) 25th September 2021
   (d) 30th September 2021

DESCRIPTIVE QUESTIONS

6. (a) Which amongst the following persons, is a benamidar:-

   (i) Ms. Saba (ii) Mr. Amanat Ali (iii)Mother of Mr. Amanat Ali

   (b) If anyone amongst the aforementioned persons is a benamidar, then what shall be the quantum of penalty leviable and upon whom it shall be levied?

7. (a) Whether TCL holds a dominant position in the relevant market of online testing?

   (b) If yes, does it amount to abuse of dominant position?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Not guilty

   Reason
   As the promoter has complied with the requirement of RERA in the matter of Tower-I viz: maintaining of separate account in a schedule bank (as per section 4(2)(l)(D), keeping the 85% amount received form the allottees. So he is not guilty in the matter of Tower-I.

2. (a) Guilty, because he facilitated the sale of an apartment in a non-registered project

   Reason
   Since the promoter has not got registration of for Tower-II and the agent was doing marketing of the flats of the Tower-II (Section 3 read with section 9), so the agent is guilty.

3. (d) No, because these are more than the costs

   Reason
   Explanation (b) to section 4(2) defines the meaning of 'predatory price' which means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

   In the given case the company has not kept the prices below the cost, but it was earning profits due to having its own server and other IT facilities including human resource, even by keeping the prices below the identical products available in the market, so it can not be said that it was involved in abusing its dominant position.

4. (a) The acquisition is valid because payment is made through a debit entry to a non-resident account maintained by Mr. Liaquat

   Reason
   In the given case Liaquat Ali has purchased the flat by paying the amount from his non-resident account. It is presumed that the funds lying in his non-resident account are from his known source of income. The property has been purchased in the name of himself and his wife. Further in terms of Section 2(9)(A)(b)(iii) of the Prevention of Benami Transaction Act, 1988 the purchase of property in the name of the spouse is permitted.

5. (c) 25th September 2021

   Reason
   In terms of RBI Circular - vide RBI/2019-20/206 (A. P. (DIR Series) Circular No. 27) dated 1st April 2020, It was been decided, in consultation with the Government of India, to increase the present period of realization and repatriation to India of the amount representing the full export value of goods or software or services exported, from nine months to fifteen months from the date of export, for the exports made up to or on July 31, 2020; on account of representations from exporters and trade bodies, in view of the outbreak of pandemic COVID- 19.

   In normal (other) cases it's 9 months that will ends on 25th March 2021.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

(a) Sub-section (9) to Section 2 of the Prohibition of Benami Property Transactions Act, 1988, is required to be considered here along with sub-section (8) and subsection (10) of the said section.

Benamindar: As per Sub-section 10, benamidar means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

Benami Property: As per sub-section 8, benami property means any property which is the subject matter of a benami transaction and also includes the proceeds from such property.

Benami Transaction: As per section 2(9)(A)(b)(iii), property registered in name of the child of an individual will not be considered as a benami transaction, where the consideration for such property has been paid out of the known sources of the individual.

As per section 2(9)(A)(b)(iv), property registered in the joint name of an individual and his brother or sister or lineal ascendant or descendant will not be considered as a benami transaction, where the consideration for such property has been paid out of the known sources of the individual.

Hence, in the present case;

Ms. Saba is not a benamidar by virtue of section 2(9)(A)(b)(iii), read with clause (8) and clause (10) respectively.

Mr. Amanat Ali is not a benamidar as per clause (10) itself.

But, the mother of Mr. Amanat Ali is a benamidar in the present case, by virtue of section 2(9)(A)(b)(iv), read with clause (8) and clause (10) respectively as acquiring property in the sole name of the mother is not covered the exceptions, it should have been acquired jointly in the name of Mr. Amanat and his mother.

(b) As per sub-section 1 to section 53 of the said act, where any person enters into a benami transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, the beneficial owner, benamidar and any other person who abets or induces any person to enter into the benami transaction, shall be guilty of the offence of benami transaction.

Further sub-section 2 provides, whoever is found guilty of the offence of benami transaction shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five per cent of the fair market value of the property.

As per section 2(16) of the said act, "fair market value", in relation to a property, means the price that the property would ordinarily fetch on sale in the open market on the date of the transaction.

As per section 2(12) of the said act, "beneficial owner" means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar. Here, Mr. Amanat will be considered as the beneficial owner as for his benefit the property is held by his mother as a benamidar.

Hence, the penalty shall be leviable upon Mr. Amanat, being the beneficial owner and his mother, being the benamidar and the quantum of penalty leviable shall be rigorous imprisonment varying from one year to seven years, and a fine which may extend up to ₹ 35 lakhs (i.e. 25% of ₹ 1.40 crores).

Answer 7

(a) As per explanation (a) to section 4 of the Competition Act 2002, "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.

TCL didn't enjoy dominance when it came up initially with the testing software, but over the period of two years, TCL truly acquired the dominant position. Quite a large share i.e. 54% of the segment of the market, is a clear indicator of their dominance in the relevant market online testing. In the journey of being zero to acquiring 54% market share, TCL has affected the competitors particularly, those who are small and in early years of operation, who can't sustain the heat of low price competition. TCL has captured the market by its own penetration strategy, independent of market forces. Here, it is to be mention that maintaining of the dominant position in the relevant market is not prohibited, but **abuse of the dominant position in the relevant market is prohibited.**

(b) Further, Section 4(2)(a)(ii) says, there shall be an abuse of dominant position under sub-section (1) of section 4, if an enterprise or a group directly or indirectly, impose unfair or discriminatory prices in purchase or sale.

TCL increased the prices to ₹ 580/- and ₹ 300/- per candidate for online test at the centre and remote respectively. Even then, TCL successfully managed to retain 47% of the market share (reduced from 54%). The loss of market share was compensated by high profits due to enhanced prices, hence the bottom line improved a bit. However, one of the reasons that TCL was able to substantially retain its existing market share is the fact that it offers better technology i.e. Software that is AI-equipped, that gives its additional competitive advantage and leverage over others and such better technology can be considered as a justifiable reason for such increase in prices which have also not crossed the market prices that prevailed when TCL had entered the market of online testing.

According, **it does not amount to an abuse of the dominant position.**

CASE STUDY 10

Mr. Darshan Lal Syal is a famous name in the business world. He is a self-made business icon, who is leading a multi-billion $ diverse business empire. Mr. Darshan came to India at the time of independence (after partition) during his teenage along with other family members. The father of Mr. Darshan was a professor of Gyani (post-graduation in Punjabi language and literature) at Punjab University, Lahore; but he belongs to a family of farmers and owns a good amount of land there. His father continued teaching at Punjab University even after they migrated to India, initially at the Hoshiarpur campus then at Chandigarh. Since the Syal family was evacuated from their ancient house in West Punjab, hence they got a piece of agricultural land in compensation under the Displaced Persons (Compensation and Rehabilitation) Act, 1954, here in east Punjab in the name of his father. Such a piece of agricultural land was inherited by Mr. Darshan and his younger brother Mr. Manohar in equal portion as per the testaments of their father.

Mr. Darshan after completing his engineering from Punjab Engineering College, Chandigarh joined a hand tool company as a junior engineer, which manufactures tools for bicycles. After working there for a few years, he decided to start his own business. He applied for CLU (conversion of land use) and mortgaged 1/4th of his portion of land and raised money to establish bicycle manufacturing units on another quarter portion. His business was a great hit. A decade later, when India was opening itself to technological advancements, his business entered into a strategic tie-up with a foreign automobile company to start manufacturing scooters and bikes under the brand name 'Biro'. Biro Cycles Limited (BCL) and Biro Motors Limited (BML) both got listed in meantime.

A few years afterward, when India witnessed a sharp increase in urban population due to migrations from rural areas, Mr. Darshan with a vision of affordable housing for all, started a project in his mother's name 'Asha Housing' on the remaining half portion of the land inherited by him. For this purpose, he formed a company engaged in civil construction, 'Asha Builders and Developers Limited (ABDL)'. The project was a big hit and Mr. Darshan was awarded emerging business leader of the year by the trade union and bodies of national importance.

More than 2 decades have been passed, Mr. Darshan and his companies are bestowed with many awards and certifications. A few years back, Mr. Darshan handed over the management of BML to his daughter Mridula and his son Ayan was appointed as CMD of ABDL. Mr. Darshan was still part of the board as a non-executive director in both companies.

Whereas BCL was sold under MBO (management buy-out). A few years later BCL, diversified its operation and entered in manufacturing of assembly lines for companies engaged in the manufacturing of a variety of gym equipment. But the consortium of business managers, who acquired BCL failed to manage its operations and finally, BCL went into the corporate insolvency resolution process (CIRP). The business was restructured as per the resolution plan and the process was completed during the recent quarter of the current fiscal year. One of the gym equipment manufacturers owed ₹ 32 lakhs of operational debts to BCL. Such debt was overdue for quite a long period. BCL sent a demand notice to such an equipment manufacturer, which was not responded to at all.

Mr. Manohar moved to the United States after studying medicines, for employment. He married Jenny there and settled in LA, (in the USA) with his family. They hold US nationality and passports. His grand-son Jai got married to Ms. Natasha who was born and brought up in India. Ms. Natasha is the grand-daughter of a childhood friend of Mr. Darshan. The marriage took place in India in August 2019. Thereafter, the entire family of Manohar moved back to the US along with Ms. Natasha. Ms. Natasha, an India Citizen completed her Master's from US, where she had met Mr. Jai.

Ms. Vanya (sister of Jai) stayed back in India for her first project from the UN to study medical facilities in South Asia. Project completed in March 2020. But then lockdown was announced and she got stuck in India. Ms. Vanya stayed with the family of Mr. Darshan during this period. Ms. Vanya was also a student of medicine and was conducting research on medical facilities and alternate medications. She finds the subject of 'Ayurveda' more than a world. Hence, to explore the same she took admission to 3 years degree program of Ayurveda in India during September 2020, after completion of which she will left for the USA. During the financial year 2019-20, Ms. Vanya stayed in India for 234 days.

In September 2020, Ms. Natasha acquired a flat in the joint name of her-self and Jai in India, so that Vanya can stay there. Half of the consideration was paid by Ms. Natasha out of the Non-Resident Account maintained by her, and the remaining half was paid by Jai, directly in Indian currency through his contacts in India. Mr. Manohar wished to sell his share of agricultural land situated in India to Mr. Raj, an Indian Resident, and repatriated the sale proceeds, outside India, so that he can buy a separate house for Jai and Natasha in a suburb of LA.

Mr. Darshan while choosing among the various pieces of land for the next project of ABDL, came across a plot, the location which is best suited for a farmhouse. Mr. Darshan, out of his savings purchased the plot for ₹ 2.25 crores, and the same was registered in name of his daughter-in-law (wife of Mr. Ayan). But due to no consensus among family members, the plot was sold for ₹ 2.60 crores. ₹ 2.25 crores were deposited and held in the account of Mr. Darshan and the remaining ₹ 35 lakhs were deposited and held in the account of the wife of Mr. Darshan.

ABDL started another project recently, 'Gyan Vihar Residency (GVR)'. The project was duly registered with the state RERA authority. Guru-Kripa Property Linkers and Satya Sai Real Estate Agents were appointed as real estate agents for GVR. Guru-Kripa Property Linkers (GKPL) applied for registration under section 9 of the RERA, 2016, on 21st September 2020. On 29th September 2020, GKPL facilitates the sale of the first flat; another on 10th October 2020. On 12th October 2020, GKPL was informed about the deficiencies in the application by the State RERA Authority. In case, if GKPL failed to provide a reasonable explanation to the points highlighted by the Authority on the day (14th October) of the opportunity of being heard, their application supposed to be rejected. On 15th October, the Authority granted single registration to GKPL w.e.f 12th October 2020. The cost of a unit in GVR is ₹ 65 lakhs.

Allottees made payments of upfront fees and thereafter through various installments as per the terms mentioned in the agreement to sell, but ABDL failed to carry the construction at the pace promised and kept on delaying the delivery of flats and apartments. Such delays are against the reputation of ABDL because up till now it had been able to deliver all the projects on time. Allottees waited for weeks, then months, and now years have passed from the promised day of delivery. Allottees formed a registered association themselves and it immediately moved to NCLT rather than RERA seeking their money back from ABDL along with interest and also the closure of the company. Mr. Ayan is least bothered with the act of allottees association because he rests assured that NCLT is not going to entertain their application, But NCLT consented to the initiation of the Corporate Insolvency Resolution Process against ABDL. However, NCLT in its order didn't award interest to allottees. Association of allottees filed an application under section 18 of RERA, to which ABDL opposed and Mr. Ayan said it will be unjust and not incapacity of allottees to take action under two legislations simultaneously.

The problems of the Syal family started mounting because CCI in one of its orders imposed a penalty of 3% of the average turnover of the last three preceding financial years to BML.

Ms. Mridula was informed by the legal team of BML, that someone had furnished a complaint to CCI that an automobile company (other than BML) is not selling spare parts of its auto-product (vehicles) in the open market, causing a denial of market access for independent mechanicals and repairers apart from charging high prices at its own service station. While disposing of the complaint, CCI conducted an inquiry against 7 other auto-mobile companies apart from the company against whom the complaint was originally made. Unfortunately, BML was one among such 7 companies and it was discovered by the commission that BML also sells spare parts at its own service station only, which is anti-competitive. Ms. Mridula feels that CCI is not authorized to impose a penalty like a tribunal and extending the scope by conducting inquiry is also not allowed to CCI and hence she is consulting the legal team to decide how they shall proceed and what the legal remedy available is.

MULTIPLE CHOICE QUESTIONS

1. With respect to the purchase and sale of the plot which was meant for a farmhouse by Mr. Darshan, who would be considered as a 'benamidar'?
   (a) No one is benamidar
   (b) Daughter-in-law of Mr. Darshan
   (c) Wife of Mr. Darshan
   (d) Both Daughter-in-law and Wife of Mr. Darshan

2. Whether BCL can apply for initiation of corporate insolvency resolution plan against the specified gym equipment manufacturer?
   (a) No, the corporate debtor who underwent CIRP itself, can't apply for initiation of CIRP against other corporate debtors.
   (b) No, because the requisite years have not been elapsed yet, from the conclusion of its own CIRP
   (c) No, because the claim is not yet denied by the specified gym equipment manufacturer
   (d) Yes, BCL can apply for initiation of CIRP against the specified gym equipment manufacturer

3. Under FEMA, 1999, Ms. Vanya for the financial year 2020-21 will be considered as a:
   (a) Person Resident in India
   (b) Person Resident outside India
   (c) Non-Resident in India
   (d) Person of Indian origin

4. With respect to the project GVR, GKPL is considered to be -
   (a) Guilty, liable for a penalty equal to ₹ 1,30,000
   (b) Guilty, liable for a penalty equal to ₹ 1,60,000
   (c) Guilty, liable for a penalty equal to ₹ 3,25,000
   (d) Not Guilty, not liable for any penalty

5. Identify which of the following reasons make the acquisition of the flat in India by Ms. Natasha in her and Jai's joint name, invalid:-
   I Invalid because neither of the owners of the property is resident in India
   II Invalid because two years have not been elapsed since the marriage of her and Jai
   III Invalid because part of the consideration was paid by Jai in Indian currency

   (a) Only i and ii
   (b) Only ii and iii
   (c) Only i and iii
   (d) All i, ii, and iii

DESCRIPTIVE QUESTIONS

6. In the lights of the applicable provisions of relevant law and precedence (if any) decide the validity of the credence held by Ms. Mridula and scope/powers of CCI;

   (a) CCI in its order imposed a penalty of 3% of the average turnover of the last three preceding financial years to BML. Whether the quantum of penalty levied is within the preview of CCI?

   (b) Whether CCI is authorised to play the role of administrator and judicial tribunal simultaneously or is it a full-time Adjudicating Authority?

   (c) CCI conducted an inquiry against 7 other auto-mobile companies apart from the company against whom the complaint was made. Whether CCI is authorized to expand the scope of its inquiry?

   (d) If BML denies/doesn't obey the order of CCI, which imposes a monetary penalty, then what action CCI can take to ensure proper execution of the order passed and recovery of the penalty?

7. Considering the validity of both the application moved by the association of allottees of GVR, in light of applicable provisions of relevant law and precedence (if any), you are required to decide;

   (a) Whether the advance payment made against the allotment to be made to the allottees can be regarded as 'financial lending'? How advance given by homebuyers against the allotment is distinct from the debt of the operation creditor? State the points of differences on the basis of decided case law.

   (b) Whether the making of the application for claiming relief under section 18 of RERA, 2016, is allowed to the association of allottees as an additional remedy, especially after action under IBC?

8. Mr. Manohar wishes to sell his share of agricultural land situated in India, to repatriate the sale proceeds, outside India, so that he can buy a separate house for Jai and Natasha in a suburb of LA. Advice, whether Mr. Manohar can do?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Both Daughter-in-law and Wife of Mr. Darshan

   Reason
   In terms of Section 2(10) of the Prohibition of Benami Transaction Act, 1988, "benamidar" means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

   Thus, according to the above definition of benamidar, the daughter-in-law and the wirfe of Mr Darshan shall be treated as benamidar.

2. (d) Yes, BCL can apply for initiation of CIRP against the specified gym equipment manufacturer.

   Reason
   Here the BCL is the operational creditor since he has supplied the good to the Gym Manufacturers. Hence the BCL being an operational creditor can initiate CIRP as prescribed under section 9 of the IBC.

3. (b) Person Resident outside India

   Reason
   Section 2(w) of the FEMA provides that "person resident outside India" means a person who is not resident in India.

Section 2(v) provides that "person resident in India" means-

(i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include-
  (A) a person who has gone out of India or who stays outside India, in either case-
    (a) for or on taking up employment outside India, or
    (b) for carrying on outside India a business or vocation outside India, or
    (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

  (B) a person who has come to or stays in India, in either case, otherwise than-
    (a) for or on taking up employment in India, or
    (b) for carrying on in India a business or vocation in India, or
    (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

In the given case, Ms. Vanya took admission in a college in Sept 2020 and after completion of this 3 year degree college she will leave India. During the Financial Year 2019-20, she stayed in India for 234 days. So, for FY 2020-21 she will remain in India for whole of the year since she is studying here. However her period of stay in India is certain i.e. after completion of her 3 years degree, she will leave India. Hence as per section 2(v)(B) none of the points (a) or (b) or (c) is fulfilled. Hence she cannot be treated as ' person resident in India', hence she will be treated as person out of India.

4. (a) Guilty, liable for a penalty equal to ₹1,30,000

Reason

Section 62 of the RERA provides that if any real estate agent fails to comply with or contravenes the provisions of section 9 or section 10, he shall be liable to a penalty of 10000 rupees for every day during which such default continues, which may cumulatively extend upto 5% of the cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority.

In the given case, GKPL sold first flat on 29.09.2020 i.e. without obtaining the registration as Real Estate Agent with the State RERA. On 12.10.2020 the State RERA informed about the rejection of application subject to give reasonable explanation. **On 15.10.2020 the State RERA granted single registration w.e.f 12.10.2020.**

So, the default period runs from 29.09.2020 to 11.10.2020 i.e. 13 days. Peanlty for ₹ 10000 every for 13 days, works out to Rs 130000/-.

5. (b) Only ii and iii

Reason

Firstly, in the given, case Natasha is a Indian Citizen, while Jai is US citizen. The half of the purchase price was paid Natasha form Non-resident Account.

However, the remaining half of the purchase price was paid by Jai in Indian Currency through his contracts in India, meaning thereby the it was not from the proper banking channel and sources of funding was not disclosed. Hence there is violation of Provision (i) of Regulation 6 of FEM Acquisition and Transfer of Immovable Property in India) Regulations, 2018.

Secondly, from the facts given in the case, the registration of marriage of Natasha and Jai is not mentioned. Further the two years have not been elapsed of their marriage, immediately preceding the acquisition of such property. Hence there is violation of Provision (iii) of Regulation 6 of FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

(a) As per section 27(b) of the Competition Act 2002, where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass orders, to impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises, which are parties to such agreements.

Hence, imposing the penalty equal to 3% of the average turnover of the last three preceding financial years to BML is within the preview of CCI.

(b) In the Civil Writ Petition Number 11467/2018 by Mahindra Electric Mobility Limited & Ors. against CCI & Another, the Delhi HC on 10.04.2019 at para 85 of its order, held that CCI does not perform only or purely Adjudicatory functions so as to be characterized as a Tribunal solely discharging judicial powers of the state; it is rather, a body that is in parts administrative, expert (having regard to its advisory and advocacy roles) and quasi-judicial - when it proceeds to issue final orders, directions and (or) penalties.

(c) Section 19 of the Competition Act, 2002, gives the power to the commission that it may make inquiry into certain agreement and dominant position of enterprise. Its sub-section (1) provides that the CCI may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on -

(a) on receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or statutory authority.

Delhi High Court in a matter of Mahindra Electric Mobility Limited & Ors. Against CCI & Another, relying upon Hon'ble SC judgment in Excel Crop Care Limited vs. CCI, held that the CCI is well within its power to expand the scope of inquiry to include other issues and parties.

Hence, CCI is 9uthorized to expand the scope of inquiry to include other issues and parties.

(d) As per section 39(1) of the Competition Act 2002, if a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations.

Sub-section (2) provides that in a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961, it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.

Sub-section (3) provides that where a reference has been made by the Commission under sub-section (2) for recovery of the penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in the default under the Income Tax Act, 1961 and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income- tax and sums imposed by way of penalty, fine and interest under the Income-tax Act, 1961 and to the Commission instead of the Assessing Officer..

Hence, if BML denies/doesn't obey the order of penalty passed by CCI, CCI may make a reference to the concerned income-tax authority under that Act for recovery of the penalty and BML shall be deemed to be the assessee in the default under the Income Tax Act, 1961.

Answer 7

(a) As per section 5(8) of the Insolvency and Bankruptcy Code, 2016, "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and it inter-alia includes(i) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; and

(ii) the expression, 'allottee' and 'real estate project' shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of RERA

Hence advance payment against allotment by allottees shall be regarded as 'financial lending'.

Further, Hon'ble Supreme Court, while disposing civil writ petition no. 43 of 2019, in the matter of Pioneer Urban Land and Infrastructure Ltd and Anr vs. Union of India, highlighted the following three major differences between operational debts and advance given by allottee:-

Point of difference	Operational Creditor	Advance by allottee
Role of supplier	In operational debts, a person who supplies the goods and services become creditor.	In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor.
Time value of money	Payments made in advance for goods & services are not made to fund the manufacturer of such goods or provision of such services.	Advance by allottees against allotment is to fund the developer to construct the apartment and flats.

The stake of interest of fund provider in the business of the other party	The operational creditor has no interest in or stake in the corporate debtor's business	Allottee of a real estate project is vitally concerned with the financial health of the corporate debtor
Stake in the corporate debtor	Operational creditor has no interest in or stake in the corporate debtor.	The allottees of a real estate project, who is vitally concerned with the financial health of the corporate debtor.
Advance payment	Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services.	In real estate projects, money is raised from the allottee, being raised against consideration for the time value of money.

(b) Hon'ble Supreme Court, while disposing of civil writ petition no. 43 of 2019, in the matter of Pioneer Urban Land and Infrastructure Ltd and Anr vs. Union of India, held that on reading to section 88, it was identified that remedies under RERA are additional remedies, which will not bar other remedies available to a homebuyer.

For reference - Section 88 of the Real Estate (Regulations and Development) Act 2016, the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

Hence, the association of allottees is eligible to claim relief under section 18 of RERA in addition to action under IBC.

Note - As per explanation to section 31 of the said act, which gives power to the aggrieved person to file a complaint says for the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

Answer 8:

As per regulation 8 (a) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018-

a person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that subsection.

However, if such a person is a Non-Resident Indian (NRI) or a Person of Indian Origin (PIO) (as defined in Foreign Exchange Management (Remittance of Assets) Regulations, 2016) resident outside India, he/ she can utilise the remittance facilities available under the Foreign Exchange Management (Remittance of Assets) Regulations, 2016, as amended from time to time.

As per section 6(5) of the Foreign Exchange Management Act 1999, a person resident outside India may hold, own, transfer or invest in Indian currency, security, or any immovable property situated in India if such currency, security, or the property was acquired, held, or owned by such person when he was resident in India or inherited from a person who was resident in India.

Hence, Mr. Manohar is allowed to transfer (sale) the agricultural land and after seeking permission from RBI can repatriate the sale proceeds, outside India. He can also utilise the remittance facilities available under the Foreign Exchange Management (Remittance of Assets) Regulations, 2016.

Further, FEMA or any regulations thereunder has nothing to do with the purpose of application of repatriated proceeds abroad.

CASE STUDY 11

BLF Limited is having a stand-alone market share of 25% in the relevant market, excluding the market share of its subsidiaries. It is a leading developer in Northern India. It has 300 subsidiaries on which it exercises complete control, out of which BLF Home Developers Limited with a market share of 10% and BLF New Gurgaon Home Developers Private Limited with a market share of 16% are the prominent ones that are engaged in the business of residential real estate development.

BLF Ltd. with its different group entities has developed some of the first residential colonies in Delhi that were completed as early as 1949. It had purchased many lands at a very low cost in the early 80's due to which it got an edge over its competitors. Since then, the company has developed 22 urban colonies, and its development projects span over 32 cities in the country. BLF Ltd. has expanded its business in different parts of India.

BLF Limited has purchased land in Gurgaon and announced a group housing complex project, named 'The Jannat' consisting of 5 multi-storied residential buildings to be constructed on the land earmarked in Zone 8, Phase-V in BLF City, Gurgaon, Haryana. As per the advertisement of BLF Ltd., each of the five multi-storied buildings was to consist of 19 floors and the total number of apartments to be built therein was to be 368 and the construction was to be completed within a period of 36 months in response to which the bookings were made by a number of persons. There are approximately 118 companies in the real estate sector in the relevant geographic market out of which BLF Ltd. has a share of about 69% of the gross fixed assets, 45% of the total capital employed, 41% of the total net income, 63% of the total cash profits and 78% of the total PAT.

On 04.09.2007, one of the allottees, Mr. Sanjay Bhansali, applied for allotment by depositing a booking amount of Rs. 20 lakhs pursuant whereto on 13.09.2007, BLF Ltd. issued allotment letter to him for apartment no. D-161, The Jannat, BLF City, Gurgaon. On 30.09.2007, a standard schedule of payment for the captioned property was sent to him according to which the buyers were obligated to remit 95% of the dues within 27 months of booking, namely, by 04.12.2009 in the case of Mr. Sanjay. The remaining 5% was to be paid on the receipt of the occupation certificate. The apartment buyer's agreements, however, were executed and signed on 16.01.2008 and BLF Ltd had already extracted from the allottees, an amount of Rs. 85 lakh (approx.) from each of the allottees by that date without the buyers being aware of the sweeping terms and conditions contained in the agreement and also without having the knowledge of whether the necessary statutory approvals and clearance as mandatory were obtained by BLF Ltd. from the concerned Government authorities.

After keeping the buyers in dark for more than 13 months, BLF Ltd. intimated to the buyers on 22.10.2008 that there would be a delay in approvals from the Government authorities and that even the construction would not take off in time. By that time, BLF Ltd. had enriched itself by crores of rupees by collecting its timely installments from the buyers. Before a single brick was laid, the buyers had already paid installments as stipulated in the agreement, for the months of November 2007, January 2008, March 2008, June 2008, and September 2008, up to almost 33% of the total consideration.

Mr. Sanjay Bhansali formed an association of allottees and approached CCI to file a case against BLF Group on 10.5.2010 after the completion of the project. The association alleged that the various clauses of the agreement and the compliance of BLF Ltd. pursuant to it is ex-facie unfair and discriminatory attracting the provisions of Section 4(2)(a) of the Competition Act, 2002 and per-se the acts and the conduct of BLF Ltd. can be considered as an abuse of the dominant position.

Allegation Arising out of the above facts

1. In place of 19 floors with 368 apartments, which was the basis of the apartment booking by the allottees for their respective apartments, now 29 floors have been constructed. Consequently, not only the areas and facilities originally earmarked for the allottees got substantially compressed, but the project also got abnormally delayed. The fall-out of the delay is that nearly a hundred apartment allottees have to bear huge financial losses as, while on one hand, their hard-earned money got blocked, and on the other hand, they have to wait indefinitely longer than the agreed period for the occupation of their respective apartments.
2. The apartment buyer's agreements containing the terms and conditions of booking were signed after months of booking of the apartments, (booking made in November 2006 and agreements got signed in September 2007 i.e. after 11 months) and by that time the allottees had already paid a substantial amount and they hardly had any option but to adhere to the dictates of BLF Ltd. In this case, BLF Ltd. had devised a standard form of printed "Apartment Buyer's Agreement" for booking the apartments in

its project and a person desirous of booking an apartment was required to accept it in 'toto' and give his or her assent to the agreement by signing on the dotted lines, even when clauses of the agreement were onerous and one-sided.

3. BLF Ltd. had the absolute right to reject and refuse to execute any apartment buyer's agreement without assigning any reason, cause, or explanation to the intending allottee. Thus, there was neither any scope of discussion nor any variation in the terms of the agreement.
4. "The Jannat", nor while executing the apartment buyer's agreements also, had got the layout plan of Phase-V approved by the authority. The decision of BLF Ltd. to announce the scheme, execute the agreements and carry out the construction without any approved layout plan had serious irreparable fallouts for which the entire liability in a normal course should have been by it, but the consequences have been shifted to the allottees. Further, the agreement stifles the voice of the buyers due to the insertion of the waiver clause in the agreement that no consent of the apartment allottee is at all required, if any change or condition is imposed by the authority while approving the layout plan.
5. BLF Ltd. had reserved to itself the exclusive rights and sole discretion, not only to change the number of zones but also their earmarked use from residential to commercial purpose, etc.
6. The land of 6.67 acres earmarked for the multi-storied apartments could even be reduced unilaterally by BLF Ltd. pursuant to the approval/sanction of the layout plan by the authority. The carpet area for the apartments was lesser than the size stipulated in the sale agreement, and therefore, the allottees wanted to get compensated for the same.
7. In each apartment, the allottee had to pay the sale price for the super area of the apartment and for the undivided proportionate share in the land underneath the building on which the apartment was located. Out of the total payments made by the apartment allottees, BLF Ltd. had authorized itself vide clauses 3 and 4 respectively that it would retain 10% of the sale price as earnest money for the entire duration of the apartment on the pretext that the apartment allottee complies with the terms of the agreement.
8. Since the apartments were sold without the approval of the layout/building plan, clause 1.5 stipulated that if due to the change in the layout/building plan, if any amount was to be returned to any of the apartment allottees, BLF Ltd. would not refund the said amount, but would retain and adjust this amount in the last installment payable by the respective apartment allottee. Further, the apartment allottee would also not be entitled to any interest on the said amount.
9. Although the apartment allottees had paid for the proportionate share in the ownership of the said land for common area facilities within 'The Jannat', BLF Ltd. had reserved with itself the right to modify the ratio with the purpose of complying with the Haryana Apartment Ownership Act, 1983.
10. In case, if any of the apartment allottees refused to give consent to alter/delete/modify the building plan, floor plan, but even to the extent of increasing the number of floors and /or the number of apartments, BLF Ltd. had the discretion to cancel his agreement and to refund the payment made by the apartment allottee that too with the interest @ 9% per annum, which is wholly arbitrary as in case of default by the apartment allottees, the rate of interest/penal interest is as high as 18% per annum.
11. Preferential location charges were paid up-front, but when the allottee does not get the desired location, he only gets the refund/adjustment of the said amount at the time of the last installment, that too without any interest.
12. In case of delay in delivering possession in the stipulated time and any of the allottees wants to terminate the agreement, BLF Ltd. thereafter had no obligation to refund the amount to the apartment allottee but would have the right to sell the apartment and only thereafter repay the amount. In the process, BLF Ltd. was neither required to account for the sale proceeds nor even has any obligation to pay interest to the apartment allottee and the apartment allottee had to depend solely on the mercy of BLF Ltd. The quantum of compensation had been unilaterally fixed by BLF Ltd. at the rate of Rs. 5/-per sq. ft. (or even Rs. 10/- per sq. ft.) of the super area which is a mere pittance.
13. BLF Ltd. unilaterally had reserved to itself the right to mortgage/create a lien and thereby raise finance /loan the land, the payment of which has been made by the allottees. In case of an event where BLF Ltd. is not able to repay or liquidate the finance/ loan, the apartment allottees might be the direct sufferers.
14. The apartment allottees had been foist with the liability to pay an exorbitant rate of interest, in case the allottee fails to pay the installment in due time i.e. 15% for the first 90 days and 18% after 90 days and no consequential interest clause for failure on the part of the builder to adhere to its obligations and time schedule.

15. The discount is given to the prospective buyers after the revised plan was as high as Rs. 500 per sq. ft., BLF Ltd. had offered only Rs 250 per sq. ft to the older buyers. The buyers of the apartments who had invested a huge amount of money starting from October 2006 in 'The Jannat' had been put to a disadvantageous position vis-à-vis prospective buyers in November 2009 i.e., after a period of 3 years.
16. The maximum FAR allowed is 175% of the site area and population density is 100 to 300 persons per acre @ 5 persons per dwelling unit. So far as the maximum height of the building is concerned, the relevant regulations prescribe that the buildings of 'The Jannat' have not been constructed in adherence to the said regulations and there has been violation on account of both FAR and density per acre.
17. BLF Ltd., however, had increased the height up to 29 floors while the foundation laid out underneath the building is suited only to sustain the load of 19 floors (which is not safe).

The defense raised by BLF Ltd in response:

BLF Ltd. argued that the association of allottees cannot file a case before the CCI because it is not in a dominant position as per the provisions of the Competition law. According to BLF Ltd., there are many large real estate companies and builders in India, particularly in Northern India as well as in NCR and Gurgaon who offer stiff competition and give competitive offers in the relevant market of residential apartments to give a wider choice to the consumers. Even though BLF Ltd. is a large builder, there are hundreds of other builders, all over India as well as in Northern India, including NCR, who offer residential apartments to prospective investors. The project was finally completed and possession was given in May 2010 after a little delay which was due to environmental constraints. Infact, their rival HTL Limited has a market share of 35% in the relevant market. BLF Ltd. further argued that CCI has no jurisdiction over the case as 'sale of an apartment' can neither be termed as the sale of goods nor sale of service. Moreover, the terms and conditions of the agreement are mentioned in the information related to agreements executed in December 2006/2007. None of the impugned conditions can be said to have been imposed after 20.05.2009, when Section 4 of the Competition Act, 2002, came into force. BLF Ltd. also argued that the reduction in the carpet area was on account of the exterior walls appurtenant to their apartments and this is the case with all the apartments and not specific to the homes of the allottees alone who have filed the complaint.

MULTIPLE CHOICE QUESTIONS

1. The relevant geographic market in this case is _.
   (a) Gurgaon for sale of services of high rated residential property
   (b) Delhi for sale of goods of high rated residential property
   (c) Northern India for sale of goods of high rated residential property
   (d) Whole India for sale of services of high rated residential property
2. The remedy available to the allottees by filing a complaint before:-
   i. Insolvency and Bankruptcy Code
   ii. Consumer Forum
   iii. RERA
   (Assume that the scheme of BLF Ltd., 'The Jannat' got commenced after the enactment of relevant provisions of the IBC, 2016 and RERA, 2016 for this particular question.)
   (a) Only i
   (b) Only ii
   (c) i, ii, and iii
   (d) None of the above
3. The chairperson and other members of the CCI office shall be appointed by:-
   (a) Central Government and shall hold the office for a term of five years or till he has attained the age of sixty-five years.
   (b) Selection committee and shall hold the office for a term of five years or till he has attained the age of sixty-five years.
   (c) Central Government and shall hold the office for a term of five years or till he has attained the age of sixty-seven years in case of chairperson and sixty-fives years in case of other members.
   (d) Selection committee and shall hold the office for a term of five years or till he has attained the age of sixty-seven years in case of chairperson and sixty-fives years in case of other members.
4. Whether the collection of 95% of consideration by BLF Ltd. without regards to the stage of construction is appropriate as per RERA assuming that the scheme of BLF Ltd., 'The Jannat' got commenced after the enactment of relevant provisions of the RERA, 2016 for this particular question and 'The Jannat' is registered as per the relevant provisions of the said act.
   (a) Appropriate as the terms/ timing of payment is governed by the sale agreement between the promoter and the allottee.

(b) Not appropriate as the timing of payment should be in line with the stage-wise completion/construction schedule.
(c) Appropriate, As the necessary discount has already been factored into the consideration by BLF Ltd.
(d) Not appropriate, because at least 10% of consideration to be reserved to pay on the receipt of the occupation certificate

5. The application of compensation U/s 19 of the Real Estate (Regulation and Development) Act 2016 is
(a) Adjudged by the adjudicating officer appointed by Real Estate Regulatory Authority at the advice of appropriate government in 30 days from receipt of application
(b) Adjudged by the adjudicating officer appointed by appropriate government at the advice of Real Estate Regulatory Authority in 30 days from receipt of application
(c) Adjudged by the adjudicating officer appointed by Real Estate Regulatory Authority at the advice of appropriate government in 60 days from receipt of application
(d) Adjudged by the adjudicating officer appointed by appropriate government at the advice of Real Estate Regulatory Authority in 60 days from receipt of application

DESCRIPTIVE QUESTIONS

6. Whether it can be considered by the commission that BLF Limited enjoys the position of dominance in the relevant market and if so, then whether it has abused its dominant position?

7. Whether the contentions of BLF Ltd. that CCI has no jurisdiction over the case by providing the reasons for the same in its defense statement are valid?

8. Analyze whether the provisions of RERA are applicable to BLF Ltd. If yes, state the penalties that would be levied on the promoters of BLF Ltd. for non-registration under RERA.

9. What would be your advice for the allottees with regard to the validity of the reduction of carpet area as per the provisions of the RERA, 2016 assuming the project got commenced after the enactment of the RERA, 2016?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (a) Gurgaon for sale of services of high rated residential property

Reason:
In terms of Section 2(s), Relevant Geographic Market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

In the given case the BLF Ltd. has developed some of the first residential colonies in Delhi that were completed as early as 1949. After that it has not developed colonies in Delhi, but remained as a leading developer in Northern India. It has 300 subsidiaries on which it exercises complete control, out of which BLF Home Developers Limited with a market share of 10% and BLF New Gurgaon Home Developers Private Limited with a market share of 16% are the prominent ones that are engaged in the business of residential real estate development. BLF Limited has purchased land in Gurgaon and announced a group housing complex project, named 'The Jannat' consisting of 5 multi-storied residential buildings to be constructed on the land earmarked in Zone 8, Phase-V in BLF City, Gurgaon, Haryana.

So, based on the above facts it can be said that the relevant geographical market for the BLF is Gurgaon.

2. (c) i, ii, and iii

Reason:
In the matter of M/s M3M India Private Limited Vs. Dr. Dinesh Sharma & Anr, the High Court of Delhi, dated 4th September, 2019, [CM(M) 1244/2019 & CM APPL. 38052-38053/2019], the issue raised was whether proceedings under the Consumer Protection act, 1986 can be commenced by home buyers against developers after the commencement of RERA.

The High Court concluded that "remedies available to the respondents herein under Consumer Protection Act 1986 and Real Estate (Regulation and Development) Act 2016 are concurrent, and there is no ground for interference with the view taken by the National Commission in these matters."

Further in writ petition of Pioneer Urban Land and Infrastructure Ltd and Anr vs Union of India, referring to Section 88 of the Real Estate (Regulation and Development) Act 2016, the apex court said that it was an additional remedy, which will not bar other remedies (application under IBC 2016) available to a homebuyer.

Hence, looking the judicial interpretation, the remedy is available to a home buyer under all the three Acts.

3. (a) Central Government and shall hold the office for a term of five years or till he has attained the age of sixty-five years.

Reason:
Section 10(1) of the Competition Act, 2002 provides that the Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment:

Provided that the Chairperson or other Members shall not hold office as such after he has attained the age of sixty-five years.

Accordingly, the appointing authority is Central Government for Chairman and other Members and he shall hold the office till the age of their 65 years.

4. (a) Appropriate as the terms/ timing of payment is governed by the sale agreement between the promoter and the allottee.

Reason:
Section 13 of the RERA provides that a promoter shall not accept a sum more than ten per cent. Of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

Sub-section (2) states that the agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot, or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

So, as per the provisions of Section 13(2) the collection of amount from the allottees shall be made as per the terms and conditions set out in the agreement of sale. Assuming that the promoter has received the 95% of consideration as per the agreement of sale, it can be said that it is appropriate as per the terms/ timing of payment as per the agreement of sale executed between the promoter and the home allottees.

5. (c) Adjudged by the adjudicating officer appointed by Real Estate Regulatory Authority at the advice of appropriate government in 60 days from receipt of application

Reason:
Section 71 of the RERA provides that for the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint, in consultation with the appropriate Government, one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Sub-section (2) states that the application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application.

Thus, as per the provisions of section 71 the RERA Authority shall appoint adjudicating officer in consultation with the appropriate government who shall dispose of the application for compensation within a period of 60 days from the date of its receipt.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

As per section 19(4) of the Competition Act, 2002, the Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:-

a. market share of the enterprise;
b. size and resources of the enterprise;

c. size and importance of the competitors;
d. economic power of the enterprise including commercial advantages over competitors;
e. vertical integration of the enterprises or sale or service network of such enterprises;
f. dependence of consumers on the enterprise;
g. monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
h. entry barriers including barriers such as regulatory barriers, financial risk, the high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
i. countervailing buying power;
j. market structure and size of the market;
k. social obligations and social costs
l. relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
m. any other factor which the Commission may consider relevant for the inquiry.

The dominant position has been defined under Explanation(a) to Section 4 as "a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-
(i) Operate independently of competitive forces prevailing in the relevant market; or
(ii) Affect its competitors or consumers or the relevant market in its favour.

In the given case, the dominant position can be governed as follows:

a. **Market Share:** BLF Limited (25%) along with its subsidiaries BLF Home Developers Limited (10%) and BLF New Gurgaon Home Developers Private Limited (16%) holds a total market share of (25+10+16) = 51% in the relevant market.

b. **Size and resources of the enterprise:** Out of 118 companies in the real estate sector in the relevant market, BLF Ltd. has a share of about 69% of gross fixed assets, 45% of the total capital employed, 41% of the total net income, 63% of the total cash profits and 78% of the total PAT, which shows its size and resources are far greater than other real estate concerns.

c. **Size and importance of the competitors:** BLF Ltd. is having a clear edge over the competitors as far as market shares, size and resources are concerned. In terms of Income and Profit after Tax, also BLF has a distinct advantage over other real estate players. BLF Ltd. has about 41% share as far as net income is concerned and about 78% as far as PAT is concerned in the relevant market of 118 companies.

d. **Economic power of the enterprise including commercial advantages over competitors:** BLF Ltd. has a gigantic asset base as compared to its competitors. Further, it also has enormous cash profits and net profits as compared to its competitors. The position of cash profits and net-worth shows that BLF Ltd. is far ahead on these accounts also as compared to its competitors. Based on a comparison of cash profits and net profits of 118 companies, BLF Ltd. has 63% and 78% share respectively. The huge cash profits and net worth of BLF Ltd. are giving them tremendous economic power over their rivals.

e. **Vertical integration of the enterprises or sale or service network of such enterprises:** BLF Ltd. has developed 22 urban colonies, and its development projects span over 32 cities. It has about 300 subsidiaries engaged in the real estate business. Thus, it has a vast network through which it can do business effectively. Since BLF Ltd has a large land bank, it is capable of carrying out construction without depending upon the requirement of acquiring land. Moreover, the land was also acquired long back at a very low cost, unlike its competitors. Its wide sales network act as a relevant factor conferring upon commercial advantage over its rivals.

Thus, it is due to its sheer size and resources, market share, and economic advantage over its competitors that BLF Ltd. is not sufficiently constrained by other players operating on the market and has got a significant position of strength by virtue of which it can operate independently of competitive forces (restraints) and can also influence the consumers in its favour in the relevant market in terms of explanation to Section 4 of the Act. Based upon all the above factors, it can be concluded that BLF Ltd. is enjoying a position of dominance in terms of Section 4 of the Act.

As per section 4(2)(a)(i) of the Competition Act, 2002, if an enterprise or a group directly or indirectly, imposes unfair or discriminatory - a condition in the purchase or sale of goods or services then it can be **considered as an abuse of dominant position.**

There shall be abuse of the dominant position, if an enterprise or a group-
(a) Directly or indirectly, imposed unfair or discriminatory (i) condition in purchase or sale of goods or

service; or (ii) price in purchase or sale of goods or service.
(b) Limits or restricts (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods of services to the prejudice of consumers; or
(c) Indulges in practice or practices resulting in denial of market access in any manner; or
(d) Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
(e) Uses it dominance position in one relevant market to enter into, or protect, other relevant market.

BLF Ltd. has abused its dominant position which can be ascertained from the following points:
a. Unilateral changes in agreement and supersession of terms by BLF without any right to the allottees
b. BLF's right to change the layout plan without the consent of allottees
c. Discretion of BLF to change inter se areas for different uses like residential, commercial, etc. without even informing allottees
d. Preferential location charges paid up-front, but when the allottee does not get the location, he only gets the refund/adjustment of the amount at the time of the last installment, that too without any interest
e. BLF enjoys unilateral right to increase / decrease super area at its sole discretion without consulting allottees who nevertheless are bound to pay the additional amount or accept a reduction in area
f. Proportion of land on which apartment is situated on which allottees would have ownership rights shall be decided by BLF at its sole discretion (evidently with no commitment to follow the established principles in this regard)
g. Allottees have no exit option except when BLF fails to deliver possession within the agreed time, but even in that event he gets his money refunded without interest only after the sale of the said apartment by BLF to someone else
h. BLF's exit clause gives them full discretion, including abandoning the project, without any penalty
i. BLF has sole authority to make additions / alterations in the buildings, with all the benefits flowing to BLF, with the allottees having no say in this regard

Thus, even when BLF Ltd. sent the said agreement for signing by the allottees, they had absolutely no right to suggest / make any alteration / modification whatsoever in the said agreement; and if they refuse to sign the agreement at that point of time the money deposited earlier stood forfeited. The extent of abuse is so gross that the buyer/allottee has to pay almost 95% of the consideration amount within 27 months of booking, and a bulk of this is often paid to BLF Ltd. even before entering into the agreement. There is no timeline specified for delivery of possession by BLF. The agreement is often sent by BLF for signing much after initial payment by the buyer.

Therefore, we can conclude that BLF Ltd. is in a dominant position and has contravened section 4(2)(a)(i) of the Act.

Answer 7

Section 2(u) of the Competition Act, 2002 makes it abundantly clear that the activities of BLF in the context of the present matter squarely fall within the ambit of the term 'service'. The relevant clause (u) reads as under "service" means service of any description which is made available to potential users and includes the provision of services in connection with the business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising".

It is clear that the meaning of 'service' as envisaged under the Act is of very wide magnitude and is not exhaustive in the application. It is not disputed that BLF undertakes to construct an apartment intended for sale to potential consumers after developing the land. Therefore, it is explicit that this kind of activity is a provision of service in connection with the business of commercial matters such as real estate or construction. Hence, the contention raised on behalf of the BLF that the sale of an apartment is not covered under the definition of service is wholly misplaced and is devoid of any substance.

The other contention of the BLF that since the apartment buyers' agreements were executed before section 4 of the Act came into force i.e. on 20.05.2009, therefore, its provisions were not attracted in the present matter has also no merit and deserves to be rejected. Though it is true that all acts done in pursuance of any agreement executed before section 4 of the Act came into being cannot be examined after the date of enforcement but if any enterprise invokes the provisions of such agreement after the date of its enforcement and that action is now prohibited by the Act then that action could certainly be seen through the lens of the Competition Act.

In the present case the agreements, although entered between BLF and the allottees before 20.05.2009 when section 4 of the Act came into being, remained in operation even after the said date and BLF proceeded with the cancellation of various allotments under the clauses of the agreement, i.e. to say, the execution of the agreements continued after the enactment of the said provisions which is grossly unjustified. Therefore, if the BLF acts under the clauses of the agreement, which are now prohibited by the Act, such action can certainly be examined under the relevant provisions of the Act.

Hence, it can be concluded that the contentions of BLF Ltd. that CCI has no jurisdiction over the case by providing the reasons for the same in its defense statement are not valid.

Answer 8

In case if the project got commenced in 2016 and was in progress on the effective date of coming into force of RERA, 2016 on 1st May 2017 then the provisions of RERA would have been applicable to BLF Ltd. because as per section 3(1) of the RERA 2016, the promoter shall make an application to the authority for registration of the project that is the ongoing date of commencement of this act and for which completion certificate has not been issued within a period of 3 months from the date of commencement of the RERA.

Further, Section 3(2)(b) provides that no registration of the real estate project shall be required, **where the promoter has received completion certificate for a real estate project prior to commencement of the RERA.**

In the given case, the project launched by the BLF Ltd. was completed and possession was given in May 2010 i.e. much before the enactment of the RERA.

Accordingly, the provisions of RERA are not applicable to BLF Ltd.

As RERA is not applicable, the question of penalty on the promoter does not arise.

Answer 9

As per section 2(k) of the Real Estate (Regulation & Development) Act, 2016 "carpet area" means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, **exclusive balcony or verandah area and exclusive open terrace area**, but includes the area covered by the internal partition walls of the apartment.

The explanation attached to this sub-section further clarified that the the expression of "exclusive balcony or verandah area" and "exclusive open terrace area"

- **Exclusive balcony or verandah area:** It means the area of the balcony or verandah, as the case may be, which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee; and
- **Exclusive open terrace area**: It means the area of open terrace which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee.

Accordingly, sale of property will be on carpet area, not super built area. Therefore, the homebuyer will have to pay only for the carpet area, that is the area within walls, and the builder cannot charge for the super built-up area.

Therefore, the explanations provided by BLF Ltd. on the reduction of the carpet area are invalid. So, home buyers/ customers were liable to pay only for the carpet area i.e. the area within walls.

CASE STUDY 12

Mrs. Sudha an Indian citizen and Mr. Rehman a Pakistani Muslim citizen got married to each other. Mrs. Sudha who is a housewife stayed in a farmhouse, situated at B-91, Ludhiana, Punjab, with her husband after the marriage. They were blessed with three children, Abhas, Razia, and Shabina. Mr. Rehman obtained a Long-term Visa in India. Mr. Rehman purchased agricultural land in his wife's name to purchase for a total sale consideration of ₹ 44 lacs, on the part of which said farmhouse was constructed immediately after the purchase. The sale consideration of ₹ 44 lacs was paid by Mr. Rehman from his own sources by drawing two cheques from his bank account. Mr. Rehman liked the ecology of the area of Ludhiana and therefore, he had chosen to purchase the property for his benefit.

After purchasing the agricultural land, Mr. Rehman spent huge amounts to reclaim the lands and raise crops such as coffee, pepper, orange, etc. He raised cattle and sheep farms and laid roads at his own cost. He had also fenced the agricultural land with live wires to protect the crops from wild animals. He had also installed generators and bore well etc. He employed 50 workers. Mr. Rehman and Mrs. Sudha had been living together with their children in Ludhiana, Punjab till the late 1990s, thereafter Mrs. Sudha insisted on changing her residence to Bangalore under the pretext of imparting education to the children. Mr. Rehman willing to stay at Ludhiana only but Mrs. Sudha became adamant on her stand and keep on insisting on migration and ready to migrate to Bangalore alone. Mr. Rehman provided her with a separate residence at Bangalore registered in the name of his son, Abhas, at a cost of ₹ 30 lacs. Mrs. Sudha and the children got shifted to the new residence at Bangalore. Mr. Rehman had been paying ₹ 30,000 per month for the maintenance of Mrs. Sudha and their children.

Ms. Shabina married Mr. Marzban an Afghan citizen and moved to Afghanistan. Ms. Shabina adopted the Parsi religion after marriage and got the citizenship of Afghanistan, simultaneously her Indian citizenship status got revoked.

Mr. Abhas's maternal grandfather went to the UAE for a business trip and purchased gold jewellery weighing 5 Kilograms. He hides the gold jewellery in the white goods to save customs duty. He gifted that gold jewellery to his grandson, Mr. Abhas. Mr. Abhas purchased a flat in Maharashtra for ₹ 40 Lakhs in the name of his sister, Ms. Shabina, after her marriage. He sold the part of jewellery gifted by his grandfather at ₹ 25 lakhs. Mr. Abhas rented the property of Maharashtra on the monthly rent of ₹ 25,000.

Mrs. Razia is settled with her husband in England. She is an air hostess with British Airways. She flies for 11 days in a month and thereafter is on a layover for 19 days. During the break (lay-over), she stays in Mumbai in the premises of British Airways. Mrs. Sudha transferred the farmhouse (not entire agriculture land) situated at B91, Ludhiana without any consideration in the name of her daughter Ms. Razia, as Ms. Razia is still a citizen of India.

Mr. Aslam, the elder son of Mr. Abhas left India to pursue master program in civil constructions and engineering. Mr. Abhas paid an annual fee of ₹ 1.8 crores as per the estimates sheet annexed to the letter of allotment of the seat (admission letter) by the college of Mr. Aslam. The exchange rate was ₹ 71 / UDS on the day of remittance. After his post-graduation, Ms. Aslam got a job in a MNC of USA. He visited India every year and gave substantial funds to his mother, Mrs. Heena to keep it by way of deposit in India for the benefit of Mr. Aslam.

Mrs. Heena and Mr. Abhas suggested that as Aslam's substantial funds are in deposit with her and he is doing well for himself in the USA, he should purchase a plot of land to build a house thereon in New Delhi.

Mr. Aslam agreed on the idea and was ready to purchase a house. Mr. Aslam came to India and handed over further funds to his mother for acquiring the plot that had already been identified to be acquired on a perpetual lease.

Mrs. Heena in her capacity as a trustee obtained the aforesaid plot on a perpetual lease in her name but for the exclusive benefits for her elder son, Mr. Aslam. All the funds used in the purchase of the plot by Mrs. Heena were from the money deposited with her and given to her by Mr. Aslam from time to time. The possession of the plot was obtained by her, for and on behalf of Mr. Aslam in her capacity as a trustee i.e., in a fiduciary capacity, and a perpetual lease deed was executed by the Delhi Development Authority (DDA).

After two years from the date of purchase of property in Delhi by Mrs. Heena, she met an accident and died. Her younger son, Mr. Kafil filed a suit that the property was in the name of his mother, and he has 50% rights along with his elder brother Mr. Aslam in the property situated in New Delhi. Mr. Aslam came to India and averted that the property was purchased by his mother out of the funds that have been provided by him from time to time. He further averred that the property was held by his mother for a perpetual lease in the fiduciary capacity as a trustee.

During the middle of the year 2012, Mr. Rehman's health condition deteriorated, and he was advised to go to England for treatment. In September 2012, he left India and got himself admitted to a hospital in England and remained there due to his health condition. During the period of his absence in India, he used to send money to the tune of ₹ 30,000/- per month towards the maintenance of the agricultural land to Mrs. Sudha. In March 2013, Mr. Rehman came back to India and found that Mrs. Sudha had retrenched all the workers, sold the cows, buffaloes numbering about 50, generators, and the agriculture produce such as pepper, coffee, etc., and appropriated the amount without his knowledge. After a further visit to England for his treatment on 17.08.2013, when Mr. Rehman returned to India, he was prevented from entering in the estate by Mrs. Sudha.

Mr. Rehman filed a case against his wife, Mrs. Sudha, that he is the owner of the agriculture land in Ludhiana. He purchased the property in the name of his wife out of love and affection. She has no right to sell the property without his permission.

Mrs. Sudha argued that she was the owner of the property and that the sale deed stands in her name. Further, she argued that she was making negotiations for the sale of a portion of the estate within the knowledge of Mr. Rehman. Also, Mr. Rehman conveyed his no objection to selling the property and appropriating the proceeds to be paid unreservedly to Mrs. Sudha or to her order. She alleged that Mr. Rehman had deserted her and her children, and she had to necessarily make the provisions to support them. Also in her support, she said that there is a presumption in law that the ostensible owner is also a legal owner.

MULTIPLE CHOICE QUESTIONS

1. Whether the maternal grandfather of Mr. Abhas is liable for punishment under the Prevention of Money Laundering Act, 2002?
   (a) No, he is not liable for any punishment under any provisions of the Prevention of Money Laundering Act, 2002
   (b) Yes, he is liable to punishment for the commitment of offence under Part A of the Schedule to the Prevention of Money Laundering Act, 2002
   (c) Yes, he is liable to punishment for the commitment of offence under Part C of the Schedule to the Prevention of Money Laundering Act, 2002
   (d) Yes, he is liable for punishment for the commitment of offence under Part A, Paragraph 12 as well as of Part B to Schedule to the Prevention of Money Laundering Act, 2002

2. Whether Mr. Rehman can purchase the agricultural land in Ludhiana in his own name?
   (a) Yes, as he has paid the amount through his bank account
   (b) Yes, he can purchase the immovable property in India taking prior permission of RBI
   (c) Yes, he can purchase the immovable property as he is holding a long term visa in India
   (d) No, he cannot purchase any immovable property in India.

3. Who can be considered as the benamidar for the property purchased in Maharashtra (presume said transaction taken place after 1st November 2016)?
   (a) Mr. Abhas
   (b) Ms. Shabina
   (c) Grandfather of Mr. Abhas
   (d) The transaction is not a benami transaction

4. Whether Mrs. Shabina after her marriage, acquire the immovable property in India, as per the provisions of FEMA, 1999?
   (a) No, she can't acquire, as she is a foreign citizen now
   (b) Yes, she can acquire the immovable property in India, with permission of RBI
   (c) Yes, she can acquire the immovable property in India, but only with the prior permission of RBI
   (d) Yes, she can acquire the immovable property in India, either by obtaining Long term visa from the Central Government of India or with the prior permission of RBI

5. Ms. Sudha being an ostensible owner of the land can be considered as , under the Prohibition of Benami Property Transaction Act 1988, assuming the land was purchased by Mr. Rehman from unknown sources?
   (a) Beneficial Owner
   (b) Benamidar
   (c) Real Owner
   (d) None of the above

DESCRIPTIVE QUESTIONS

6. Whether Ms. Razia can acquire the farmhouse (not entire agriculture land) situated at B91, Ludhiana without any consideration from her mother Mrs. Sudha, considering the provisions of FEMA, 1999.

7. Whether the contention of Mr. Rehman that Mrs. Sudha has no right to transfer (sell) the immovable property which was purchased by him in her name, under the Prevention of Benami Property Transactions Act, 1988 is correct?
8. Whether the purchase of property by Mr. Aslam in the name of his mother in a fiduciary capacity i.e. as a trustee is barred by the provisions of Prohibition of Benami Transactions Act, 1988? Support your opinion with the relevant legal case law.
9. Whether the fees paid by Mr. Abhas exceeded the prescribed threshold of FEMA Rules? State the consequences of the same.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Yes, he is liable for punishment for the commitment of offence under Part A, Paragraph 12 as well as of Part B of the Schedule to the Prevention of Money Laundering Act, 2002.

   Reason:
   Section 2(y) of PMLA defines the meaning of Scheduled offence, which means-

   (i) the offences specified under Part A of the Schedule; or

   (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or

   (iii)the offences specified under Part C of the Schedule

   Part A: Paragarph 12 - Offences under the Customs Act, 1962 - Section 135: Evasion of duty of prohibitons

   Part B: Offence under the Custome Act, 1962 - Section 132 - False declaration, false documents, etc.

   In the given, the Gold of 5kg was brought from UAE to India showing it as white goods for the purpose of evading customs duty, which is an offence under Part A-Para 12 and also under Part B (assuming that the price of 5Kg gold exceeds the value of one crore rupees)

2. (b) Yes, he can purchase the immovable property in India taking prior permission of RBI

   Reason:

   The Proviso to Regulation 4 of the FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that no person of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea (DPRK) shall acquire immovable property, other than on lease not exceeding five years, without prior approval of the Reserve Bank.

   Further Regulation 9 states that no person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea (DPRK) without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years.

   Thus, as per the above provisions, since Rehman is a Pakistani Citizen, he is not allowed to purchase any immovable property in India, other than on lease not exceeding 5 years, without the prior approval of RBI.

3. (b) Ms. Shabina

   Reason:
   Section 2(10) of the Prevention of Benami Transaction Ac, 1988 provides the meaning of benamidar which means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

   In the given case, Abhas has purchased a flat in Mumbai in the name of Shabina, while the money is espended by Abhas. Hence Shanbina shall be treated as benamidar.

4. (c) Yes, she can acquire the immovable property in India, but only with the prior permission of RBI

   Reason:
   Regulation 7 of the FEM(Acquisition and Transfer of Immovable Property in India) Regulations, 2018, a person being a citizen of Afghanistan, Bangladesh or Pakistan belonging to minority communities in those countries, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been granted a Long Term Visa (LTV) by the Central Government may purchase only one

residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment.

But this Regulation 7 is application for those persons who are in minority in their country. A Muslim citizen of Afghanistan cannot be termed as minority in their country, hence this Regulation 7 shall not apply.

Regulation 9 of the FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 states that no person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea (DPRK) without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years.

Thus, as per Regulation 9 prior permission of RBI is required.

5. (b) Benamidar

Reason:
The relevant definitions under the Prohibition of Benami Transaction Act, 1988 are as under:

Benamindar: It means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name. [Section 2(10)]

Beneficial owner: It means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar. [Section 2(12)]

In the given case Rehman has purchase the property in the name of Sudha. Rehman is treated as Beneficial owner where as Sudha is treated as Benamidar.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:
Ms. Razia is a citizen of India and settled in England with his husband John. Mrs. Sudha transferred the farmhouse situated at B91, Ludhiana without any consideration to her (Ms. Razia).

Person resident in India, has been defined in section 2(v) of the FEMA. The section 2(v)(i)(A)(a) state that-

Person resident in India means a person residing in India for more than 182 days during the course of the preceding financial year but does not include, a person who has gone out of India or who stays outside India, for taking up employment outside India.

Thus, as per section 2 (v)(i)(A)(a), Ms. Razia would become resident only if she has come to or stayed in India for employment. Ms. Razia stayed in India (at Mumbai) for more than 182 days in the preceding financial year. The issue here is whether staying can be considered 'residing'. The words 'resided for more than 182 days' implies that compulsive stay in India will not be considered. 'Stay' is a physical attribute while 'residing' denotes permanency. Therefore, where an air hostess employed by Airlines outside India is accommodated at a 'base' in India during the period of lay-over, her staying in India can't be regarded as a period of residence in India. Hence, Ms. Razia would continue to be a non-resident.

As per Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, the definition of 'Non-Resident Indian (NRI)' is a person resident outside India who is a citizen of India (like Ms. Razia).

Regulation 3(a) of the aforesaid Regulations provides that an NRI or an OCI may acquire immovable property in India other than agricultural land/ farmhouse/ plantation property provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

Regulation 3(b) states that an NRI or an OCI may acquire any immovable property in India other than agricultural land/ farmhouse/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013.

In given case, Ms. Razia who is a non-resident Indian (reside outside India despite being a citizen of India) can't acquire the farmhouse at B-91 Ludhiana, Punjab, considering the provisions of the FEMA, 1999.

Answer 7:
As per section 2(9) of the Prohibition of Benami property transactions Act, 1988 Benami transaction means:

(A) a transaction or an arrangement-

a. where a property is transferred to or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

b. the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by-

(iv) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual.

Further, as per section 2(8) of the Prohibition of Benami property transactions Act, 1988, "benami property" means any property which is the subject matter of a benami transaction and also includes the proceeds from such property.

In the given case, Mr. Rehman has purchased the agricultural land in the name of his spouse Mrs. Sudha and as per section 2(9) of the Prohibition of Benami property transactions Act, 1988, the property is not benami property and thereby the transaction cannot be considered as a benami transaction. Thus, Mrs. Sudha is the real owner of the property and has all the rights to sell the said property and is not restricted by section 6 of the said act to transfer the property. Therefore, the contention of Mr. Rehman that Mrs. Sudha has no right to sell the property which was purchased by him is not correct.

Note - Section 41 of the Transfer of Property Act 1882 deals with transfer by ostensible owner. It says where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be violable on the ground that the transferor was not authorised to make it.

Provided that the transferee, after taking reasonable care to ascertain that the transferor had the power to make the transfer, has acted in good faith.

Answer 8:

As per section 2(9) (A) of the Prohibition of Benami property transactions Act, 1988 Benami transaction means-

a transaction or an arrangement-

(a) Where a property is transferred to or is held by, a person and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by -

(i) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose;

(ii) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual;

In the given case, Mr. Aslam has taken the property for a perpetual lease in the name of his mother, Mrs. Heena. As per section 2(9) of the Prohibition of Benami property transactions Act, 1988, the transaction is a benami transaction because he did not hold the property in the joint name with his mother.

In the civil suit of Sh. Amar N. Gugnani Vs. Naresh Kumar Gugnani, the High Court of Delhi, dated 30th July 2015 [CS(OS) No. 478 / 2004], the Court cited, "I would at this stage refer to a judgment delivered by this Court in the case of J M Kohli Vs. Madan Mohan Sahni & Anr in RFA No.207/2012 decided on 07.05.2012. In such judgment, this Court has had an occasion to consider the intendment of the passing of the Benami Act as reflected from Section 7 of the Benami Act. Section 7 of the Benami Act repealed the provisions of Sections 81, 82, and 94 of the Indian Trusts Act, 1882 (in short 'the Trusts Act') and which provisions of the Trusts Act gave statutory recognition and protection to the benami transactions by calling

such transactions protected by a relationship of trust. It bears note that benami transactions were very much legal within this country before the passing of the Benami Act and the relationship of a benamidar to the owner was in the nature of a trust/fiduciary relationship because it was the Trusts Act that contained the provisions of Sections 81, 82 and 94 giving statutory recognition to the benami ownership of the properties being in the nature of trust."

The expression "fiduciary relationship" and a relationship of a trustee cannot be so interpreted so as to in fact negate the Benami Act itself because all benami transactions actually are in the nature of trust and create a fiduciary relationship and if the expression "trustee" or "fiduciary relationship" is interpreted liberally to even include within its fold a typical benami transaction, then it would amount to holding that there is no Benami Act at all.

Thus, we can say that the transaction entered by Aslam is a benami transaction as fiduciary capacity mentioned by Aslam is not the same fiduciary capacity mentioned in PBPT rather it is the fiduciary capacity mentioned in the Indian Evidence Act.

Answer 9:

Under the Liberalised Remittance Scheme, all resident individuals, including minors, are allowed to freely remit up to USD 2,50,000 per financial year (April - March) for any permissible current or capital account transaction or a combination of both. Further, resident individuals can avail of foreign exchange facility for the purposes mentioned in Para 1 of Schedule III of FEM (CAT) Amendment Rules 2015, dated May 26, 2015, within the limit of USD 2,50,000 only.

[The students may refer the FAQs on Liberalised Remittance Scheme (updated as on 21st October, 2021, by access the URL https://m.rbi.org.in/scripts/FAQView.aspx?Id=115]

Accordingly, the Authorised Dealers may freely allow remittances by resident individuals up to USD 250,000 per financial year (April-March) for any permitted current or capital account transaction or a combination of both.

Authorised Dealer (Category I banks and Category II), may release foreign exchange up to USD 2,50,000 or its equivalent to resident individuals for studies abroad without insisting on any estimate from the foreign University. However, Authorised Dealer Category I bank and AD Category II may allow remittances (without seeking prior approval of the Reserve Bank of India) exceeding USD 250,000 based on the estimate received from the institution abroad.

In the given case, Mr. Abhas paid ₹ 1.8 crores when the exchange rate was ₹ 71/USD. Mr. Abhas made the payment of $253,521 (₹ 1.8 crores/71) which exceeds the threshold limit of $250,000 of LRS. However, the resident can remit more than the prescribed limit for studies abroad if so required by the University. Even in this case, Mr. Abhas paid the fee as per the estimates sheet annexed to the letter of allotment of the seat (admission letter) by the college of Mr. Aslam, hence Mr. Abhas has not violated the provision of FEMA rules.

CASE STUDY 13

Mr. Nitin Bakhshi and Mr. Manish Mehra were good friends. While Nitin was a judge in the NCLT court, Manish had his own business. They had met in college, studied together, and life took a different turn for both of them. They would always try to meet up regularly and seek each other's advice.

One day, after a long tiring day at work, Manish called Nitin and offered to meet him at a nearby cafe. Nitin instantly agreed. They were very happy to see each other and started discussing what was happening in their life. Nitin shared a case which he has recently received. He narrated to Manish was as follows:

"Mr. Arjun Malhotra is the founder and the chairperson of the Malhotra Group, the Group which has many entities under its umbrella. The Group's operations are wide and had a presence in various sectors. One such group company is Malhotra Entertainment Limited (hereinafter referred to as "MEL") whose line of business consisted of making web series and various other shows. MEL wanted to expand its operations in the space of technology and media, for starting its very own streaming service to air the web series and shows produced by them directly to the viewers. But the new venture required funding. Arjun thought of increasing the debt ratio of MEL for this purpose and approached the Project Finance Unit of the Universe Bank Limited (hereinafter referred to as "Bank"). The Bank referred to the proposal of the proposed ventures and found it promising. But set forth a condition for Arjun to give his personal guarantee for this purpose. Arjun was confident that his venture would flourish and agreed to do so. He signed a Deed of Guarantee in favour of the Bank. The Bank sanctioned MEL a loan of ₹ 100 crores for the venture for a term of 10 years to be repaid in a phased manner as per the terms of the Loan Facility Agreement. Arjun was very happy, and he instructed his team to start with the activities.

Two years had passed by and Walky Talky Limited (hereinafter referred to as "WTL"), another group entity of the Malhotra Group which was engaged in the business of manufacturing and selling cellphones, was at a phase where the technology of the competitors was rapidly upgrading, and the only way to survive its business was to revamp its product. Arjun thought about it and approached the Bank for funds for WTL. The Bank agreed again, subject to Arjun giving his personal guarantee for the transaction with a view to secure the funding to which he had no choice except to agree on the proposal. The Bank sanctioned ₹ 50 cr via a Loan Facility Agreement to WTL and received a Deed of Guarantee executed by Arjun in its favour.

Arjun thought it would be best to tie-up with some entities for support services. In the course of its business, MEL and WTL procured services of various companies for the purpose of their operations, one such entity was Limered Private Limited (hereinafter referred to as "LPL"). LPL is a well-known company which provided software technology services. Arjun thought the tie-up with LPL would be beneficial for both MEL as well as WTL. LPL would be paid for the services provided to both companies independently.

Time went on, the market trends were ever changing. MEL and WTL (collectively referred to as "the companies") were constantly adapting their business plan to sustain and thrive in the market. Unfortunately, the companies could not cope up with the recent environmental changes and started sustaining losses. The situation was such that the companies could not pay the dues it owed to LPL and they also defaulted in the repayment of the loans taken from the Bank. Arjun was very upset that the tables had turned down so drastically. His plans were that the companies would grow and emerge as the number one player in the market, but unfortunately, things did not work out in the same manner. The losses were increasing; the companies were unable to even pay the employee salaries. LPL could not bear the opportunity cost of outstanding dues anymore and decided to submit an application to the NCLT for the recovery of its dues. The application was duly admitted, and the Corporate Insolvency Resolution Process (under Insolvency and Bankruptcy Code 2016 (hereinafter referred to as IBC) got initiated apart from declaration of moratorium under section 14 of IBC.

MEL and WTL had continued defaulting their loan repayment to the Bank. The Bank had classified the account as a Non-Performing Asset (NPA). The Bank discussed the matter with its legal counsel, Ms. Saniya Sharma. She suggested that the Bank should enforce the personal guarantee which it had availed in its favour from Arjun, for the loan facility given to MEL and WTL. The Bank issued a demand notice to Arjun Malhotra to pay the loan to the outstanding balance. Arjun, upon receiving the notice, discussed the same with his lawyer, Mr. Rohan Kumar and told him that he was not having sufficient funds in his personal capacity to repay. Mr. Rohan advised him to respond to the Bank stating that, as the Corporate Insolvency Resolution process has begun, and pending the consideration of the Resolution Plans against the companies, it would be prudent for the Bank not to proceed against Arjun for insolvency resolution of Mr. Arjun; he further asked him to add in a response letter that moratorium was also declared under section 14 of IBC. Since the efforts were underway to cure the defaults in terms of monetization, the Bank was requested to withdraw the demand notice. The Bank refer Arjun's response to Ms. Saniya Sharma.

Meanwhile, Mr. Rajesh Panchal was appointed as the Resolution Professional for the MEL and WTL. Mr. Rajesh Panchal immediately took custody and control, including the business records of the companies. The creditors of the companies included the Bank, LPL as well as Orange Rock Limited (hereinafter referred to as "ORL") which had given a loan to both the companies for the purpose of its venture and raw materials to the companies on credit, which remained unpaid. Mr. Rajesh Panchal, keeping the facts and circumstances in mind, formed the Committee of Creditors ("COC"). Mr. Panchal also invited prospective lenders, investors and other people to put forward the resolution plan. He received a resolution plan from Athens Global Private Limited (hereinafter referred to as "AGPL"), a global leader in the field of technology solutions which offered to infuse an upfront payment of ₹ 90 crores and take over the company. The resolution plan included preference payment to the Bank and other financial institutions. However, LPL was aggrieved for not being given preference in the resolution plan. It submitted the plea to the NCLT to make necessary amendments to the resolution plan. LPL said that on the grounds of equity and fairness it must be paid in the same proportion as the Bank and other financial institutions."

Manish Mehra listened to each and every detail attentively. Nitin told him that he was presiding the bench which had to decide on the matter. Nitin realized that something is bothering Manish. They were close friends, hence, he could tell the difference. He couldn't take it any longer and confronted Manish. He asked Manish to share his problems and promised him that he would help him in whatever way he could. Manish took the opportunity and narrated the following to Nitin.

Manish had a son Jubin who was residing in the USA. Manish had saved some money over the years and decided to invest. He purchased a flat in Mumbai in the name of his son, Jubin. He thought he would give a surprise to Jubin when he returned to India with his family. But unfortunately, before I could tell him about the property, he was confronted by the Income-tax officers. Since Jubin had no idea about that property, he upfront denied the ownership of the flat. He said that he has been in the USA for the past few years and has no idea of the flat.

Another issue was, Manish had entered into a Memorandum of Understanding ("MoU") for an apartment situated on the outskirts of Mumbai, in a place called Malshej (hereinafter referred to as the "premises"), with Thanos Builders and Makers Private Limited (hereinafter referred to as "TBPL"). The MoU was for a period of 99 years effective from the date of signing. He paid TBPL, a consideration of ₹ 50 lakhs for the purpose of the arrangement and they agreed to keep the occupancy fee as ₹ 500 per month. The document was duly stamped with the applicable stamp duty and was duly registered. As per the terms of the MoU, TBPL was to hand over the premises, which was in development then, to Manish within a period of 5 years. Once handed over, the terms of the MoU allowed Manish to make structural changes and alter the premises as Manish would deem fit without any prior approval of TBPL. It would be Manish's onus to pay the electricity, water and related charges. The term of 5 years was coming to an end, but the premises were not even near completion.

Manish was in a state of breakdown, but Nitin consoled him and offered him help.

MULTIPLE CHOICE QUESTIONS

1. ORL had given loans to MEL as well as to WTL respectively for the purpose of their ventures and had also given some raw materials to both the companies on credit, which remained unpaid. Hence for the purpose of the Insolvency and Bankruptcy Code, 2016, it can be said that ORL:
   (a) is an operational creditor
   (b) is a financial creditor
   (c) is partly an operational creditor and partly a financial creditor
   (d) ORL has the option to classify itself as either a financial creditor or an operational creditor

2. The resolution plan as received from AGPL by the insolvency professional contained a provision for combination, as referred to in section 5 of the Competition Act, 2002. In such a case, who shall take approval and approval of which authority is required if the resolution plan is to be considered for approval by COC?
   (a) AGPL shall take prior approval of Competition Commission of India
   (b) Mr. Rajesh shall take prior approval of Adjudicating Authority
   (c) Mr. Rajesh shall take prior approval of Competition Commission of India
   (d) AGPL shall take prior approval of Adjudicating Authority as well as of Competition Commission of India.

3. Mr. Rajesh Panchal, keeping the facts and circumstances in mind, formed the committee of creditors ("COC"). The COC would consist of:
   (a) Bank and LPL
   (b) LPL and ORL
   (c) Bank and ORL
   (d) Bank, LPL and ORL

4. Manish Mehra purchased a flat in Mumbai in the name of his son Jubin from his savings but Jubin upfront denied the ownership of the flat. This transaction is:
   (a) A Benami transaction
   (b) A valid transaction
   (c) A voidable transaction
   (d) None of the above
5. Mr. Manish Mehra had entered into an MoU for the Malshej Premises with TBPL, but on account of lack of funds and financial difficulties, TBPL could not complete the construction and handover the premises to TBPL within the time limit specified in the MoU and assuming that there was default on part of TBPL to return the funds to Mr. Manish on his application for withdrawal from the project, Mr. Manish has recourse under:
   (a) The Real Estate (Regulation and Development) Act, 2016
   (b) The Insolvency and Bankruptcy Code, 2016
   (c) The Consumer Protection Act, 2019
   (d) All of the above

DESCRIPTIVE QUESTIONS

6. Advice, whether Mr. Manish Mehra can take legal action under section 18 of the Real Estate (Regulation and Development) Act, 2016 (RERA), assuming that RERA is in force and the said real estate project of TBPL is registered thereunder.
7. The Bank decided to enforce the personal guarantee given by Mr. Arjun Malhotra. But he responded that the demand is not maintainable in the pretext of the ongoing Corporate Insolvency Resolution process against MEL and WTL & Moratorium was declared under section 14 of IBC. Consider yourself in the position of the Bank's legal counsel Ms. Saniya Sharma and advice.
8. LPL is aggrieved as it was not given preference in the resolution plan and submitted its plea to the NCLT to make necessary amends to the resolution plan. LPL is of the view that on the grounds of equity and fairness it should be paid in the same proportion as the Bank and other financial institutions. Considering yourself in the position of Mr. Nitin Bakhshi, the judge hearing the case, please suggest.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) is partly an operational creditor and partly a financial creditor

Reason:

In terms of Section 5(7) of the IBC, "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

Further in terms of section 5(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

In the given case since ORL has provided loan to MEL and WLT, hence ORL should be considered as Financial Creditor in terms of Section 5(7).

Further ORL has also supplied raw material to MEL and WTL, so ORL should also be considered as Operational Creditor in terms of Section 5(20).

Further section 21(4) of the IBC provides that where any person is a financial creditor as well as an operational creditor, -
(a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;
(b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

2. (a) AGPL shall take prior approval of Competition Commission of India

Reason:

The proviso to section 31(4) of the IBC provides that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.

National Company Law Appellate Tribunal, New Delhi in (Company Appeal (AT) (Insolvency) No. 524 of 2019) Arcelor Mittal India Pvt. Ltd. Vs. Abhijit Guhathakurta, noticed and hold that proviso to sub-section (4) of Section 31 of the 'I&B Code' which relates to obtaining the approval from the 'Competition Commission of India' under the Competition Act, 2002 prior to the approval of such 'Resolution Plan' by the 'Committee of Creditors', is a directory and not mandatory. It is always open to the 'Committee of

Creditors', which looks into viability, feasibility and commercial aspect of a 'Resolution Plan' to approve the 'Resolution Plan' subject to such approval by Commission, which may be obtained prior to the approval of the plan by the Adjudicating Authority under Section 31 of the 'I&B Code'.

Further in a matter of Vishal Vijay Kalantri vs Shailen Shah (Company Appeal (AT) (Insolvency) No. 466 of 2020) NCLAT, New Delhi affirm their opinion.

3. (c) Bank and ORL

Reason:
Section 21(2) of the IBC provides that the committee of creditors shall comprise all financial creditors of the corporate debtor.

In the given case-
- Bank is the financial creditor since it gave loan.
- LPL is the operational creditor since it supplied the software.
- ORL gave loan as well as supplied raw material.

Regarding ORL, section 21 (4) (a) of the IBC provides where any person is a financial creditor as well as an operational creditor, such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor.

Thus, CoC will be comprised of Bank and ORL (ORL to the extent of the financial loan as a percentage of the total debt outstanding against the corporate debtor for voting).

4. (b) A valid transaction

Reason
Section 2(9) (A) of the Prohibition of Benami Transaction Act, 1988 provides that

"Benami transaction" means, -

a transaction or an arrangement-

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by-

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

In the given case, Manish has purchased a flat in the name of his son Jubin form his savings i.e. known sources of income and such transaction comes within the exception of Section 2(9)(b)(iii) hence it is a valid transaction

5. (d) All of the above

Reason:
RERA: The preamble of RERA provides that it is an Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

Thus, RERA was enacted for the purpose of regularization of real estate sector.

IBC: Second proviso to Section 7 of the IBC provides that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less.

From the above provision of IBC, the home allottees have been provided the protection of the interest of the home allottees.

The Consumer Protection Act, 2019: The preamble of the Act provides that it is an Act to provide for protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumers' disputes and for matters connected therewith or incidental thereto.

In terms of Sec 2(6)(vii) of the Act, "complaint" means any allegation in writing, made by a complainant for obtaining any relief provided by or under this Act, that a claim for product liability action lies against the product manufacturer, product seller or product service provider, as the case may be.

In terms of section 2(34) "product liability" means the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto.

In terms of section 2(37)(a) "product seller", in relation to a product, means a person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purpose and includes, (i) a manufacturer who is also a product seller; or (ii) a service provider, but does not include a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats.

It means a product seller includes a person who is engaged in the sale of constructed houses or in the construction of homes or flats.

Thus, it can be concluded that in all the three Acts, whether it be RERA, IBC or Consumer Protection Act, 2019, the home allottees can seek relief by invoking any of the legislation.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

Section 18(1)(a) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as RERA) provides for the return of the amount and compensation if the promoter fails to complete or is unable to give possession of an apartment, plot, or building in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

The provision attached to this section states that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed. Hence, it is clear that an allottee has 2 choices:

1) Either to withdraw from the project and ask for refund of the amount paid by the allottee along with the interest; or
2) To continue with the project and call upon the promoter to pay for interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

In this case, it is pertinent to evaluate the terms "promoter", "allottee" and "agreement for sale" to determine whether Mr. Manish Mehra can seek the recourse provided by the said section 18.

Section 2(c) of RERA defines the term "agreement for sale" as an agreement entered into between the promoter and the allottee.

Section 2(d) of RERA defines the term "allottee" as the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfers or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent.

Further Section 2(zk)(i), (ii), (v) and (vi) defines the term "promoter" means -

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

From the above-mentioned definitions, it is obvious that the deciding factor shall be the nature of the document executed by Manish and TBPL to determine whether this is a case of an agreement for sale or otherwise. In the case of Lavasa Corporation Limited Vs. Jitendra Jagdish Tulsiani, the High Court of Bombay, dated 7th August, 2018 [Second Appeal (Stamp) No. 9717 of 2018 with Civil Application No. 683 of 2018]

In this case the common questions of law as to 'whether the provisions of the RERA would apply in case of an 'Agreement to Lease'?'; particularly in the facts of the present case, 'whether the definition of the term "Promoter", as provided under Lavasa.doc Section 2(zk) in the RERA, would include a 'Lessor', and 'whether the remedy provided to the 'Allottees' under Section 18 of the RERA can be available only against the 'Promoter', or, in that sense, also against a 'Lessor'?'

The Court quoted that here the Hayden's Rule of Suppression of Mischief needs to be applied with full force and if that Rule is applied, then the provisions of the RERA are required to be held as equally applicable to the long term leases, like the present one of "999 years"; or, where the substantial amount of consideration is already obtained by the 'Developer'.

Merely because the Legislature has excluded the allotment, when it is given on rent, it does not exclude the long term lease like the present one. That will be defeating and frustrating the object of the Act and hence, it has to be held that the Appellate Tribunal has rightly held that, so far as the present case is concerned, considering the long term lease of '999 years', it would definitely amount to sale.

The Court opined that having regard to the totality of the facts and circumstances and the terms and conditions of the 'Agreements', having regard to the entire purport and object of the Act, it has to be held that, the dispute in the present case definitely falls within the jurisdiction of RERA. The interplay of all the provisions contained in the Act, coupled with the real purport of the 'Agreement of Lease', leads to no other inference, but to Lavasa.doc hold that, the complaints filed by the Respondents before the 'Adjudicating Officer', under Section 18 of the Act, are definitely maintainable and the 'Adjudicating Officer' is having the jurisdiction to entertain and decide those complaints.

In the given case, the Memorandum of Understanding ("MoU") was executed for a period of 99 years effective from the date of signing and TBPL received a consideration of ₹ 50 lakhs for the purpose of the arrangement, and the occupancy fee was set as low as ₹ 500 per month. The MoU was also duly stamped with the applicable stamp duty and was duly registered. The fact that Manish paid a consideration for the arrangement, the document was stamped and registered and the term of the MoU was for a long period of 99 years reflects that the nature of the transaction was that of a sale. Also, the fact that Manish had the right to alter the premises and make changes therein and was also liable to pay the water, electricity, and other charges, shows that his rights and obligations were equivalent to that of a purchaser. In drafting a document. the intent captured therein is more material than the nomenclature used. When the document captures the intent of a sale between both parties, the title given to the document is immaterial. Hence the MoU is nothing but an agreement for sale and Manish has the right of recourse to under section 18 of RERA.

Answer 7

Given the facts of the case, the Bank has classified the accounts of MEL and WTL as Non-Performing Assets (NPAs) and issued a demand notice to Mr. Arjun Malhotra for payment of the dues standing in the books of the Bank on account of the default of MEL and WTL. Arjun's response mentioned that since the efforts were underway to cure the defaults in terms of monetization, the Bank was requested to withdraw the demand notice.

Section 60(2) of the Insolvency and Bankruptcy Code, 2016 ("Code") provides that, "where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal".

Hence, the provisions of the Code provide for recourse to the personal guarantee even if the Corporate Insolvency Resolution Process has been initiated against the corporate debtor, being MEL and WTL in the given case. Had the intention of the legislature been to let the aggrieved creditor, Bank in a given case, kept waiting for subsequent events to happen under the Insolvency Process, the provisions for the initiation of proceedings wouldn't have been made in the first place. Therefore, it would not be right for Mr. Malhotra to assume that the proceedings of insolvency have been filed with the NCLT so no action can be taken until the resolution plan has been accepted/materialized. Also, it is to be noted that the liability of a guarantor, Arjun in the given case, does not extinguish/reduce merely by virtue of the proceedings. The law does not envisage that the insolvency resolution of the personal guarantor should follow only when the process of the corporate insolvency of the corporate debtor has come to an end.

The Supreme Court, in the matter of State Bank of India vs. V. Ramakrishnan (Civil Appeal No. 3595 of 2018, dated 14th August, 2018) quoted the following key recommendations of the Insolvency Law Committee Report dated 26.03.2018:

The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of Section 14.

Since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under Section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision.

The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only.

After the decision of the Apex Court, Section 14(3) of the IBC was substituted by the Insolvency and Bankruptcy Code (Second (Amendment) Act, 2018. w.e.f. 6-6-2018. It now provides as under:

Section 14(3)(b) the provisions of sub-section (1) shall not apply to a surety in a contract of guarantee to a corporate debtor.

In view of the above, the bank shall proceed against Mr. Arjun by filing an application for insolvency resolution of Mr. Arjun before the NCLT

Answer 8

In terms of section 5(20) of the IBC , "operation creditor" means a person to whom an operational debt is owed. Operational debt and includes any person to whom such debt has been legally assigned or transferred. In the given case LPL has made a claim against the services it rendered to MEL and WTL ("corporate debtor"), hence LPL can be classified as an operational creditor.

The LPL initiated CIRP against the corporate debtors, which was accepted by the NCLT and Resolution Professional was appointed, CoC was constituted and invited the resolution plan from the prospective buyers. CoC comprises on financial creditors only and the operational creditors although entitled to attend the CoC meeting but could not vote in the meeting.

While considering of the resolution plan, section 30 of the IBC is attracted. Section 30(2) provides that -

The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Section 30(4) states that the committee of creditors may approve a resolution plan by a vote of not less than 66% per cent. of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board.

In the case of India Resurgence ARC Private Limited Vs.M/s. Amit Metaliks Limited & Anr., the Supreme Court of India, dated 13th May, 2021 [Civil Appeal No. 1700 of 2021], the Apex Court observed as under:

As regards the process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority; and Section 30(2) read with Section 61(3) for the Appellate Authority.

The limited judicial review available to Adjudicating Authority lies within the four corners of Section 30(2) of the Code, which would essentially be to examine that the resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for: (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor after approval of the resolution plan; and (e) implementation and supervision of the resolution plan.

In regard to the question of fair and equitable treatment, though the Adjudicating Authority as also the Appellate Authority have returned concurrent findings in favour of the resolution plan yet, to satisfy ourselves, we have gone through the financial proposal in the resolution plan. What we find is that the proposal for payment to all the secured financial creditors (all of them ought to be carrying security interest with them) is equitable and the proposal for payment to the appellant is at par with the percentage of payment proposed for other secured financial creditors. No case of denial of fair and equitable treatment or disregard of priority is made out.

Thus, what amount is to be paid to different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

Accordingly, myself assuming as the judge of the NCLT, will see that the resolution plan submitted by the resolution applicant is in consonance with the provisions of section 30(2)(b). If it is so, the commercial wisdom of the CoC in approving the resolution plan should not be interfered.

CASE STUDY 14

Vikas Kapoor is an aspiring Bollywood actor. With all his dreams and aspirations, he came to Mumbai in the year 2010 to try his luck. Blessed with a charming personality and being hardworking as well, he was offered his 1st break by a small-time producer in Bollywood. He was offered to play the role of best friend in the main lead. The opportunity is not to die for Vikas, but there will definitely be an option to take a chance. After all, he had nothing to loose. The movie was released on 29th October 2011, and was a hit. Vikas received recognition for his work and was soon signed up for some other movie projects. Vikas thought it would be a good time to take it to the next level and to start his own production house. He met his friend Ms. Shaira and told her about his business plan. She liked the idea and encouraged him to pursue it, offering him her full support. On 16th February 2013, he incorporated his company known as Vikas Films Private Limited (VFPL). The company was incorporated with a share capital of ?10 lakhs. The vision of the company was to be a premier production house, and the mission of the company was to provide quality entertainment. VFPL started working on its first-ever film, 'Dil Se Dil Tak', in which Vikas and Shaira were in the lead role.

Vikas was in New York, shooting an item number of his upcoming film when he remembered that Shaira's birthday was coming. Vikas was in love with her and wanted to propose to her on her birthday. He thought what could be a better way to do that than to gift her some jewellery. He took the opportunity to stop by Gazelle, a famous jewellery store in New York. The price of gold on that day was USD 50 per gram, which was higher than the prevailing rates in India. But he did not want to compromise and settle for less and he bought a necklace made with 80 grams of gold. While standing in the payment queue, his eyes struck a rose made up of silver weighing 30 grams. The price of silver was USD 19 per gram. He wanted to buy something for himself too; after all, he has never been overseas before. He had always dreamed of buying a branded watch with a platinum finish, and so he bought one, worth USD 550, along with the silver rose. He thought of wearing it, but he was already wearing a watch. He thought that he should not wear it as there is a risk of damage while in transit. Vikas arrived in India and walked through the Green Channel though he was required to walk through the Red Channel since he was carrying more than the limits of bona fide baggage (allowed for duty-free clearance) under the Baggage Rules, 2016.

Meanwhile in India, Dreamland Reels Pvt. Ltd (DRPL), one of the oldest companies in the Bollywood Industry, which is engaged in the production, and distribution of films all over India. The filmmaking process involves production, distribution and exhibition. An exhibition is when people see a movie in the theatre. For the exhibition, DRPL would tie-up with various Multiplexes and Single Screen Theatres, collectively referred to as the 'Exhibitors'. With the rise of Multiplexes, the market share of Single Screen Theaters', has come down to 35% (means if 100 exhibitions took place then 65 are in multiplexes and the remaining 35 in Single Screen Theaters). So, the importance of Single Screen Theaters is relatively less. DRPL is all set to release its mega starrer film 'Hero No. 1' on 25th December 2015. While 'Hero No. 1' is going to release soon, DRPL has another project which is nearing completion, and they wished to release the same on 14th February 2016, with the title 'Love Tales'. What could be a better occasion than Valentine's Day to release a film with a plot on modern romance. DRPL called for a meeting with all the Exhibitors to discuss the release of 'Hero No.1'. DRPL put forth a condition before the Single Screen Theatres that if they wanted to purchase the rights of the film 'Hero No. 1' they also have to purchase the rights of the film 'Love Tales' to be released and exhibited on Valentine's Day which DRPL kept as a non-negotiable condition. The majority of the Single Screen Theatres agreed to the condition because DRPL is the largest (number of films per year) producer as well apart from being one of the oldest, but some did not find it lucrative and hence declined. Unfortunately, the ones declined did not get the rights to exhibit both, 'Hero no 1' & 'Love Tales'.

Vikas had just returned to India. The time had come, VFPL was ready with its film 'Dil Se Dil Tak' and wanted to release the same on February 14, 2016. VFPL invited Exhibitors and observed that various Single Screen theatres had declined their invitation. Vikas then came to know that the same was due to the fact that the Single Screen theatres have already purchased the rights of the film 'Love Tales', under a condition put forth by DRPL, which was also to be released on February 14, 2016. Vikas was taken aback and he thought that though DRPL was a well-known banner, but how could they do that. He thought of this as an extremely unfair move on DRPL's part. He decided that he had to do something about this. He appointed a lawyer, Rohan Kumar. Rohan heard the case and advised Vikas to report the same as DRPL had contravened the provisions of the Competition Act, 2002.

Legal experts based upon the precedence established by Commission (Competition Commission of India) and other judicial bodies believe Multiplexes and Single Screen Theatres shall be considered as different segments ("Relevant Product Market") because the features and commercial conventions are distinct despite the core element (film) of their sale is same.

It was December 2016, Vikas' movie 'Dil Se Dil Tak' got released and managed to do reasonably well. Not a big hit, and not a flop either. VFPL made a profit of ₹ 80 lakhs from the movie and Vikas earned ₹ 40 lakhs as his remuneration in the capacity of the actor. Vikas decided to purchase a house, now that he had the funds, it would be a good move, he thought. He contacted Mr. Kataria, a broker who showed Vikas some options in South Mumbai, but they seemed beyond his budget. Mr. Kataria then showed him a beautiful farmhouse in Panvel for ₹ 30 lakhs which was so beautiful that Vikas thought it would be a good place for throwing some parties and immediately agreed to seal the deal. The farmhouse was purchased in the name of his mother, Mrs. Shanti Kapoor. Vikas paid the money from the remuneration he earned and also paid Mr. Kataria his brokerage fees of ₹ 5 lakhs. Mrs. Shanti Kapoor thereafter retransferred the said property in the name of Vikas.

Mr. Kataria was glad that he could earn ₹ 5 lakhs from Vikas, and he felt it like an achievement. His nephew Ranjan pleaded with him to lend him some money. Mr. Kataria gave him ₹ 5 lakhs as a loan, and Ranjan signed a document to return it to Mr. Kataria. Ranjan used that money, which his uncle had given him and with an additional sum of ₹ 3 lakhs which he had from unaccounted money, purchased a garage in Nagpur in his own name. Ranjan was happy, as finally, he could start his two, three, and four-wheelers service centre.

Ms. Shaira was thrilled to see the gifts Vikas brought for her. He proposed to her, and she accepted. Both got engaged. Vikas was so happy that everything in his life was finally headed in the right direction. He visited his rapper friend who goes by the name, "KingStar" who told Vikas of his upcoming rap song, 'Dance Trance' and made Vikas listen to it. Vikas was so impressed that he was willing to purchase the copyrights of the song for using the same in his next film. He offered KingStar a sum of ₹ 5 lakhs to be paid from the remuneration, which Vikas had earned from his first movie. KingStar was ready to sign the papers, and Vikas made him sign the copyrights in favour of Ms. Shaira.

MULTIPLE CHOICE QUESTIONS

1. DRPL had kept a condition in front of the Exhibitors who were Single Screen Theatres to purchase rights of exhibiting both the movies 'Hero no 1' to be released on 25th December 2015, and 'Love Tales' to be released on 14th February 2016. Though there was no written document in that regard, some Single Screen Theatres accepted the condition and purchased rights of both the movies. Therefore, the understanding is:

   (a) Not an agreement
   (b) Is an Anti-competitive agreement
   (c) Is a Void Agreement to the extent Single Screen Theatres were made to accept the condition of purchasing rights of both the movies
   (d) Is a Valid Agreement

2. Regarding DRPL it can be said that:
   (a) DRPL enjoys a dominant position in the market, as it is for quite a long time in the Industry
   (b) DRPL enjoys a dominant position in the market, as its film is a mega starrer one
   (c) DRPL enjoys a dominant position in the market, as it is the largest producer in the Industry.
   (d) It is not certain if DRPL has a dominant position

3. In the context of the purchase of a garage in Nagpur in name of Mr. Ranjan, Mr. Kataria is
   (a) Liable for committing a Benami transaction, because he paid part of the consideration
   (b) Liable for committing a Benami transaction, because he paid the majority of the consideration
   (c) Liable for committing a Benami transaction, because his money has been channelized although he himself not paid the same
   (d) Not liable for committing a Benami transaction

4. In the transaction regarding rap song, 'Dance Trance', which is the following statement is correct?
   (a) Transaction is benami and Mr. Vikas is benamidar.
   (b) Transaction is benami and Ms. Shaira is benamidar.
   (c) Transaction is benami and KingStar is benamidar.
   (d) Transaction is not benami.

5. Under which of the section of the Competition Act, 2002 Mr. Vikas can approach to Competition Commission of India against the DRPL?
   (a) Under-section 3(4)
   (b) Under-section 4
   (c) Under-section 19
   (d) Under all of the above sections

DESCRIPTIVE QUESTIONS

6. Evaluate the legal validity of both the transactions regarding the Panvel farmhouse. If the transactions are valid, justify with reasons. If not, then suggest what could be the proper course of action.
7. Is Vikas Kapoor guilty of an offence under the Prevention of Money Laundering Act, 2002? Explain.
8. VFPL has reported DRPL for contravention of the provisions of the Competition Act, 2002. Please examine the case and elaborate your findings in terms of the said Act.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (b) Is an Anti-competitive Agreement

   Reason:
   It may be termed as "tie-in arrangement", which includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

   In terms of Section 3(4)(a) of the Competition Act, 2002, the tie-in arrangement shall be an agreement in contravention of section 3(1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

2. (c) DRPL enjoys a dominant position in the market, as it is the largest producer in the Industry.

   Reason:
   Section 4 of the Competition Act, 2002 deals with the abuse of dominant position.

   Section 4(2) provides that there shall be an abuse of dominant position under section 4(1), if an enterprise or a group,-

   (a) directly or indirectly, imposes unfair or discriminatory-
   (i) condition in purchase or sale of goods or service; or
   (ii) price in purchase or sale (including predatory price) of goods or service

3. (d) Not liable for committing a Benami transaction

   Reason:
   Here Kataria was involved in purchasing a garage in Nagpur. He simply gave ₹ 5 lakh to his nephew Ranjan on his demand. Ranjan purchased the garage with the money lent by Kataria. Hence Kataria is not liable for indulge in benami transaction.

4. (b) Transaction is benami and Ms. Shaira is benamidar.

   Reason:
   In terms of Section 2(10) of the Prohibition of Benami Transaction Act, 1988, "benamidar" means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

   In the given case, the song's copy right was purchased by Vikas in the name of her wife Shaira. The money was paid out of genuine source by Vikas. Although it is a benami transaction, however it is exempted in terms of section 2(9)(A)(b)(iii).

   The benamidar is Shaira.

5. (d) Under all of the above sections

   Reason:
   Analysing each of the sections/ sub-section given in the option:

   Section 3(4): Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including- (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

   In the given situation, the DRPL was found to have engaged in tie-in arrangement.

   Section 4 deals with abuse of dominant position. Yes, DRPL was in dominant position and have abused its dominant position.

   Section 19 deals with the Inquiry into certain agreements and dominant position of enterprise. In this the CCI may make an inquiry in to section 3 and 4 either on its motion or on receipt of any information.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

Firstly, the purchase of the Panvel farmhouse has been done in the name of Mrs. Shanti Kapoor, mother of Vikas Kapoor. This is a Benami Transaction.

Section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, lays down the definition of a Benami Transaction, which reads as under:

"benami transaction" means,-

(A) a transaction or an arrangement-

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by-

(i) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

(ii) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint- owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual;

It says it is a transaction where a property is transferred to a person and consideration paid by another person and the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration. Further, one of the exceptions to a Benami transaction provides that when the property is held in the name of any person who is individual's lineal ascendant or descendant and such a lineal ascendant or descendant appear as a joint owner in the property and the consideration has been paid from known sources of the individual. Mother is a lineal ascendant.

Hence, in this case though the consideration has been paid from a known source, i.e. remunerations earned by Vikas Kapoor, the farmhouse is not held jointly by the mother and the son for the exception to apply.

Secondly, Mrs. Shanti Kapoor re-transfers the Panvel farmhouse to Vikas. Here, Mrs. Shanti Kapoor is treated as benamindar. Section 6 of the Prohibition of Benami Property Transactions Act, 1988 deals with the matter relating to prohibition on re-transfer of property by benamidar, which reads as under:

(1) No person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf.

(2) Where any property is re-transferred in contravention of the provisions of subsection (1), the transaction of such property shall be deemed to be null and void.

Thus, as per the above provisions the aforesaid transaction of transfer of property from the mother to his son shall be null and void.

The ideal course of action in the given case should have been the execution of a sale deed in the favour of Vikas Kapoor capturing the consideration paid by him, duly stamped with the applicable stamp duty, and registered. If Vikas was desirous of later transferring the same in favour of his mother, then he could have executed a Gift Deed as per the Transfer of Property Act. Alternatively, Vikas and his mother could have been joint owners of the farmhouse.

Answer 7

It is mentioned in the case itself that Vikas required to walk through the red channel because he carries more than the limits of bona fide baggage (allowed for duty-free clearance) under the Baggage Rules, 2016; but he walked through the green channel to avoid customs duty. Hence, Vikas has committed an offence under section 135 of the Customs Act, 1962.

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

Further as per Section 2(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

Further as per paragraph 12 of part A of Schedule to the Prevention of Money Laundering Act 2002, offences under the Section 135 of Customs Act, 1962 regarding evasion of customs duty; are considered as a scheduled offence under the Prevention of Money Laundering Act, 2002.

Therefore, Vikas is guilty of an offence under the Prevention of Money Laundering Act, 2002.

Students are advised to note

Mr. Vikas also committed an offence under Section 132 of Customs Act, 1962 regarding false declaration which is mentioned under part B of the schedule to the Prevention of Money Laundering Act, 2002. But same is not a scheduled offence under the Prevention of Money Laundering Act, 2002. Because offences specified under Part B of the Schedule considered as the scheduled offence only if the total value involved in such offences is one crore rupees or more. This is not the case here considering the prevailing exchange rate between USD and INR.

Answer 8

The facts of the case are that DRPL wanted to release its film 'Hero no 1' on 25th December 2015, being Christmas and its film 'Love Tales' on 14th February, 2016 being Valentine day. VFPL also wanted to release its film 'Dil Se Dil Tak' on the same day as 'Love Tales'.

DRPL put forth a condition before the Single Screen Theatres that if they want to purchase the rights of the film 'Hero no 1', they have to also purchase the rights of the film 'Love Tales' to be released and exhibited on valentine's day. DRPL kept that as a non-negotiable condition.

With the rise of Multiplexes, the market share of Single Screen Theaters', has come down to 35% (means if 100 exhibitions took place then 65 are in multiplexes and the remaining 35 in Single Screen Theaters).

Since the legal experts based upon the precedence established by Commission (competition commission) and other judicial bodies believe Multiplexes and Single Screen Theatres shall be considered as different segments ("relevant product market") because the features and commercial conventions are distinct despite the core element (film) of their sale is same, hence the importance of 35% market share held by Single Screen Theaters' for exhibition shall not be considered in relative context to 100; instead it shall be considered as separate relevant product market. Means appreciable adverse effects shall be measured and considered in an independent context.

The majority of the Single Screen Theatres agreed to the condition because DRPL is the largest (number of films per year) producer as well apart from being one of the oldest, but some did not find it lucrative and hence declined. Unfortunately, the ones who declined did not get the rights to exhibit both, 'Hero no 1' and 'Love Tales'.

Since DPRL put forward tie-in agreement (prohibited under section 3(4) the Competition Act, 2002 and explained through explanation to said sub-section) as a non-negotiable condition in front of Single Screen Theatres, hence guilty under section 3(1) the Competition Act, 2002 of entering an anti-competitive agreement.

DRPL being the largest (number of films per year) producer, hold the dominance over the exhibitors (as well as on other producer and distributors) but that neither prohibited and nor considered as offence. This feature of being the largest producer empowers the DPRL to put forward the non-negotiable condition and also influences/forces the majority of the Single Screen Theatres to agree on the condition (tie-in i.e. to purchase the rights of the film 'Hero no 1', Single Screen Theatres have to also purchase the rights of the film 'Love Tales') hence DRPL also guilty under section 4(1) of the Competition Act, 2002 of abusing the dominance.

CASE STUDY 15

Bindal Steel and Power Ltd. (BSPL) was incorporated in 2002. It is engaged in the exploration of iron ore and produces economical and efficient steel and power through backward and forward integration. BSPL's business operations span across the states of Chhattisgarh, Odisha & Jharkhand in India, where it operates some of India's most advanced steel manufacturing and power generation capacities on a global scale. BSPL has created cutting-edge capacities to produce upto 9.95 Million Tonne p.a (MTPA) of Iron through a judicious mix of Direct Reduced Iron (DRI), Blast Furnace and Hot Briquetted Iron (HBI) Routes catering to its 11.6 MTPA of Liquid Steelmaking capacities across three locations in India and abroad as well. The company has an installed finished steel capacity of 6.55 MTPA prudently spread over Bar Mills, Plate Mills, Rail & Universal Beam Mill (RUBM), Medium & Light Structural Mill (MLSM), and Wire Rod Mill.

Bindal Steel & Power (Mauritius) Ltd. (BSPML) subscribed 7 lakh shares of BSPL at USD 9 each (USD 6.3 million) in 2002. The parent company BSPML holds 56% shares in BSPL. BSPL is also an associate of Bindal Steel & Power (USA) Ltd. (BSPUL) which holds 27% shares of BSPL. In 2009, the BSPL is planning for vertical expansion by diversifying from the steel and power industry to the automobile sector. BSPL in order to meet expenses for working capital in relation to setting up of factories in different locations of India issued 6% debentures worth $ 80 million which were listed on the New York Stock exchange. BSPL had already applied for the loan registration number for the purpose of a loan through an automatic route of RBI. BSPL submitted the duly certified Form ECB, which also contains the terms and the conditions of loan, in duplicate to the local branch of SBI Bank for obtaining valid LRN. The debentures were raised in foreign currency and also are repayable in foreign currency. The parent company BSML subscribed to 60% of debentures issued by BSPL. The foreign branch of SBI Bank in the U.S.A also subscribed 10% of debentures issued by BSPL. The 6 months NIBOR prevailing in the New York Stock exchange at the time of providing the loan was 3%. BSPL is required to deposit tax which is deducted at source on interest income at a rate of 5% on behalf of the subscribers of the debentures.

BSPL is required to repay the loan in the time span of 5 years. The repayment schedule is 25% payment in 1st year, 20% payment between 2nd to 4th year, and balance 15% payment in 5th year. Taking 360 days in calculation the average period of loan comes out to be 3.2 years. After 1 month from the date of the issue of debentures, the Board meeting was held to formulate the risk management policy of the loan. The Board is of the opinion that the company BSPL is at a high risk of fluctuation in foreign exchange and hence the board needs to hedge the principal portion of the debt by entering into a forward contract.

As per the latest audited balance sheet of BSPL, its paid-up share capital was USD 7.5 million (face value equivalent to USD 6 per share), reserves and surplus of USD 8 million out of which USD 5 million were free reserves. One of the outstanding loans was equivalent to USD 5 million in form of rupee-denominated bonds provided by BSPML in 2006 bearing a coupon rate of 4% p.a.

In 2016, Bindal Steel and Power Ltd. (BSPL) decided to expand its presence to several other states. The board of directors thought it would be a good move to set up few more factories, particularly in the states in which BSPL wants to create its presence. To undertake this, venture finance was a pre-requisite for this purpose. BSPL was not desirous of increasing its equity component and decided to raise its debt component instead. Accordingly, the management of BSPL decided to apply for a loan. BSPL approached Uniform Finance Limited (UFL) for this purpose. It submitted an application to UFL requesting for ₹ 100 crores as a loan. UFL agreed to facilitate the lending as secured lending to be repaid in 40 EMIs. BSPL accepted the conditions and entered into a Loan Agreement with UFL. BSPL handed over 40 postdated cheques to UFL towards the payment to UFL. The dates of the cheques were in correspondence with the EMI dates.

UFL was part of the Uniform Industries Group. The Group had another entity known as Uniform Capital Limited (UCL). UCL was also involved in commercial finance and had a larger client base as compared with UFL. The Group was desirous of merging UFL in UCL to further expand its client base under one umbrella in the name of UCL. The petition for the merger was under consideration in the High Court (HC) and HC approved the same.

BSPL wanted to procure some infrastructure-related material for setting up the factories. It entered into an agreement with Infra Providers Pvt. Ltd. (IPPL) for the purpose. IPPL was renowned in the industry for providing good quality infrastructure-related material for building and construction purposes. BSPL and IPPL executed a Procurement Agreement which fleshed out the quality and quantity of material to be delivered, the logistics of the delivery, the schedule of delivery, the tranches in which payment would be made by BSPL, etc.

BSPL commenced the activities towards the new venture. IPPL started delivering the requisite materials to BSPL for settling up the factories. However, BSPL was not convinced with the quality of the material and

withheld the payment of money to IPPL. IPPL contested the same and sued BSPL in the court of law for non-payment of money. BSPL's contention was that since the material supplied did not meet the specified quality it was not liable to pay IPPL for the same.

BSPL had also taken a loan in form of rupee-denominated bonds from Bindal Steel & Power (USA) Ltd. (BSPUL). Though BSPUL was a group entity the loan was taken at an arm's length interest rate. The repayment was to be done by BSPL at a later date.

Unfortunately, the market hit with depression, and the economic conditions in the industry were impacted. BSPL suffered some losses which impacted its bank balance. As a result of the same, the postdated cheques submitted to UFL were dishonored. UCL (as UFL got merged with UCL) was aggrieved and called for the arbitration proceeding for the matter which was a medium of settlement recorded between the parties in terms of the Loan Agreement signed between BSPL and UFL.

IPPL came to know of the situation of BSPL and filed an application to the NCLT for initiation of corporate insolvency resolution process against BSPL and then after UCL also decided to file an application to the NCLT for the same.

MULTIPLE CHOICE QUESTIONS

1. For initiation of the corporate insolvency resolution process against BSPL, IPPL can file an application to NCLT jointly with:
   (a) Uniform Capital Limited
   (b) Uniform Capital Limited and Bindal Steel & Power (USA) Ltd.
   (c) Bindal Steel & Power (USA) Ltd.
   (d) IPPL can file application solely only and not jointly
2. The Committee of Creditors (CoC) of BSPL would comprise of:
   (a) IPPL and BSPUL
   (b) UCL and BSPUL
   (c) UCL, BSPUL and BSPML
   (d) UCL
3. Assume that there are no legal proceedings going on between IPPL and BSPL and NCLT admitted the application filed by IPPL for initiation of the CIRP against BSPL but immediately thereafter IPPL and BSPL came to a satisfactory settlement. In such a case, the application for CIRP:
   (a) May be allowed to withdraw by NCLT on an application by IPPL
   (b) May be allowed to withdraw by NCLT on an application by IPPL subject to the approval of the Committee of Creditors with a 90% voting share
   (c) May be allowed to withdraw by NCLT on an application by IPPL or Resolution professional
   (d) Cannot be withdrawn
4. Whether the all-in-cost of the debentures is within the prescribed threshold under FEMA, 1999?
   (a) Yes, because the all-in-cost is 6% whereas the prescribed limit is 7.5%.
   (b) No, because the all-in-cost is 11% whereas the prescribed limit is 7.5%.
   (c) Yes, because the all-in-cost is 6.03% whereas the prescribed limit is 7%.
   (d) Yes, because the all-in-cost is 6% whereas the prescribed limit is 10.5%.
5. Which of the following statement is correct?
   I Raising of ECB through a foreign branch of SBI Bank is not valid because the foreign branch of an Indian bank cannot subscribe to the foreign currency-denominated bonds
   II Raising of ECB through a foreign branch of SBI Bank is not valid because the foreign branch of an Indian bank cannot subscribe to debentures, funds of which are to be used for working capital purposes
   III BSPL has appropriately hedged the foreign exchange exposure as per the provisions of FEMA, 1999
   IV The parent company of BSPL cannot subscribe to the debentures because it is holding more than 51% equity in BSPL.
   (a) I and III
   (b) II, III, and IV
   (c) Only II
   (d) II and III

DESCRIPTIVE QUESTIONS

6. Whether the application to NCLT for CIRP against BPSL filed by UCL is valid considering the fact that arbitration proceedings are pending as well as the loan was taken from the former company, UFL, and not UCL? Assume no application to NCLT by IPPI has been filed.
7. Whether the application filed by IPPL to NCLT for initiation of corporate insolvency resolution process against BSPL is eligible to be admitted or liable to rejection?
8. Whether the BSPL allowed raising the external commercial borrowing through an automatic route?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) IPPL can file application solely only and not jointly

   Reason:
   The IPPL here is an Operational Creditor. Since the BSPL has made default in paying the dues of the IPPL, so IPPL can initiate CIRP against BSPL.

2. (d) UCL

   Reason:
   Section 21(2) of the IBC provides that the committee of creditors (CoC) shall comprise all financial creditors of the corporate debtor.

   Since IPPL is an operational creditor, so it can not be a part of the CoC. UCL being the financial creditor, so it can become member of CoC.

3. (b) May be allowed to withdraw by NCLT on an application by IPPL subject to the approval of the Committee of Creditors with a 90% voting share

   Reason:
   Section 12A of the IBC states that the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of 90% voting share of the committee of creditors, in such manner as may be specified.

4. (a) Yes, because the all-in-cost is 6% whereas the prescribed limit is 7.5%.

   (The 6 months NIBOR pertaining in New York Stock exchange at the time of providing loan was 3%.Under ECB framework, Benchmark rate plus 450 bps spread.so rate would be 3% +4.5% =7.5% hence,6% is within the limit)Refer ECB framework under FEMA)

5. (c) Only II

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

Uniform Finance Limited (UFL) is part of the Uniform Industries Group. BSPL vide a Loan Agreement taken a loan from of ₹ 100 crores from UFL to be repaid in 40 EMIs. Here, EMIs would mean every month installment. For the same BSPL had submitted 40 postdated cheques, which were dishonored owing to the financial crunch faced by BSPL.

The Loan Agreement mentioned arbitration as a mode of dispute settlement between the parties, hence, UCL called for arbitration proceedings for solving the dispute pertaining to non-payment of the balance amount by BSPL.

We can say that considering the nature of the transaction, the debt owed by BSPL is a financial debt and hence, UFL is a financial creditor of BSPL and BSPL is a corporate debtor.

A financial creditor can apply to the NCLT under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiation of corporate insolvency resolution process against the corporate debtor.

A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money.

It is to be noted that an application filed under the said Section 7 of the Code is NOT BARRED by the ongoing arbitration proceedings. However, once an application under Section 7 of the Code is admitted by the NCLT, the other proceedings pending before any Courts or Tribunals including the Arbitral Tribunals are stayed after the commencement of the moratorium period. The moratorium period shall commence from the date of admission of the application by the NCLT.

Section 14(1)(a) provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely, the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority.

Section 238 of the IBC provides that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law

Further, in the interim, UFL got merged into Uniform Capital Limited (UCL) which is another group entity of Uniform Industries Group. Hence, though the debt was originally due by BSPL to UFL, but by virtue of the High Court approving the scheme of merger, the loan amount receivable by UFL stands transferred and vested in UCL. Accordingly, UCL has acquired the status of the financial creditor in terms of section 5(7) of the Code.

Hence, it can be concluded that in spite of the fact that arbitration proceedings are ongoing, UCL being the financial creditor of BSPL can apply to the NCLT for initiation of the corporate insolvency resolution process.

Answer 7:

BSPL had entered into a Procurement Agreement with Infra Providers Pvt. Ltd. (IPPL). The motive of entering into this agreement was for BSPL to procure materials for setting up its factories. BSPL did not make payment to IPPL on the grounds that the quality of the material was not in consonance with the Procurement Agreement. The said agreement did specify the specifications of the materials. IPPL contested the same and sued BSPL for the payment.

Here, it worthwhile to take reference of the definition of Operation Creditor and Operational Debt as defined under the IBC.

Section 5(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Section 5(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

In the given case , the transaction, that BSPL entered into with IPPL was in the ordinary course of its business, hence the debt can be categorized as an operational debt under section 5(21) of the Insolvency and Bankruptcy Code, 2016 (Code) and IPPL can be categorized as an operational creditor under Section 5(20) of the Code.

An operational creditor can make an application to the NCLT under Section 9 of the Code for the initiation of the corporate insolvency resolution process. One of the pre-requisite for an Operational Creditor to file an application under Section 9 is that the operational creditor does neither receive payment from the Corporate Debtor (BSPL in our case) nor receives any notice of the existence of a dispute.

Section 5(6) of the IBC state that "dispute" includes a suit or arbitration proceedings relating to- (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty.

BSPL and IPPL regarding the quality of the materials, and hence, due to which the question of making payment by BSPL is pending. This qualifies as a 'dispute' in terms of section 5(6) of the Code.

Hence, IPPL's application for initiation of corporate insolvency resolution process against BSPL is liable to be rejected in the presence of a 'pre-existing dispute' as to the debt. IPPL should rather wait for an order of the competent court in whose jurisdiction the dispute has been filed.

Answer 8

The RBI vide its Circular No. RBI/FED/2018-19/67FED Master Direction No.5/2018-19 dated 26.03.2019 (updated as on 10.12.2021) at Para 2.2. has prescribed the Limit and leverage for ECB Framework.

All eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under the automatic route. Further, in the case of FCY denominated ECB raised from direct foreign equity holder, ECB liability-equity ratio for ECB raised under the automatic route cannot exceed 7:1. However, this ratio will not be applicable if the outstanding amount of all ECB, including the proposed one, is up to USD 5 million or its equivalent. Further, the borrowing entities will also be governed by the guidelines on debt-equity ratio, issued, if any, by the sectoral or prudential regulator concerned.

Equity includes paid-up share capital and free reserves (including the share premium received in foreign currency) as per the latest audited balance sheet. ECB Liability includes all outstanding amounts of all ECB (other than rupee-denominated) and proposed ones (only outstanding ECB amounts in case of refinancing). Both ECB and equity amounts will be calculated with respect to the foreign equity holder.

In the given case, Bindal Steel & Power (Mauritius) Ltd. (BSPML) subscribed 7 lakh shares of BSPL at USD 9 each in 2002 but the face value of share needs to be considered that is USD 6 per share, hence paid-up capital amounts to USD 4.2 million. The parent company BSPML holds 56% shares in BSPL. The share of

BSPML in Free Reserves is $ 2.8 million (56% of USD 5 million). Thus, equity is USD 7 million (USD 4.2 million + USD2.8 million).

The company issued 6% debentures of USD 80 million which was listed on the New York Stock exchange. The parent company, BSML subscribed to 60% of debentures issued by BSPL. Thus, ECB liability is USD 48 million. The outstanding amount of the old loan is not included because it is denominated in rupees.

The ECB liability-equity ratio is 6.86:1 (USD 48/ USD 7). Since the ratio is less than 7:1, hence the BSPL allowed raising the external commercial borrowing through an automatic route.

CASE STUDY 16

Mr. Prem Mehra is an Indian businessman. He became the Chairman of the Premium Company Ltd. in 2004 after his father's death. Premium Company was established in July 1984 by Mr. D.D. Mehra, the father of Mr. Prem Mehra. The company is running multiple businesses such as Financing, Infrastructure, Telecommunications, etc.

Mrs. Ashima Mehra, the wife of Mr. Prem Mehra is a philanthropist and also a Director in Premium Company. Mr. and Mrs. Mehra have three children - Mr. Aditya Mehra, Mr. Akhil Mehra and Ms. Kaira Mehra. Amongst the three, Mr. Aditya is the eldest son and Ms. Kaira is the youngest amongst the three siblings. Mrs. Anuradha Mehra the mother of Mr. Prem Mehra also holds a 10% equity stake in the Premium Company.

The Premium Company started the telecommunications business in India on 3rd June 2004, with nationwide CDMA 2000 service. The company introduced its GSM service in 2009. The company with the corporation of a Japanese company introduced its co-branded Android smartphones in India in 2014.

On 11th March 2016, Premium Company announced that it had acquired Z-Fone Tele-Services Limited (ZTSL) and it agreed to pay ₹ 292 crores within the next 5 years. As a result of the deal, Premium Company acquired ZTSL India's subscribers and its spectrum.

Premium Company in 2007 acquired a controlling stake in Ganesham Films and after some time bought all the stakes in Ganesham Films and subsequently, changed the name of the company to Premium Mediatek Networks.

To pay the existing debts and to make the company work efficiently, Premium Company took bank loans from a consortium of Indian banks. The company wanted to expand its telecom business and DTH services in India. So, this time the company approached foreign banks for the loan. Being one of the pioneer companies of India and on its credibility, all the three foreign banks - Global Bank of America, Exim Bank of Scotland, and Chartered Bank of London, sanctioned the required loan amounts.

The Indian lenders of Premium Company included ABD State Bank with an exposure of over ₹ 1,245 crore followed by Bank of Baroda (₹ 1,090 crore), P&G National Bank (₹ 810 crore), and JV National Bank (₹ 792 crore). Among overseas lenders, Global Bank of America had an exposure of over ₹ 700 crore (converted into Rupees) followed by Exim Bank of Scotland (over ₹ 430 crore, converted into Rupees), and Chartered Bank of London (₹ 350 crore, converted into rupees). All the four Indian banks as aforesaid sanctioned the loans in the year 2012 in a consortium agreement. Premium Company assured the bank to pay all the installments on time. The company as per their commitment paid installments on time.

Everything went well but from August 2017, due to heavy losses, the company defaulted in paying installments to all the nationalised as well as the foreign banks. Due to tough competition in the telecommunications market and the entry of new giants in the market, the rates of voice calls and data plans reduced considerably. The Banks started sending reminders to the Premium Company to clear all of their respective dues.

The JV National Bank seized and then attached a warehouse of PQR to recover the unpaid loan as per court decree, but even after many attempts, not able to recover its loan by selling the property at the expected market price. So, the bank had decided to lease the premises. Premium Company had come to know about it and had approached the bank in May 2016 to take the premises on lease. The annual rent of the premises had been fixed at ₹ 1.5 crores. As the company went in losses from the year 2017, it defaulted in paying lease rentals for the last two years, which amounted to ₹ 3 Crores. Due to non-payment of dues by some other companies as well along with Premium Company to JV National Bank, the NPA of JV National Bank rose to sixty-five percent. JV National Bank has been grappling with mounting bad loans for the last two years.

Mr. Prem Mehra in a press conference announced four real estate projects in Mumbai, Nagpur, Pune, and Nashik on 21st November 2019 that Premium Company will undertake. The details of the project were as follows:

- Premium Serene in Vashi Mumbai, where the proposed project consists of an area of five hundred square meters and the number of proposed apartments will be eight .
- Premium Codename in Nagpur, where the proposed project consists of an area of fifty thousand square meters and the number of proposed apartments will be eighty.
- Premium lifestyle in Pune, where the proposed project area consists of five thousand square meters and the number of the proposed apartments will be eighty.
- Premium Royal serenity in Nasik, where the proposed project area consists of five thousand square meters and the proposed apartment will be one hundred.

The company decided that the booking of the apartments in all the projects will start after 24th December 2019, after obtaining all the legal permissions from the prescribed authority. A board meeting was held on 5th December 2019. The board of directors was of a view that there is the shortage of funds with the company. Ultimately with a unanimous decision, the budget for two projects was reduced. The company decided to reduce the number of apartments in two projects. Now the company will build only eight apartments in Premium Serene in Vashi Mumbai and in the case of Premium Codename in Nagpur, the construction will take place in two phases. In the first phase, a twenty-five square meters area will be developed with the construction of forty flats and in the second phase, another twenty-five square meters area will be developed for constructing the remaining forty flats. As per the Act, all the required documents were then submitted by the company for RERA registration.

From 25th December 2019, the company started the bookings of flats in all four projects. As a Christmas day offer, the company gave an extra two lakh rupees discount on each project on the booking of the flat within 6 months of starting of construction work. People started booking flats in all four projects. The cost of the flats in all four projects started from rupees three crores to seven crores. The company started the work in all the projects in full swing after getting the commencement of work certificate for each of the projects from the authority.

Mr. Harshit Khanna, a registered real estate agent, is the owner of a firm called Harshit Homes. He wanted to get associated with Premium Company for selling the flats of Mumbai as well as Nagpur projects respectively. Mr. Harshit gave an advertisement without the company's knowledge, in the newspaper for the sale of flats along with an offer that whosoever books any flats via his firm will get extra one percent discount on booking amount.

The company overall got a good response for the three projects except for the Nasik project. It got only seventy percent of the total booking slots till mid of February. A board meeting was held on 26th February 2020 in which it was decided that due to losses in other businesses of the company and being heavily in debt to the creditors, the company will sell its Nasik project to a third party, XYZ Infrastructure Company. After overtaking the project, XYZ Infrastructure Company made certain changes in the layouts of the project.

Premium Company tried to sell its assets to various companies, including its rival Tele Tones Company, to clear the debts but the deals did not crystallize as expected. Later, the insolvency proceedings against Premium Company started on a plea filed by Japanese Telecom Company after the company failed to clear its dues.

The CoC final meeting was to be held on 25th March 2020, but amidst the nationwide lockdown, it got cancelled. According to the order of the National Company Law Tribunal, CoC needs to complete the entire process by 30th March 2020, and the resolution professional, Legal Hawk needs to file the resolution plan with the NCLT, Mumbai by 2nd April 2020.

MULTIPLE CHOICE QUESTIONS

1. In which of the four real estate projects started by Premium Company, registration of the project is not mandatory?
   (a) Premium Serene
   (b) Premium Codename
   (c) Premium lifestyle
   (d) Premium Royal Serenity
2. Mr. Harshit has himself announced that any person making bookings via their agency will be given an extra discount. In regards to the provisions of RERA, this announcement can be deemed as:-
   (a) Voidable at the option of the Premium Company.
   (b) Misleading the buyers for services that are not intended to be offered.
   (c) Correct and to be intended to be offered by the Company.
   (d) To be reliable as made by the registered agent of the company.
3. The company decided to construct the Nagpur project in two different phases due to a shortage of funds. What shall be the impact of the decision on the project?
   (a) Both the phases are part of one project and so no separate registration is required for each phase.
   (b) Separate registration of the project is required only in cases where it is developed by two different promoters.
   (c) Each phase will be considered as a stand-alone project and separate registration is required for both phases.
   (d) If the second phase is immediately started after completion of the first phase then no separate registration of the phases is required.

4. XYZ Infrastructure Company after the takeover of the project, did changes in the layouts of the project. Is it authorised to do the changes to the layouts of the ongoing project?
   (a) Before doing any changes in the project, it has to take prior approval of the RERA Authority
   (b) As a new promoter of the project, it is authorised to make necessary changes.
   (c) With the permission of the two-third of allottees of the flats, they can make necessary changes.
   (d) The new promoter is required to carry forward the project by complying with all the pending obligations of the erstwhile promoter.

5. The final meeting of the committee of creditors was to be held on 25th March 2020. Is it necessary to hold the meeting in person or can it be arranged otherwise?
   (a) Since it is a final meeting, everyone needs to be present in person.
   (b) Meeting in person is not necessary and it can be held via video conferencing.
   (c) Only resolution plans can be discussed via video conferencing and voting needs to done in person.
   (d) With prior permission of the Tribunal (NCLT), resolution professionals can hold meetings via video conferencing.

DESCRIPTIVE QUESTIONS

6. Answer the following questions with respect to the constitution of the committee of creditors.
   a. All the four Indian banks, as a consortium gave loans to Premium Company. How will they form part of the committee of creditors and how their voting shares would be determined?

   b. JV National bank is a financial as well as an operational creditor of the Premium Company. Can JV National Bank club both the debts and claim it as a financial debt?

7. In context with the Competition Act, 2002, answer the following:
   a. What is the obligation on part of Premium Company and Z-Fone Tele-Services Limited under the Competition Act 2002, assuming that acquisition of ZTSL by the company will result in the formation of a 'combination'?

   b. In case, the Commission is suspicious about the adverse effects of the merger of both the companies on the competition, then what measures will the Commission take to investigate before issuing the approval order?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (a) Premium Serene

   Reason:
   Section 3(2)(a) of the RERA provides the exemption from registration. It reads as under:

   Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

   In the given case, the Premium Serene of Vashi Mumbai, the proposed project consists of an area of five hundred square meters only and the number of proposed apartments will be eight only. Since it is neither exceeding from 500 sq meter in area nor in number of apartments from five, hence no registration is required.

2. (b) Misleading the buyers for services that are not intended to be offered

   Reason:
   Section 10(c) of the RERA states that every real estate agent registered under section 9 shall not involve himself in any unfair trade practices, namely:-

   (i) the practice of making any statement, whether orally or in writing or by visible representation which- (A) falsely represents that the services are of a particular standard or grade; (B) represents that the promoter or himself has approval or affiliation which such promoter or himself does not have; (C) makes a false or misleading representation concerning the services;

   (ii) permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.

   Thus, the announcement of Harshit shall be treated as unfair trade practice under section 10(c)(i)(C) of RERA.

3. (c) Each phase will be considered as a stand-alone project and separate registration is required for both phases.

Reason:
The Explanation attached to section 3(2) reads as under:

For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand- alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

4. (d) The new promoter is required to carry forward the project by complying with all the pending obligations of the erstwhile promoter.

Reason:
Section 15(2) of the RERA reads as under:

On the transfer or assignment being permitted by the allottees and the Authority under sub-section (1), the intending promoter shall be required to independently comply with all the pending obligations under the provisions of this Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.

Provided that any transfer or assignment permitted under provisions of this section shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder.

5. (b) Meeting in person is not necessary and it can be held via video conferencing.

Reason:
Section 24(1) of the IBC provides that the members of the committee of creditors may meet in person or by such other electronic means as may be specified.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

a. According to Section 21(3) of the IBC, 2016, subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

Hence, each of the Indian banks will form part of the committee of creditors and their voting shares would be determined on the basis of financial debts (loan) owed to them by the Premium Company.

Here, it is to mention that foreign bank cannot be part of the CoC, since IBC is not an extra-territorial law. The courts situated outside India will not recognize the insolvency or liquidation proceedings of a company in India for its obligations abroad. This comes under the chapter of Cross Border Insolvency for which section 234 and 235 of the IBC deals with. Section 234 deals with the agreements with foreign countries and section 235 deals with the letter of request to a country outside India in certain cases.

b. According to Section 21(4) of the IBC, 2016, where any person is a financial creditor as well as an operational creditor,-
   (a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;
   (b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

   So, in the above-mentioned scenario, JV National Bank has no right to club both the debts and claim it as financial debt, as the bank would be considered as a financial creditor only to the extent of financial debts owed by it.

Answer 7:

a. Under Section 6(2) of the said Act, it is stated that subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of-

   (a) Approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be.

(b) Execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

Section 6(2A) of the said Act, states that no combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier.

Answer 8:

In case, the Commission is suspected of the merger of the company then it will investigate it under section 29 of the Competition Act 2002, in the following manner;

(1) Where the commission is of the prima-facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a show-cause notice to the parties to combination to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.

(1A) After receipt of the response of the parties to the combination, the Commission may call (Regulation 20 of the regulations) for a report from the Director-General and such report shall be submitted by the Director-General within such time as the Commission may direct.

(2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have an appreciable adverse effect on competition, then it shall direct the parties to the said combination to publish details of the combination or the receipt of the report from Director general Called under sub-section (1A), whichever is later direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.

CASE STUDY 17

Mr. Brijesh Lal is a leading real estate developer based in Jaipur. In the last two decades, his company, Satya Sai Developers Pvt. Ltd. has successfully developed many housing projects, which includes three in Jaipur and one each in Delhi, Bhopal, and Mumbai. The apartments which were built in Mumbai and Delhi included all the modern amenities and luxuries. The company is an ISO-certified company having a good reputation for delivering the projects well within the stipulated time and date.

In March 2014, Mr. Lal launched two projects in Jaipur, by the name 'Sun Residency' and 'Lotus Square'. In Sun Residency, 500 residential units consisting of 3BHK apartments were to be developed. This project was to be completed in all respects by November 2019. Lotus square was a small project with only 12 residential units of 4 BHK each to be completed by July 2016.

In January 2016, Mr. Lal transferred his rights in the project, Lotus square, to a third party, BN Housing Developers, as he wanted to concentrate on some other big projects, which he planned to launch by June 2016. But in between, the Real Estate (Regulation and Development) Act, 2016, came into force from 1st May 2016. So, Mr. Lal registered Sun Residency and submitted all the requisite documents with the concerned authorities. As the application for registration was found to be complete in all respects, the project was granted registration by RERA.

BN Housing Developers thought that it is a small project and they didn't find any need to register the project and they were also confident to successfully complete the project on time. As per their commitment, they successfully completed the project on time and all the allottees of apartments got their possessions by the end of July 2016.

According to the specified date for completion, Sun Residency was also completed and all the allottees got their possession by December 2019. But in February, some cracks developed in the walls of the building, and allottees found some quality issues in the construction. The association of allottees tried to bring it to the notice of Mr. Lal who was shocked to hear such complaints as he never compromised on construction quality for any of his projects. He called an urgent meeting of his team to discuss the issue.

Meanwhile, Mr. Lal finalised the land in one of the posh areas of Gurugram, National Capital Territory (NCT). He purchased 1000 square meters of land in that area for twenty crore rupees. He decided to build a project in two phases and so he thought to purchase 600 square meters of the adjoining plot too. The plot belonged to an NRI, Mr. Ranveer, cousin brother of Mr. Lal from whom Mr. Lal wanted to buy that plot for seven crore rupees. But Mr. Ranveer demanded eight crore rupees. Mr. Lal was so desperate and excited to start the project that he accepted his offer and purchased the land. Mr. Lal paid seven crore rupees from his RFC account and the remaining amount he paid as a gift through crossed cheque to Mr. Ranveer which Mr. Ranveer deposited to his NRO account. Mr. Ranveer gave his approval and finalised the deal.

Finally, in September 2016, Mr. Lal was able to launch the project by the name 'Imperial Residency' in which 200 residential units consisting of 3BHK apartments were to be developed. In the first phase, 100 units will be constructed and in the second phase, the next hundred units will be constructed. The date of completion of the project was December 2020.

Mr. Raj Maheswari, manager in KDM Bank wanted to purchase a luxurious flat of his own. As he was in direct contact with Mr. Lal, he called him and asked him about the availability of flats in Imperial Residency. Mr. Lal told him that only two flats were left, as the rest all were booked. Mr. Lal's manager briefed Mr. Raj about the project. Mr. Raj got interested in the information and went to see, Imperial Residency, along with his wife. He liked its strategic location and all the other amenities offered in the project. He gathered all the information regarding the sanctioned plan, layout plan, and mode of payments from the sales office representative. On the same day, Mr. Raj along with his wife Mrs. Ashima, jointly entered into an agreement for sale with the promoters of the project and made a payment of 10% of the booking amount for the flat. In installments, Mr. Raj paid 70% of the total amount to the builder as the slab got completed and the remaining 30% was to be paid at the time of possession of the flat. Mr. Raj paid 80% of the total amount from his own disclosed sources of income and for the rest 20%, he took a loan.

A company called X-One Company Ltd. bought twenty flats in phase one of Imperial Residency. As of now, all the flats got booked due to the affordability and provision of all the modern amenities in the flats. The project was in its full swing. In January 2020, there was an earthquake in the Delhi NCR area. But there was no damage caused to the existing structure of the building. Although the architect of the project suggested some structural changes in the layout plan, to make the building more resistant to earthquakes, so, in the future, it can withstand the earthquake of a larger frequency that is likely to occur in that location. But X-One Company Limited didn't voted for the need for such changes as it felt there is no such need.

Mr. Lal acquired an old building near Shantivan, Ashram road, Jaipur. It was situated in a good location. Mr. Lal thought of acquiring the building from the existing flat owners. He contacted the secretary of the society. It was a building with 2bhk apartments and had six floors. On each floor, there were 4 flats and on the ground also, the building had four flats. So, in total, the building had 24 flats. The society people agreed to sell their flats if they were paid thirty lakh rupees per flat.

Mr. Lal had a meeting with his architect wherein the architect suggested him to do some structural changes in the existing building layouts and to build car parking by demolishing the flats on the ground floor, as it will increase the flat value and he will be able to earn more profit by selling the flats. As per the architect's advice, Mr. Lal purchased all the flats from existing flats owners. After a year of making all the structural changes and renovation as suggested by his architect, Mr. Lal sold each flat at forty lakh rupees. He renamed the building as 'Premium Heights' and advertise for selling the flats. The building and flats after renovation looked so good, that one third of the previous residents of the building again re-purchased the flats from Mr. Lal. Rest other flats were sold to the new allottees.

Mr. Lal's friend, Mr. Navneet Singh, started a housing project in 2016. The date of completion of the project was November 2019 and the allottees were to get an allotment of flats by December 2019. Mr. Singh wanted Mr. Lal to get associated with the project as a financer. Mr. Lal agreed to finance, one-fourth of the project cost, in return that he will get five percent profits on the sale of each flat. But the project got delayed and by November 2019 only eight percent of work could have been completed. A meeting was held by Mr. Singh on 5th December 2019 wherein he tried to convince all the allottees that the work will be completed by May 2020 and will start getting possession from June month. But some of the allottees refused to wait for the next six months and demanded a refund, to which Mr. Lal objected. The aggrieved allottees decided to file a complaint against the promoters if their amounts were not refunded.

Multiple Choice Questions

1. The allottees wanted a refund of their entire amount from Mr. Singh. Do you think Mr. Lal has a right to raise objections against the refund?
   (a) As being one of the financers of the project, Mr. Lal has a right to raise the objection.
   (b) Mr. Lal can raise objections, only when he is one of the promoters of the project.
   (c) Mr. Lal can raise an objection, only if it is mentioned in the sale deed.
   (d) The allottees have the right to claim a refund whereas Mr. Lal has no right to raise any objection against the same.

2. Mr. Lal did renovation and changes in the existing building and re-sold one-third of the flats in Premium Heights to some of the previous owners. With respect to the scope of RERA, which of the following is the correct option?
   (a) RERA is not applicable as the building is not demolished and the only renovation is done with required structural changes.
   (b) RERA is not applicable as the flats are re-allotted to the existing 1/3rd of the flat owners.
   (c) RERA is applicable as Mr. Lal purchased more than fifty percent of the flats before their renovation.
   (d) RERA is applicable as Mr. Lal advertises for selling and flats are resold with new allotments.

3. The association of allottees of Sun Residency brought the construction defects to the notice of Mr. Lal. After allotting the possession to the allottees and formation of society, is Mr. Lal still liable to the allottees? Identify the correct statement, regarding the liability of Mr. Lal.
   (a) Once the society of allottees is formed, Mr. Lal is not at all liable for any repairs or defects in the buildings.
   (b) Mr. Lal is liable only towards the structural defects in the buildings if such defects bring to his notice within five years from the date of handing over the possession.
   (c) Mr. Lal is liable towards the structural defects or any other defect in workmanship, quality, or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development in the buildings if such defects occurred within five years from the date of handing over the possession.
   (d) Mr. Lal is liable for the structural defects in the buildings if such defects bring to his notice within five years from the date of handing over the possession.

4. Regarding the flat purchased by Mr. Raj jointly along with Mr. Ashima, which of the following is the correct statement?
   (a) Advance in form of deposit shall not be a sum of more than 5% of the cost of the property.
   (b) Any amount of deposit can be collected by the promoter if a written agreement for sale is entered.
   (c) Said transaction is a Benami transaction.
   (d) None of these is a correct statement.

5. The promoters of Lotus Square didn't register the project with RERA authority as required under RERA, 2016. What will be the consequences they have to bear for it?
   (a) Penalty up to ten percent of the estimated cost of the project.
   (b) Penalty up to ten lakh rupees or ten percent of the estimated cost of the project, whichever is higher.
   (c) Penalty of five lakh rupees, which may cumulatively be extended up to ten percent of the estimated cost of the project.
   (d) Penalty up to ten percent of the estimated cost of the project and imprisonment up to five years.

Descriptive Question

6. Mr. Ranveer sold his plot to Mr. Lal and out of eight crore rupees receivable, for one crore rupees, he wanted Mr. Lal to transfer him in form of a gift. Examine and analyse the situation.

7. Due to the earthquake in that area, the architect of the building proposed some alternations in the structure of the layout of the building. As an owner of the maximum apartments in the building do you think, X-One Company Ltd. is in a position to influence the opinion of promoters and the other flat holders?

ANSWER TO MULTIPLE CHOICE QUESTIONS.

1. (d) The allottees have the right to claim a refund whereas Mr. Lal has no right to raise any objection against the same.

   Reason:
   The allottees can demand refund from the promoter in terms of section 19(4) of RERA. Here Mr. Lal is the financier only and do not come within the definition of promoter as prescribed under section 2(zk) of RERA.

2. (d) RERA is applicable as Mr. Lal advertises for selling and flats are resold with new allotments.

   Reason:
   Section 3(2)(c) of RERA provides that notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

   Thus, as per the provision the registration was not required for renovation or repair or re-development provided the promoter has not done the advertisement. Here the promoter has done advertisement, therefore he is liable for registration under RERA.

3. (d) Mr. Lal is liable for the structural defects in the buildings if such defects bring to his notice within five years from the date of handing over the possession.

   Reason:
   The proviso attached to section 11(4)(a) of the RERA provides that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

   Section 14(3) of RERA provides that in case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

4. (d) None of these is a correct statement.

   Reason:
   We have to examine each of the option given below:

   Option (a): As per section 13(1) of RERA the advance payment is restricted up to 10% of the cost of apartment. In the given case, Mr. Ashima paid only 10%, so option (a) is correct.

   Option (b): Section 13(1) provides that a promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register

the said agreement for sale, under any law for the time being in force. In the given case, the agreement for sale was entered into before giving 10% as an advance. Hence option (b) is correct.

Option (c): This is not the benami transaction, since the purchase has paid the amount from his known sources of income (on which the Income tax has been paid) and for the remaining amount he has taken loan from bank. Hence option is correct.

Option (d): Now option (d) remains which is the last correct option which says "None of these is a correct statement.

5. (a) Penalty up to ten percent of the estimated cost of the project.

Reason:
Section 59(1) of the RERA provides that if any promoter contravenes the provisions of section 3, he shall be liable to a penalty which may extend up to 10% of the estimated cost of the real estate project as determined by the Authority.

Answer to descriptive questions

Answer 6:
Under the Liberalised Remittance Scheme ("LRS"), all resident individuals, including minors, are allowed to freely remit up to USD 250,000 per financial year for any permissible current or capital account transaction or a combination of both. Such remittances are permitted to be used for conducting permissible current or capital account transactions and subsumes gifts in foreign currency made to any NRI or Persons of Indian Origin ("PIO").

However, as per answer to FAQ no. 26 on the LRS, a resident individual can make a rupee gift to an NRI/PIO, who is a close relative of the resident individual [relative' as defined in Section 2(77) of the Companies Act, 2013] by way of crossed cheques /electronic transfer. The amount should be credited to the Non-Resident (Ordinary) Rupee Account (NRO) of the NRI / PIO and credit of such gift amount may be treated as an eligible credit to NRO Account. The gift amount would be within the overall limit of USD 250,000 per financial year as permitted under the LRS for a resident individual. It would be the responsibility of the resident donor to ensure that the gift amount being remitted is under the LRS and all the remittances made by the donor during the financial year including the gift amount have not exceeded the limit prescribed under the LRS.

Here, the term "relative" is to derive its meaning from the definition provided in section 2(77) of the Companies Act, 2013, which state that 'relative' with reference to any person, means anyone who is related to another, if -

(i) They are member so a HUF;

(ii) They are husband and wife; or

(iii) One person is related to the other in such manner as prescribed in Rule 4 of the Companies (Specification of definitions details) Rules, 2014. i.e. spouse, father, mother, son, son's wife, daughter, daughter's husband, brother, and sister of the individual.

Accordingly, FEMA brings in, a restrictive meaning to gifting transactions by covering gifts of the sum of money within the LRS domain and the scope of relative is narrower.

So, according to the definition of 'relative' under the Company Act 2013, it does not include cousin brother. Therefore, gift of a sum of Indian Rupees by Mr. Lal by way of a crossed cheque to his cousin brother would require prior approval of RBI.

Hence, in the above case, rupees one crore can only be transferred to Mr. Ranveer, if in case, he comes within the ambit of the definition of "close relatives" otherwise the money can be transferred through crossed cheque to a cousin brother, only with the prior permission of RBI and no benefit of the limit under LRS would be available in such case.

Answer 7:
Section 14(2)(ii) of the RERA, 2016, states that the promoter shall not make any other alterations or additions in the sanctioned plans, layout plans, and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation to section 14(2)(ii) also states that, for the purpose of this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family,

or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

Hence, from the provisions of the above section and its explanation, it is clear that despite the company holding twenty flats in the project, it will be counted as a single allottee. The builder needs the consent of two-thirds of allottees prior to making changes in the existing plan or building layout. So, it can be said that X-One Company Ltd. is not in a position to manipulate neither builder nor any other allottees. If two-third of the allottees give their written consent, then the required changes will be made in the building structure.

CASE STUDY 18

Mr. Sanjeev Kumar is an entrepreneur running his company engaged in manufacturing designer shirts, office wear, and T-shirts, under the brand titled "S. Kumar's Designer Wears" since 1999. It is a famous Indian brand, sold at many dealership outlets across the whole of India. The brand is famous among both middle class as well as elite class people.

After many years of struggle, finally, Mr. Kumar owned a bungalow in Saket Vihar, New Delhi where he has just started residing along with his family. Mr. Kumar's wife, Mrs. Reena, is a doctor by profession and works in a private hospital in Gurugram. Their son, Rehan has completed his graduation from NIFT, Delhi in the year 2015. After that, he joined his father's business. Mr. Kumar's daughter, Anjali, is pursuing graduation in fine arts from the University of East London which is a three years' degree course.

Mr. Kumar on 3rd July 2019, remitted USD 100,000, for his daughter's education abroad. It includes her college fees, hostel accommodation, and food expenses. On his daughter's birthday, after two months, Mr. Kumar remitted USD 3,500 as a gift to his daughter on her birthday from his RFC Account.

Mr. Kumar had high aspirations and wanted to expand his business internationally. Hence, in the year 2015, after his son joined his business, Mr. Kumar thought of exporting his designed garments to other Western and Asian countries. After discussing with his wife and son, Mr. Kumar included his son as a director in his company. Thereafter, as required, Mr. Kumar completed various formalities required for exporting his product. After submission of all the documents, Mr. Kumar was finally issued a ten-digit unique importer-exporter code (IEC) from the office of the Directorate General of Foreign Trade (DGFT) under Section 7 of the Foreign Trade (Development & Regulation) Act, 1992.

In the month of July 2015, Mr. Kumar sent his first export consignment of designer clothes to a foreign buyer in Malaysia. The order amounted to USD 15,000. As per the conversation and agreement, the importer was required to make payment in three months after shipment. As per the terms and conditions, a letter of credit was opened by the Malaysian International Bank on behalf of the importer.

Mr. Kumar grabs another good deal of USD 25,000, from a USA-based client, Mr. James Samuel who wanted to import designer clothes from India as they were economical as well as of good quality. In the U.S.A there was a good demand for designer men's wear.

Mr. Kumar was able to get 20% of the total export value in advance. Mr. Kumar and his son, both made some exclusive designs especially for Mr. James, as per his requirements. Mr. Kumar was well aware that completing orders within a given time frame, plays a key role in receiving more orders in the future. Mr. Kumar shipped the goods within five months and the remaining export value was repatriated in India within six months from the export date through the authorized dealer.

Every time, Mr. Kumar before shipping goods used to file the requisite export declaration form as per the rules and procedure. Mr. Kumar submitted the requisite form in duplicate to the Commissioner of Customs for verification and authenticity check.

Mr. Kumar in January 2018, got an export order from UAE based client, Mr. Mohammed Khalid. Mr. Khalid owes Al-Hend Retail which is one of the largest retail chains of UAE, both in terms of revenue and in terms of the total number of stores. It sells a range of goods including groceries, electronics, and apparel under various retail brands. Mr. Khalid wanted to tie up with Mr. Kumar for men's official and fashion wear. Mr. Khalid asked Mr. Kumar to send some of the sample, so that he can finalise the patterns and designs. Mr. Kumar's son, Mr. Rehan, personally went to UAE to show the samples to Mr. Khalid and finalised the order. They both had detailed discussions about the fabric, patterns, and designs. Mr. Khalid placed his first order for USD 27,000. Mr. Rehan assured him that the order will be shipped within the next five months. As per the deadline, Mr. Khalid received his order before the expiry of five months. The designs and collection as expected got a good response from the customers.

As per the demand in the UAE market, Mr. Khalid in September 2018, again placed an order for around USD 60,000. Mr. Kumar assured Mr. Khalid that as per his requirements, he will make some new designs and will try to complete and deliver the order within six months' time. This time, Mr. Kumar was paid an advance amount of USD 15,000. But even after seven months, Mr. Kumar was not able to deliver the order to Mr. Khalid as he was under constant pressure to deliver the orders of other clients. In the first week of March 2019, Mr. Kumar's company's labour went on strike as they wanted an increment in their salary. The management tried to resolve the issues with the labourers but all their efforts went in vain. As a result, there was a complete lockdown in the company for the next two months. Due to which export orders of Mr. Kumar got delayed and he started getting reminders from his clients including Mr. Khalid.

After negotiation, the labourers were given 10% increments in their salary as demanded. They all were back to work from 1st May 2019. By end of July 2019, Mr. Kumar was not able to complete Mr. Khalid's order. By September 2019, he was only able to partially deliver his consignment. Mr. Kumar called Mr. Khalid and apologized to him for not being able to deliver the order on time. He requested Mr. Khalid to give him one month's time to complete his order, to which Mr. Khalid refused and wanted Mr. Kumar to refund his advance amount. Mr. Kumar then personally went to UAE to convince Mr. Khalid and Mr. Khalid to agree for one month time.

Meanwhile in New York, on 2nd November 2019, Mr. James while reading the newspaper, came across an advertisement that an exhibition cum fashion show was to be organised for 7 days, from 12th December to 19th December 2019. Many designers and big fashion brands from all over the world will showcase their best designs in the exhibition. Mr. James called Mr. Kumar and asked him to participate and also send him some sample designs to be displayed on his behalf at the exhibition.

In India, as per the special provisions for the export of garment samples, only those exporters are allowed to send samples that are registered with the Apparel Export Promotion Council (AEPC). Hence, it was easy for Mr. Kumar to send samples as he was a member of AEPC.

As this sounded to be a good opportunity and in future, he can get more prospective clients from other countries, he asked Mr. James to send him the form as well as all the formalities required to be done for the participation. Mr. Kumar discussed the same with his son, Mr. Rehan and they started making some new designs, keeping in mind the latest trends. The shipment got ready for dispatch. The shipment was dispatched on 1st December and it reached New York by 15th December to Mr. James.

The consignment consisted of samples that were of value not exceeding the USD 10,000. The samples were displayed at the exhibition and got a very good response. As a result of this exhibition, Mr. Kumar got two more orders worth USD 30,000 each from two different outlets, one situated in Los Angeles, U.S.A and one retail outlet situated in Canada.

Mr. Kumar was very happy as his revenue collection in the U.S and Canadian markets rose to USD 100,000 annually. He was immensely happy with all of his dealers including Mr. James and owner of retail outlets in the U.S.A and Canada. As a token of appreciation, he sent them gifts in form of customized suits and a good mobile phone as a gift to each of them which cost him, a total of three lakh rupees.

In July 2018, Mr. James' wife, Mrs. Anna, called Mr. Kumar. She is working in association with UNO, for an NGO called "Hope", which works for children who suffer from autism (problems with communication and social interaction). Mrs. Anna approached Mr. Kumar, to help her in raising the funds for such children and Mr. Kumar donated USD 3,000 from his account under the liberalised remittance scheme. Mr. Kumar also gave Mrs. Anna some references of his friends who generally used to contribute to such a noble cause. She got a good response from Mr. Kumar's friends too. Mrs. Anna was overwhelmed by the support, she got from Mr. Kumar and his friends. She sent all the receipts of donations to Mr. Kumar's address with a thank you note.

MULTIPLE CHOICE QUESTIONS

1. After the declaration form is submitted by Mr. Sanjeev Kumar to the Commissioner of Customs, what will be the course of action after its verification by the Commissioner?
   (a) The Commissioner will pass an order for the export of the shipment to proceed.
   (b) The Commissioner shall forward the original copy of the declaration to RBI.
   (c) The Commissioner shall issue a NOC to Mr. Kumar and send a copy to AD bank.
   (d) The Commissioner will retain the original copy of the declaration form and return the duplicate copy to Mr. Kumar.

2. The importer-exporter code number is:
   (a) Only issued to identify exporter and importer and not meant to be used while doing any transactions
   (b) Required to be mentioned on copies of declaration forms submitted to a specified authority.
   (c) Needed only while the export amount is to be realized.
   (d) Only used by RBI in order to maintain records of exporter and importer.

3. Do you think the declaration requirement is applicable, in the case where Mr. Kumar exports garment samples to Mr. James in the U.S.A?
   (a) It is applicable if samples are not to be imported back
   (b) It is not applicable as it is exempted from such requirement
   (c) It is applicable as the samples are sent outside India.
   (d) It is not applicable as the export of garments is excluded from such requirements.

4. Mr. Kumar remitted USD 3,000 for donation abroad under LRS. Can such donation be considered under the prescribed limit of LRS?
   (a) The amount so remitted will be reduced from the prescribed limit of LRS in a financial year.
   (b) The amount so remitted cannot be considered under the prescribed limit of LRS.
   (c) The amount so remitted can be considered under LRS, only if it is remitted with prior approval of the Central Government.
   (d) The amount so remitted can be considered under LRS, only if it is remitted with prior approval of RBI.

5. Whether Mr. Kumar had undertaken any obligation while taking advance payment against export order, from Mr. Kahlid?
   (a) Mr. Kumar needs to inform RBI if he fails to deliver the shipment within the stipulated time.
   (b) Mr. Kumar needs to dispatch the shipment within one year from the date of receipt of advance payment.
   (c) Mr. Kumar needs to refund the full advance payment if the order is not dispatched within a period of six months with prior approval of RBI.
   (d) Mr. Kumar needs to refund the full advance payment if the order is not dispatched within a period of 1 year with prior approval of RBI.

DESCRIPTIVE QUESTIONS

6. Mr. Kumar after remitting USD 100,000 for her daughter's education abroad, again remitted USD 3,500 as a gift to his daughter Anjali. Evaluate that how as an Indian resident, he was eligible to do both these remittances one after another?

7. What are the evidences that Mr. Kumar may need to furnish at the time of filing declaration of exports if required by the Commissioner of Customs and what are the other requirements that Mr. Kumar needs to adhere to relating to such declaration?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (b) The Commissioner shall forward the original copy of the declaration to RBI.

   Reason:
   As per Regulation 6 (A) of Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, the declaration in form EDF shall be submitted in duplicate to the Commissioner of Customs. And after duly verifying and authenticating the Declaration Form, the Commissioner of Customs shall forward the original Declaration Form/Data to the nearest office of the Reserve Bank and hand over the duplicate Form to the exporter for being submitted to the Authorised Dealer.

2. (b) Required to be mentioned on copies of declaration forms submitted to a specified authority.

   Reason:
   As per Regulation 5 of Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, the importer-exporter code number allotted by the Director General of Foreign Trade (DGFT) shall be indicated on all copies of the declaration forms submitted by the exporter to the specified authority and in all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.

3. (b) It is not applicable as it is exempted from such requirement.

   Reason:
   As per Regulation 4 (a) of Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, export of goods may be made without furnishing the declaration if it comprises trade samples of goods and publicity material that supplied free of payment,

4. (a) The amount so remitted will be reduced from the prescribed limit of LRS in a financial year.

   Reason:
   In terms of Para 7(b) of the Master Direction - Liberalised Remittance Scheme (LRS) issued by the RBI vide its Circular No. RBI/FED/2017-18/3 FED Master Direction No. 7/ 2015-16 dated 01.01.2016 (Updated as on 20.06.2018), any resident individual may remit up-to USD 2,50,000 in one FY as gift to a person residing outside India or as donation to an organization outside India. Further as per FAQ No. 3 on LRS (updated as on 21.10.2021) provided by the RBI, which states that individual can avail of foreign exchange facility for the gift or donation within the LRS limit of USD 2,50,000 on financial year basis.

5. (b) Mr. Kumar needs to dispatch the shipment within one year from the date of receipt of advance payment.

As per Regulation 15 (1)(i) of Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, where an exporter receives advance payment (with or without interest), from a buyer/ third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that the shipment of goods is made within one year from the date of receipt of advance payment.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

Para 1 of Schedule III of the FEM (Current Account Transactions) Rules, 2000 states that individuals can avail of foreign exchange facility for the -

- Gift or donation; [Ref. Para 1(ii)]
- Studies abroad, [ref. Para (viii)]

Within the limit of USD 250000 only.

Any additional remittance in excess of the said limit shall require prior approval of the RBI.

Thus, as per the Liberalised Remittance Scheme, Authorised Dealers may freely allow remittances by resident individuals up to USD 250,000 per F.Y. (April-March) for any permitted current or capital account transaction or a combination of both as mentioned in Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

AD Category I banks and AD Category II may release foreign exchange up to USD 250,000 or its equivalent to resident individuals for purpose of the gift or for studies abroad without insisting on any estimate from the foreign University. However, AD Category I bank and AD Category II may allow remittances (without seeking prior approval of the Reserve Bank of India) exceeding USD 250,000 based on the estimate received from the institution abroad but for remittance of gift amount exceeding prescribed limits, prior approval of the Reserve Bank of India is necessary

However, no approval of RBI shall be required for transactions mentioned in Schedule II and Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

Hence, a remittance made by Mr. Kumar to Ms. Anjali of USD 5,000 from the RFC Account as well as a remittance of USD 100,000 towards her education is within the limits mentioned under Liberalised Remittance Scheme.

Since in this case, the total remittances (i.e. USD 100000 + USD 3000) is much below/within the overall limit of USD 250000, hence, it did not require any prior approval of the Reserve Bank of India and so Mr. Kumar being a resident individual was eligible to do both these remittances one after another, but within a Financial Year.

Answer 7:

Para 3 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015, deals with the matter relating to the declaration of exports. It provides that-

(1) In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing -

(i) the full export value of the goods or software; or

(ii) if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.

(2) Declarations shall be executed in sets of such number as specified.

(3) For the removal of doubt, it is clarified that, in respect of export of services to which none of the Forms

specified in these Regulations apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

(4) Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

The declaration shall be supported by such evidence as may be needed, containing true and correct amount and material particulars including -

- The exporter is a person resident in India and has a place of business in India;
- The destination stated on the declaration form is the final place of the destination of the goods exported;
- The value stated in the declaration represents the full export value of the goods. If the full value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods in overseas market.

Other requirements that Mr. Kumar needs to adhere to relating to such declaration

- Realization of export proceeds in respect of export of goods from the third party should be duly declared;
- The Importer-Exporter code number allotted by the DGFT shall be indicated on all copies of the declaration forms submitted by the exporter to the specified authority and in all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.

CASE STUDY 19

Mapple Inc. is an American MNC that designs and markets consumer electronics, computer software and personal computers, etc. Mapple India is the Indian subsidiary of Mapple Inc. through which it markets and sells its products in India. XPhone and Sintel are leading mobile service providers in India, jointly having more than 30 crore Indian subscribers that account for almost 52% market share in the GSM market. In total, there are around 20 service providers in India but none of them individually holds more than 30% of the market share.

Particular models of iPhones - iPhone 3G and iPhone 3GS, were manufactured by Mapple Inc., launched in India during August 2008 and March 2010, respectively. During the fiscal year, 2010, worldwide sales of iPhones were 73.5 million.

Mobile services in India can be offered through two competing technologies i.e. GSM and CDMA and that, SIM cards of each of these cellular services are compatible only with those handsets which deploy their respective technologies and thus not able to substitution. iPhones are based on GSM technology. Handsets can be broadly classified as smartphones and featured phones. While acknowledging that iPhone is a unique product, there are certain smartphones offered by other brands such as Nokia, Blackberry, and Samsung that have advanced features and which could be considered as substitutes for the iPhone.

Mapple Inc. and Mapple India entered into some exclusive contracts/agreements with XPhone and Sintel respectively, for the sale of iPhones in India, even prior to its launch. XPhone and Sintel are both, cellular data and GSM network service providers functioning in India. As a result of the agreements, XPhone and Sintel got exclusive selling rights for an undisclosed number of years. The iPhones sold by XPhone and Sintel came in the compulsorily locked form, thereby meaning, that the handset purchased from either of them shall work only on their respective networks and none other.

Mapple Inc. permitted iPhone users only those applications on their iPhones that have been approved by them and available through their own online application store namely 'App Store'. Further, no other third-party applications can be run on iPhone unless the same has been approved by Mapple Inc. If however, the operating system of jail broken iPhone is upgraded, the iPhone gets re-locked and all the third-party applications are deleted by the servers of Mapple Inc. permanently. XPhone and Sintel refused to accept any iPhone for repairs at their authorized service centers if the same is not purchased from them. However, an unlocked iPhone can be purchased from abroad. Also, a consumer who has purchased a locked iPhone in India and has paid the unlocking fees is free to choose the network operator of his choice after unlocking the iPhone.

Out of the total market share for smartphones in India, Mapple India had a market share of 1.5% in the year 2008; less than 1% in 2009 and 2010 respectively, and 2.4% in 2011. Additionally, at the time of the launch of iPhone in India, there were about 250 million GSM mobile subscribers which subsequently rose to about 600 million in the year 2011.

An allegation by Ms. Rekha:

Ms. Rekha was one of the biggest fans of iPhones. After it was launched in India, she purchased an iPhone but was extremely disappointed when she realized, that, there were so many restrictions for using such iPhone which did not appear, value for money. When she investigated more into this, she found out that Mapple India was taking undue advantage of the dominant position that it enjoyed in the market. She then approached the CCI, to file a complaint against such abuse, in violation of section 4 of the Competition Act, 2002. In her complaint, she made the following allegations -

Mapple India enjoys a dominant position in the relevant market for smartphones, both in India as well as internationally, as iPhone, being the largest selling smartphone in the world. The informant also averted that XPhone and Sintel jointly enjoyed a dominant position in the relevant market for GSM mobile telephony services in India. The informant further submitted that XPhone and Sintel have abused their dominant positions by imposing unfair conditions on the purchasers of Mapple iPhones.

Reply by Sintel to the report of CCI:

It fails to consider that any dispute in relation to a telecommunication service is actionable under the Telecom Regulatory Authority of India Act, 1997, and the Competition Act, 2002 cannot be invoked as the CCI does not have any jurisdiction on the matters of cellular service providers in India when TRAI is the regulatory body. The bundled offer was in compliance with the guidelines of TRAI.

The informant failed to make any averment of having purchased Mapple iPhone 3G/3GS to show that she had any interest in the matter and has the locus standi to file the information.

The informant also failed to state that she had purchased iPhone 3G and 3GS from the grey market in India or abroad and consequently it is inexplicable as to how she has a grievance in this regard.

Mapple iPhone 3GS is being sold since June 2011 without its network being locked. For this reason, the issue raised in the information filed by Ms. Rekha is infructuous. The practice of locking the network onto the Mapple iPhone, even though in accordance with international practice, has long been discontinued in India.

Reply by XPhone to the report of CCI:

The agreement was non- exclusive and iPhones were available in India through a number of other distributors/channels and XPhone, being a telecom service provider provided the best tariff plans to its customers and XPhone never imposed any restrictions on its customers with respect to using unlocked phones and therefore, there it can be said that there is no violation.

The tariff plans, as were provided to iPhone customers were the same and if not, even better than the normal plans offered to other subscribers. Further, the tariff plans, as approved by Mapple Inc. were filed with the TRAI in August 2008 and were in full compliance with the TRAI regulations. Additionally, it is important to note that, even if an iPhone specific plan was published, the customers always had complete freedom to choose from other plans which were not iPhone specific and rather the customer were spoilt for choice, given the range of plans available to them. Therefore, there is no question of XPhone, being discriminating with iPhone customers vis-à-vis its other customers.

The concept of "collective dominance" is not recognized under section 4 of the Competition Act. Both, Sintel and XPhone are separate legal entities, with no structural links and with the completely different boards of directors and management. Therefore, the question of "collective dominance" does not arise.

iPhones are easily available in the open market and without any network locking. More importantly, even the iPhones bought through XPhone distribution channels were unlocked as and when a request was made after following the due process. Further, the TRAI's MNP (mobile number portability) regulations give a right to the customer to move from one service provider to another freely, and consequently, the same customer can unlock his phone without any hassle. These facts clearly indicate that the allegations in the information are mere speculations and should be dismissed outright.

MULTIPLE CHOICE QUESTIONS

1. The relevant market(s) that the Director-General will identify while making the inquiry is/are
   I Smart Phones in India
   II GSM cellular service in India
   III Smart Phones in America and India
   (a) Only I
   (b) I and II
   (c) II and III
   (d) I, II, and III
2. The iPhones sold by XPhone and Sintel came in the compulsorily locked form, thereby meaning, that the handset purchased from either of them shall work only on their respective networks and none other. This is in the nature of
   (a) Exclusive supply agreement
   (b) Horizontal agreement
   (c) Tie in agreement
   (d) Refusal to deal
3. Whether the contention of Sintel that CCI does not have jurisdiction on the matters of cellular service providers in India when TRAI is the regulatory body is correct?
   (a) Yes, TRAI has sole jurisdiction as the industry regulator, CCI does not have jurisdiction
   (b) No, both have the jurisdiction; but TRAI can supersede and has primacy being industry regulator over CCI.
   (c) No, both special acts and primacy have to be given to the respective objectives of both the regulators under their respective statutes.
   (d) Can't say, as information on TRAI regulations is not provided
4. Assuming the iPhone is not purchased by Miss Rekha from the Mapple store. Can she file a case, in the forum under the Competition Act 2002?
   (a) No, as Ms. Rekha has purchased iPhone from the grey market i.e. through distributors and thus, has no right to file a case
   (b) No, as Ms. Rekha has not suffered any loss due to tie-up agreement made by Mapple India with XPhone and Sintel respectively
   (c) Yes, as Ms. Rekha has used the iPhone & availed the cellular services, so she indirectly gets affected
   (d) Yes, not only Ms. Rekha but any person can file such a case

5. The chairperson and other members of the CCI office shall be appointed by
   (a) Central Government
   (b) Relevant State Government
   (c) High Court
   (d) Central Government and the selection committee

DESCRIPTIVE QUESTIONS

6. Whether there can be a case of abuse of dominant position against Mapple India, XPhone, and Sintel respectively?
7. Is there an appreciable adverse effect on competition due to the agreement made by Mapple India with XPhone and Sintel respectively?
8. Briefly states the duties of the CCI and the orders that can be passed by it after the establishment of infringement of section 3 or section 4 respectively?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (b) I and II

   Reason:
   Relevant Market: It means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. [Section 2(r)]

   Relevant geographic market: It means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. [Section 2(s)]

   Relevant product market: It means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. [Section 2(t)]

   Hence, for this purpose the relevant market for Smart phones and GSM Cellular Services shall be India, the option I and II are correct.

2. (c) Tie in agreement

   Reason:
   The words "tie-in arrangement' has been defined in explanation (a) to section 3 which includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

   In the given case, the iPhones sold by XPhone and Sintel shall work only on their respective networks and none other, which comes in the definition of "tie-in agreement".

3. (c) No, both are special Acts and primacy has to be given to the respective objectives of both the regulators under their respective statutes

   Reason:
   In the case of CCI vs Bharti Airtel Ltd, Supreme Court of India, dated 5th December, 2018, [Civil Appeal no. 11843 of 2017] recognised that the TRAI Act and the Competition Act are both special Acts and primacy has to be given to the respective objectives of both the regulators under their respective statutes. CCI's jurisdiction is not excluded by the presence of sectoral regulators and to that end, the CCI enjoys primacy with respect to issues of competition law.

   The Apex Court, opined that the purpose of the Competition Act is to eliminate the practices which are having adverse effect on the competition and to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by other participants in India. To this extent, the function that is assigned to the CCI is distinct from the function of TRAI under the TRAI Act. [Para 89]

   Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. [Para 90]

The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector, which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI which leads to the prima facie conclusion that the IDOs have indulged in anticompetitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well. [Para 91]

4. (d) Yes, not only Ms. Rekha but any person can file such a case.

Reason:
Section 19(1)(a) of the Competition Act, 2002 provides that the Commission may inquire into any alleged contravention of the provisions contained in section 3(1) or section 4(1) either on its own motion or on receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association.

Thus, as per the provisions of section 19(1) the Commission may inquire into the alleged contravention if it receives information from any person or consumer. Hence not only the Rekha but any person can make an application to the CCI to inquire.

5. (a) Central Government

Reason:
Section 9(1) of the Competition Act, 2002 provides that the Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:
Legal Position

As per section 19(4) of the Competition Act 2002, the Commission (CCI) shall, while inquiring whether an enterprise enjoys a dominant position or not u/s 4, have due regard to all or any of the following factors, namely:-

a. market share of the enterprise;
b. size and resources of the enterprise;
c. size and importance of the competitors;
d. economic power of the enterprise including commercial advantages over competitors;
e. vertical integration of the enterprises or sale or service network of such enterprises;
f. dependence of consumers on the enterprise;
g. monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
h. entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
i. countervailing buying power;
j. market structure and size of market;
k. social obligations and social costs
l. relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
m. any other factor which the Commission may consider relevant for the inquiry.

The dominant position has been defined under explanation (a) to Sec 4 as a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-

(i) operate independently of competitive forces prevailing in the relevant market; or
(ii) affect its competitors or consumers or the relevant market in its favour.

Analysis of the case

Mapple India had a market share of 1.5% in the year 2008; less than 1% in 2009, and 2010 respectively and 2.4% in 2011. Prima facie, these percentages of market share don't suggest anything that tantamount to the existence of dominance.

XPhone and Sintel are leading mobile service providers in India, jointly having more than 30 crore Indian subscribers that account for almost 52% market share in the GSM market. As regards the dominance of XPhone and Sintel in the relevant market, since both are two separate entities without the evidence of having any horizontal agreement or cartelization between them that could be deemed as anti-competitive. Hence, on the basis of section 19(4) conditions that neither Sintel nor XPhone, individually, have any adequate market power so as to be deemed dominant.

Also, the argument that XPhone and Sintel hold nearly 52% of the market share in the GSM services in India cannot be accepted for the fact that they are horizontal competitors who fight for greater market share. Moreover, there is no allegation, qua these OPs that they have indulged in anti-competitive conduct among themselves for a common cause.

Conclusion

Thus, it can be concluded that since dominance does not get established, there can be no case for abuse of dominance against all the three aforesaid entities under Section 4 of the Act.

ANSWER 7

According to Section 3(1) of the Act, "No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India".

Section 3(4) of the Act, highlights anti-competitive agreements between vertically related enterprise as "Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including -

(a) tie-in arrangement;
(b) exclusive supply agreement;
(c) exclusive distribution agreement;
(d) refusal to deal;
(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India".

Further, what constitutes appreciable adverse effect on competition has been provided for in Section 19(3).

The words "tie-in arrangement' has been defined in explanation (a) to section 3 which includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

In the above case, even though, some kind of 'the tie-in arrangement' can be seen which has an adverse implication on the purchaser of iPhones in terms of their ability to choose and switch between various cellular service providers and data plans. But since none of (Mapple India / Sintel / XPhone) have a dominant position in their respective market, and that there has been no intentions and evidence to show that the market has been foreclosed to competitors or that entry-barriers have been erected for new entrants in any of the markets by any of the opposite parties.

Mapple India had a share of less than 3% in the market of smartphones during the period 2008-11. Furthermore, the share of GSM subscribers using Mapple iPhone to total GSM subscribers in India is minuscule (less than 0.1%). No operator has more than 30% market share, in an otherwise competitive mobile network service market. As none of the impugned operators, (XPhone / Sintel) have market-share exceeding 30%, that smartphone market in India is less than a tenth of the entire handset market, and that Mapple iPhone has less than 3% share in the smartphone market in India, it is highly improbable that there would be an Appreciable Adverse Effect on Competition (AAEC) in the Indian market for mobile phones.

Moreover, the lock-in arrangement of the iPhone to a particular network was only for a specific period and not perpetual, a fact known to prospective customers. It is difficult to construe consumer harm from entering into a 'tie-in' arrangement by the horizontally related enterprises. It is observed that there is no restriction on consumers to use the network services of XPhone and Sintel to the extent that the network services can be availed on any mobile handset, even an unlocked iPhone purchased from abroad. Also, a consumer who has purchased a locked iPhone in India and paid the unlocking fees is free to choose the network operator of his choice.

Also, there is no evidence to show that entry barriers have been created for new entrants in the markets i.e. in the smartphone market and mobile services market by any of the impugned parties. Similarly, existing competitors have not been driven out from the market, or that the market itself has been foreclosed. Hence,

the belief that the tie-in arrangement has caused serious harm appears untrue. Hence, there appears no appreciable adverse effect on competition due to agreement by Mapple India with XPhone and Sintel respectively.

Answer 8

Section 18 of the Competition Act 2002, provides that, subject to the provisions of this Act, it shall be the duty of the Commission:

(a) To eliminate practices having adverse effect on competition;
(b) To promote and sustain competition;
(c) To protect the interests of consumers; and
(d) To ensure freedom of trade carried on by other participants in markets in India.

The proviso attached to this section further states that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of Central Government, with any agency of any foreign country.

Apart from the duties as mentioned in section 18, the other functions of the Commission are:

- **Inquiry into certain agreements and dominant position of enterprise (Section 19):** The Commission may inquire into any alleged contravention of the provisions contained in section 3(1) or 4(1) either on its own motion or on receipt of any information; or a reference made to it by the Central / State Government.
- **Inquiry into combination by Commission (Section 20):** The Commission may, upon its own knowledge or information relating to acquisition or merger or amalgamation, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India.
- **Reference by statutory authority (Section 21):** The Commission shall give its opinion when any reference is made by any statutory authority.
- **Reference by Commission (Section 21A):** When any issue is raised by any party that any decision which the Commission has taken during any proceeding which would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may take a reference in respect of such issue to the statutory authority.
- **Meetings of Commission (Section 22):** The Commission shall meet periodically as prescribed by its Regulations.
- **Orders by Commission** after inquiry into agreement or abuse of dominant position (Section 27)
- **Division of enterprise enjoying dominant position (Section 28):** The Commission may direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

As per section 27 of the Competition Act 2002, where after an inquiry under section 19 regarding alleged contravention of entering into an anticompetitive agreement or abuse of dominance as per procedure detailed in section 26, if Commission find the allegation true and contravention of section 3(1) or 4(1) respectively; it may pass all or any of the following orders

Cease and desist order - direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be.

Impose penalty - as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

Modification of the terms of such agreements - Agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

To abide - Which direct the enterprises concerned to abide by such other orders as the commission may pass and comply with the directions, including payment of costs if any

Such other order or issue such directions as it may deem fit.

In case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader, or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.

CASE STUDY 20

Ashok and Deepak are the sons of Late Shri Rajesh Mehra. Being the legal heirs of Rajesh Mehra, they both inherited immovable properties in Lucknow from their father. Ashok, an Indian citizen, is living in London for the past 7 years, running his practice as a Civil Engineering consultant. Deepak is a director of BSC Private Limited (BSC) along with his son Jay, which is engaged in the business of manufacturing silk garments.

BSC imported machinery worth ₹ 30,50,00,000/- from Germany, shipped it to India on 10.05.2020. As a result of the installation of which, the company's cost of manufacturing of silk clothes got reduced significantly and therefore the board of the company decided in a meeting to reduce the prices of the silk clothes, thereby, revising its cost structure as follows:

Particulars	Before Change (Competitive Price) (₹)	After Change (₹)
Cost of manufacturing per meter	300	180
Selling price per meter of cloth	500	350

The market share of BSC gradually started to increase due to lower prices offered in the market than the comparative market price of ₹ 440 to ₹ 520, which affected businesses of other silk manufacturers in the market. Accordingly, they arranged for a meeting and in that decided to make a complaint to the CCI stating that BSC is guilty of predatory pricing having the effect of reducing the competition or eliminating the competition.

For the import of machinery from Germany, BSC had sought professional advice from Polylingua Consultants based in Spain for which they raised a bill of 2,05,000 Euros, equivalent to ₹ 2,05,00,000. Polylingua Consultants were not paid 1,02,000 Euros out of their total receivable amount, so the advocate of Polylingua Consultants sent a demand notice for payment under section 8 of the Insolvency and Bankruptcy Code, 2016 against which there was no reply made by BSC within the stipulated time and so the advocate of Polylingua Consultants moved a petition under section 9 of the Insolvency and Bankruptcy Code, 2016 seeking commencement of insolvency process against BSC They were not having any office or bank account in India, so it could not submit a 'Certificate from a financial institution' as required under the code. On getting aware of the fact that Polylingua Consultants have filed an application for insolvency process, BSC sent an email to Polylingua Consultants stating that there was the existence of dispute for the unpaid amount of 1,02,000 Euros because there was a breach by Polylingua Consultants of a warranty but there was no evidence available with BSC to support its assertion of fact and then after also filed a hard copy of the email with the Adjudicating Authority within 5 days of the filing of application by Polylingua Consultants.

Ashok got a contract as an engineering consultant for a real estate project in Varanasi, India, so he came to India on 03.09.2019. Afterward, as the contractual obligations were over with the builder, he returned back to London on 12.03.2021, to carry out his normal business projects in London. While his stay in India he sold the immovable property through a real estate broker on 15.01.2020, which he had inherited from his father. Ashok came after a long time and out of affection, he gifted his nephew, Jay, a sum of 7000 pounds in cash (1 pound = 1.2 USD).

Jay is passionate about trading in the stock market and one fine day he got information (not publicly disclosed) from one of his friends working in a Big Bee Ltd. - relating to the merger of two big corporates - Big Bee Ltd. and Bumble Bee Ltd. Based on such insider trading information, Jay bought plenty of stocks of Big Bee Ltd.

Jay wanted a residential unit in Varanasi and therefore he approached his uncle Ashok to convince the promoter/builder to allot one residential unit from the real estate scheme, of which he was an engineer, at a reduced price. The area in which the building is going to be constructed is having an area of 900 square meters. The project is registered with the authority as per the provisions of RERA. He made all the enquiries regarding the project details, sanctioned plans, and plan layouts. He also cross checked all the listed details on the Authorized website of RERA.

The agreement of sale was signed between the builder and Jay. Jay paid upfront 10% as booking fees of the total amount of ₹ 80 lakhs via account payee cheque and got the unit registered in the name of his wife Chaya. The balance amount of ₹ 72 lakhs was paid by Mr. Jay in installments through cheque, the source of which was, ₹ 50 lakhs, were from his remunerations earned from BSC and ₹ 22 lakhs were from the proceeds of Insider Trading in the stock market which Jay had not disclosed in his Income Tax Return for the relevant financial year. The builder made some minor changes due to structural reasons which were

duly verified by Ashok and other allottees and also the changes were duly intimated to all the allottees along with the declaration from the promoter about the same. Jay took physical possession of the apartment within a month of the issue of the occupancy certificate by the relevant authority.

The Enforcement Director under the Prevention of Money Laundering Act, 2002, obtained information related to insider trading in the stock market from the office of SEBI and also got to know that Jay was also a party to the crime who had purchased an immovable property in Varanasi which constituted a reason to believe and after recording the same in writing, the Enforcement Director issued an order provisionally attaching the immovable property acquired by Jay in the name of his wife.

MULTIPLE CHOICE QUESTIONS

1. By what date BSC should make payment for the machinery imported from Germany?
   (a) 10.11.2020
   (b) 10.05.2025
   (c) 10.08.2020
   (d) 10.05.2021

2. Ashok can transfer inherited immovable property in India to
   (a) Person resident in India only
   (b) Non-resident Indian who is a person citizen in India only
   (c) Foreign Citizen only
   (d) Any of from (a) and (b) above

3. How much amount of foreign exchange needs to be surrendered and till what time period, to an authorised dealer by Jay from the amount received as a gift from his uncle Ashok?
   (a) 5,333 pounds and 180 days
   (b) 5,333 pounds and 90 days
   (c) 1,667 pounds and 180 days
   (d) 5,333 pounds and 7 days

4. Whether the property held in the name of the wife by Jay be considered a Benami transaction?
   (a) Yes
   (b) No
   (c) Partially
   (d) Can't say

5. If the promoter accepted 10% booking fees from the allottees by entering into an agreement for sale but not getting it registered, then what could be the maximum penalty that could be imposed on the promoter assuming the estimated cost of the real estate project is ₹ 150 crores?
   (a) ₹ 15 Crores
   (b) ₹ 7.5 Crores
   (c) ₹ 7.5 Crores + with fine for every day during which default continues
   (d) No Penalty

DESCRIPTIVE QUESTIONS

6. (A) Whether the act of BSC, selling silk garments at prices lower than prices prevailing in the market be considered as predatory pricing under the Competition Act, 2002?

   (B) Whether Jay can occupy the property during the period of provisional attachment and if the adjudicating authority passes an order confirming the provisional attachment of the property made U/s 5 of the relevant Act, then what remedy is available with Jay if he is aggrieved with the order?

7. (A) What would be the residential status of Ashok for the F.Y2019-20, 2020-21 & 2021-22 respectively?

   (B) Whether Ashok can repatriate the sale proceeds of the immovable property outside India?

8. (A) One of the allottees to the real estate scheme objected that promoter had not taken prior written consent of the allottees for making the changes to their allotted unit. Examine the statement in the lights of provisions of the Real Estate (Regulation & Development) Act, 2016.

   (B) Non-availability of 'Certificate from a financial institution' by Polylingua Consultants at time of filing application for initiating a corporate insolvency resolution process with adjudicating authority, makes it liable to reject the application. Examine the validity of this statement.

   (C) Can the adjudicating authority reject the application filed by Polylingua Consultants on the ground that the amount claimed is under dispute?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (a) 10.11.2020

   Reason:
   Para B.5.1 (i) of the 'Master Direction on Import of Goods and Services' dated January 01, 2016 (updated as on 07.12.2021), provides that remittances against imports should be completed not later than 6 months form the date of shipment, except in case where amounts are withheld towards

guarantee of performance, etc. Further, in view of the disruptions due to outbreak of COVID- 19 pandemic, with effect from May 22, 2020, the time period for completion of remittances against normal imports (except in cases where amounts are withheld towards guarantee of performance etc.) has been extended from six months to twelve months from the date of shipment for such imports made on or before July 31, 2020.

In the given case, the shipment was made on 10.05.2020 (i.e. before 31.07.2020) hence the remittances should have been made not later than 6 months, so BSC should make remittances not later than the date of 10.11.2020.

2. (d) Any of from (a) and (b) above

Reason:
Para 3 of The Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 deals with the matter relating to the Acquisition and Transfer of Property in India by a Non-Resident Indian or an Overseas Citizen of India. Its sub-para (d) and (e) reads as under:

An NRI or an OCI may-

(d) transfer any immovable property in India to a person resident in India;

(e) transfer any immovable property other than agricultural land/ farm house/ plantation property to an NRI or an OCI.

Thus, Ashok can transfer the inherited property to either Person resident in India or Non-resident Indian who is a citizen of India.

3. (a) 5,333 pounds and 180 days

Reason:
Para 7 of the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015, provides that a person being an individual resident in India shall surrender the received/realised/unspent/unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be.

Further, Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 provides at Para 3(iii)(b) which reads as under:

For the purpose of clause (a) and clause (e) of Section 9 of the Act, the Reserve Bank specifies the following limits for possession or retention of foreign currency or foreign coins, namely :-

(iii) Retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques not exceeding US$ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers' cheques;

(b) **was acquired by him, from any person not resident in India and who is on a visit to India**, as honorarium or gift or for services rendered or in settlement of any lawful obligation.

In the given case, Jay has received GBP 7000. So first convert it into USD which comes to USD 8400 (7000*1.02).

Now after retaining USD 2000 the remaining amount is of USD 6400.

Convert USD 6400 in GBP, which comes to GBP 5333 (6400/1.2 = 5333.3333).

Therefore, Jay is required to deposit GBP 5333 within 180 days from the date of receipt to an authorized dealer.

4. (c) Partially

Reason:
The benami transaction has been defined under section 9 of the Prohibition of Benami Transactions Act, 1988. The relevant portion of section 9 and its sub-section reads as under:

Section 9: Benami transaction means

(A) a transaction or an arrangement-

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

In the given case, Jay, has purchased the flat in the name of his wife Chaya and part of the consideration was paid out of his undisclosed sources (not shown in the Income Tax Return). Hence transaction is deemed to be partly benami transaction.

5. (b) ₹ 7.5 Crores

Reason:

Section 13(1) of the RERA provides that a promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

Further, section 61 provides that if any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project as determined by the Authority.

In the given case, the advance was taken by the promoter without entering into the written agreement, so he is liable for the penalty of 5% of total cost i.e. Rs. 150 crores which comes to Rs. 7.50 crores.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

(A) No, in the given case the BSC has reduced the prices on account of import of hi-tech machinery, which is cost effective, hence it shall not be treated as predatory pricing under the provisions of the Competition Act.

As per section 4(2)(a) of the said Act, there shall be an abuse of dominant position, which is considered as offence under the Competition Act 2002, if an enterprise or a group-

directly or indirectly, imposes unfair or discriminatory-

(i) condition in purchase or sale of goods or services; or

(ii) price in purchase or sale (including predatory price) of goods or services.

Further, as per explanation (b) to section 4, "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

In the given case, though the price is less than the competitive market price but not less than cost. The cost of manufacturing per meter of cloth is ₹ 180 and the selling price offered is ₹ 350. Hence, the act of BSC offering clothes at prices lower than the price prevailing in the market shall not be considered as predatory pricing under the Competition Act, 2002.

(B) **(i)** Section 5 (4) of the Prevention of Money Laundering Act, 2002 provides that nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation - For the purposes of this sub-section person interested in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

Hence, Jay can occupy the property during the period of provisional attachment.

(ii) Further, as per Section 26 of the aforesaid Act, the Director or any person aggrieved by an order made by the Adjudicating Authority under this Act may prefer an appeal to the Appellate Tribunal.

The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Adjudicating Authority is received and it shall be in such form and accompanied by prescribed fees.

The Appellate Tribunal may, after giving an opportunity of being heard, entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

Hence, the remedy availed with Jay is to file an appeal with the Appellate Tribunal within the period as mentioned in the above provisions.

Answer 7

(A) As per Section 2(v) of the Foreign Exchange Management Act, 1999,

"Person resident in India" means:

(i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include-

(A) a person who has gone out of India or who stays outside India, in either case-
(a) for or on taking up employment outside India, or
(b) for carrying on outside India a business or vocation outside India, or
(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than:
(a) for or on taking up employment in India, or
(b) for carrying on in India a business or vocation in India, or
(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

(ii) any person or body corporate registered or incorporated in India,

(iii) an office, branch, or agency in India owned or controlled by a person resident outside India, an office, branch, or (iv) agency outside India owned or controlled by a person resident in India;

In the given case,

1. He didn't reside in India during the preceding financial year i.e. in 2018-19. Therefore, Ashok is a 'Person resident outside India' for the financial year 2019-20.
2. Ashok resided for more than 182 days i.e. from 03.09.2019 to 31.03.2020 which comes to 211 days (year 2020 being a leap year) in the preceding financial year i.e. 2019-20, and also his purpose of stay during the financial year 2020-21 is business or vocation. Therefore, Ashok is a 'Person resident in India' for the financial year 2020-21.
3. Ashok resided for more than 182 days i.e. from 01.04.2020 to 12.03.2021, which comes to 346 days in the preceding financial year i.e. 2020-21 but he had gone out of India to continue his business or vocation. Therefore, Ashok is a 'Person resident outside India' for the financial year 2021-22.

(B) As per regulation 8 to the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018,

A person referred to in sub-section (5) of section 6 of the Act, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section. However, if such a person is an NRI or a PIO (as defined in Foreign Exchange Management (Remittance of Assets) Regulations, 2016) resident outside India, he/ she can utilise the remittance facilities available under the Foreign Exchange Management (Remittance of Assets) Regulations, 2016, as amended from time to time.

In the event of sale of immovable property other than agricultural land/farm house/plantation property in India by a person resident outside India who is a citizen of India or a person of Indian origin, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely :

(i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;

(ii) the amount to be repatriated does not exceed (a) the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account, or (b) the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for the acquisition of the property; and

(iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

Thus, Ashok can repatriate the sale proceeds of the immovable property outside India which he had inherited from his father who is assumed to be a person resident in India provided he satisfies all the above-mentioned conditions.

Answer 8

(A) As per proviso to Section 14 of the Real Estate (Regulation & Development) Act, 2016, the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Explanation.-For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

In the given case, it appears that the changes were minor in nature, necessitated due to architectural and structural reasons and don't appear to be one as excluded from the meaning of "minor additions or alterations". Also, the promoter has duly verified such changes and intimated to all the allottees. Thus, the objection raised by one of the allottees does not seem to be tenable.

(B) As per Section 9 of the Insolvency and Bankruptcy Code, 2016,

The operational creditor shall, along with the application filed in the prescribed form, furnish, interalia,-

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;

The words 'if available' used in section 9(3)(c) make it evident that such certificate shall only be submitted if such a copy is available.

Hence, the application of Polylingua Consultants cannot be rejected on the grounds of the non-availability of a 'Certificate from a financial institution'. The given statement is invalid.

In the case of Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd. [Civil Appeal No. 15135 of 2017] the Supreme Court of India, dated 15.12.2017, opined that Section 9(3) (c) of The Insolvency and Bankruptcy Code, 2016 is directory in nature.

The Apex Court held that "a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is certainly not a condition precedent to triggering the insolvency process under the Code. The expression "confirming" makes it clear that this is only a piece of evidence, albeit a very important piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. Further, annexure III in the Form also speaks of copies of relevant accounts kept by banks/financial institutions maintaining accounts of the operational creditor, confirming that there is no payment of the unpaid operational debt, only "if available". This would show that such accounts are not a pre-condition to trigger the Code, and that if such accounts are not available, a certificate based on such accounts cannot be given,"

(C) As per Section 5(6) of the Insolvency and Bankruptcy Code, 2016, dispute includes a suit or arbitration proceedings relating to-

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty;

In the case of Mobilox Innovations (P.) Ltd. v Kirusa Software (P.) Ltd. [Civil Appeal No. 9405 of 2017], the Supreme Court of India, dated 21.09.2017, opined that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(ii)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster.

However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

In the given case, BSC sent an email for dispute, post the time period for submitting a notice of dispute under section 8 of the code. In terms of section 8(2)(a), which states that the corporate debtor shall within a period of 10 days of the receipt of the demand notice or copy of invoice bring to the notice of the operational creditor existence of a dispute. The BSC had not replied to the aforesaid notice. BSC sent mail only after the initiation of the CIRP by the operational creditor.

Hence, the adjudicating authority cannot reject the application of Consultants on the ground that the amount claimed is under dispute.

CASE STUDY 21

Ramesh and Suresh are friends since their childhood. For business purposes, Ramesh went to New Jersey, US and has been settled there for 7 years and Suresh started a real estate business in India by incorporating a company named Tycoon Private Limited (TPL), initially with him and his son Jay as directors in the company by having a combined 100% stake in the company. Jay, only occasionally participated in his father's business.

Ramesh was in possession of a plot of land having an area of approximately 7,800 square meters in his native place Banaskatha, Gujarat acquired by him when he was staying in India. The land was situated on the outskirts of the village. With a view to developing a smart city, the housing board wanted to acquire such land. Eventually, Ramesh sold such land through an agent based in the US for ₹ 25 crores (equivalent to $ 3,125,000) to the housing board. Ramesh paid a commission of $ 70,000 to agent in the US. The State Government on behalf of housing board, then called out for tenders from various real estate companies for acquiring the land on a long term lease and developing a township on the same.

TPL entered into agreements with the local suppliers near Banaskatha that all the material and man power requirements relating to any infrastructure projects were to be supplied only to their company and not to any other party. TPL's bid for the project was selected as it was the most cost-effective amongst all and was offered the contract to develop the township by taking the land on a long term lease. One of the real estate companies, that participated in the tender filed a complaint with the Competition Commission of India that the aforesaid agreement entered into by TPL was anti-competitive in nature, as due to this type of agreement with the local suppliers, the cost of developing township for TPL would have been much lower in comparison to other builders and as a result of which it could offer the lowest bid amongst all. Had they been in the same position as TPL was, they could also have offered such a low bid and could have got the contract. The Competition Commission of India after following the procedure prescribed in the Competition Act, 2002, concluded that the agreement entered into by TPL is anti-competitive in nature and shall stand null and void and TPL shall be responsible to bear the bidding costs. It was also decided that the bidding shall again take place with the participation of TPL allowed subject to compliance of certain conditions by it as stipulated by CCI in the order.

The project was awarded to TPL in the bidding that took place again but this time with no objections against it. Finally, when the contract was offered, Suresh in order to raise more funds converted the company into public limited by calling an initial public offer whereby his stake and that of his son would continue to be 50% in total. Suresh approached Ramesh to invest in his company and also to become a director in it by depositing a sum of ₹ 1 lakh. Ramesh made the said deposit which was refunded to him as he was elected as a director in the TPL in the general meeting of the company. He acquired a 10% stake in the TPL through private placement. Ramesh then visited India thrice during the duration of the project as a non-whole time director for the company's work and was paid remuneration for the same along with the reimbursement of the cost of travel and accommodation in accordance with the agreement made with Ramesh.

Jay, being a civil engineer went to the US for the purpose of business travel by drawing $ 80,000 to study the modern technologies that can be used in the development of the township. Already, during the year he had drawn $ 1.4 lakhs and his father remitted a further $ 30,000 to him for his maintenance expenses abroad. Jay made a contract worth $ 2,000,000 with a consultancy firm in the US on behalf of TPL that can provide consultancy services for the project of the township and remitted an amount of $ 1,200,000 from India for the same as part payment. By the end of the year, Jay returned back to India and was having $ 10,000 left with him as an unspent foreign exchange.

The project of development of township included developing 2 commercial buildings, 1 residential building, 1 school, and 1 recreation centre. The project was to be developed in phases and so phase-wise registration was obtained with the authority as per the provisions of RERA. The prospectus of the project was issued by the promoter, Suresh. The properties therein attracted the eyes of various businessmen near the area and in a matter of months of the issue of prospectus, the majority of the units were allotted. One of the allottees, Mr. Jaykant, required certain modifications in the layout plan of his allotted unit, as per the agreement to sale, which was done duly but even then he was not satisfied completely with the modifications made and felt that it was not according to the agreement and wanted to claim a refund of the amount paid till date along with interest.

For some of the units allocated in the project, the promoter - Suresh had taken ₹ 5 crores in cash from various allottees, which was not disclosed anywhere, from which Suresh bought a property as a joint owner with his mother Shrimati for ₹ 15 crores and paid ₹ 10 crores through account payee cheque and ₹ 5 crores

through cash money, he had obtained from allottees. The Initiating Officer issued notice to Suresh and his mother Shrimati to show cause as to why the aforementioned property should not be considered as a Benami property. The Initiating Officer then passed an order provisionally attaching the property with the prior approval of the Approving Authority. On receipt of the reference from the Initiating Officer, the Adjudicating Authority issued notice to Suresh to furnish the necessary papers of the agreement within 30 days from the date of this notice. After taking into account, all the materials furnished, Adjudicating Authority passed an order holding the property to be a Benami property. The Adjudicating Authority after giving Suresh an opportunity of being heard made an order for confiscating the Benami property.

MULTIPLE CHOICE QUESTIONS

1. The agreement entered into by TPL with the local suppliers near Banaskatha will be termed as_.
   (a) tie-in arrangement
   (b) exclusive supply agreement
   (c) refusal to deal
   (d) exclusive distribution agreement

2. The deposit made by Ramesh with the company for his nomination as a director and the refund made to him will amount to -
   (a) Current account transaction requiring prior approval of RBI
   (b) Current account transaction not requiring prior approval of RBI
   (c) Permissible capital account transaction
   (d) Non- Permissible capital account transaction

3. How much amount of additional remittance can be made to Jay without requiring prior approval of RBI?
   (a) $ 1,40,000
   (b) $ 1,70,000
   (c) $ 30,000
   (d) Nil

4. Whether the property held in the name of his mother by Suresh is considered as benami transaction provided the registry of the property was done by Suresh at a value of ₹ 10 crores only?
   (a) Yes
   (b) No
   (c) Partially Yes, partially No
   (d) Can't say

5. Within what period and how much amount of unspent foreign exchange represented in form of foreign currency notes, Mr. Jay shall return to the authorised dealer?
   (a) $ 10,000 within 180 days of return
   (b) $ 8,000 within 180 days of return
   (c) $ 10,000 within 90 days of return
   (d) $ 8,000 within 90 days of return

DESCRIPTIVE QUESTIONS

6. (A) What procedure could have been followed by the Competition Commission of India on receipt of the complaint from one of the real estate companies to conclude that the agreement entered into by TPL was anti-competitive in nature?
   (B) Whether the payment of commission amount to an agent in the US by Ramesh and remittance by TPL for consultancy services to a consultancy firm in the US would require prior approval of RBI?

7. (A) Whether payments made to Ramesh on his visit to India for the company's work require any permissions of RBI?

   (B) Whether holding of and selling of the immovable property by Ramesh is valid as per the provisions of FEMA Act, 1999, and whether Ramesh can repatriate the sale proceeds of the immovable property outside India?

8. (A) Whether Mr. Jaykant can claim a refund of the amount paid for the unit allocated to him in the light of provisions of the Real Estate (Regulation & Development) Act, 2016?

   (B) The prospectus issued by the promoter, Suresh, should contain certain information as required by RERA Act, 2016. Please provide your comments on the same.

   (C) What is the option available with Suresh against the confiscating order of the property passed by the Adjudicating Authority and also describe the procedure to be followed by Suresh for the same?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) refusal to deal

Reason

In terms of explanation (d) attached to section 3 of the Competition Ac, 2002 "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.

In the given case the TPL has entered into agreement with the local suppliers near Banaskatha that all the material and manpower requirements relating to any infrastructure projects should be supplied only to their company and not to any other party. It shows that the TPL had made an agreement with the local suppliers to refuse to deal with the other persons.

2. (b) Current account transaction not requiring prior approval of RBI

Reason
Schedule III

3. (d) Nil

Reason
Schedule III of The Foreign Exchange Management (Current Account Transactions) Rules, 2000 provides that an individual can avail of foreign exchange facility for certain purposes within a limit of USD 250000. In the given case the limit has already been exhausted. (80000 + 30000 + 140000 = 250000). Therefore, for any further additional remittance beyond USD 250000, will require prior approval of RBI.

4. (b) No

Reason
Section 9 of the Prohibition of Benami Transactions Act, 1988 provides as under:

(A) a transaction or an arrangement-

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by-

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint- owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual.

In the given case, Suresh purchased the property in his mother's name, which comes in the exempted category of Section 9(A)(b)(iv). However, as mentioned in the case study that Suresh had taken Rs 5 crores in cash from various allottees which was not disclosed anywhere and this undisclosed income was utilised as part payment in purchasing the flat in the name of his mother. However, the registry was made for Rs 10 cores and this Rs 10 cores was from the known sources of Suresh.

Therefore, the transaction should not be treated as benamidar, since the full value of the consideration was paid through the account payee cheque, which was from the known sources of income. If the registry would have been for ₹ 15 crores, then only it would be treated as partly banamidar.

5. (b) $ 8,000 within 180 days of return

Reason
Para 7 of the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015, provides that a person being an individual resident in India shall surrender the received/realised/unspent/ unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be.

Further, Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 provides at Para 3(iii) which reads as under:

For the purpose of clause (a) and clause (e) of Section 9 of the Act, the Reserve Bank specifies the following limits for possession or retention of foreign currency or foreign coins, namely :-

(iii) Retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques not exceeding US$ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques.

In the given case Jay returned back to India and was having $ 10,000 left with him as an unspent

foreign exchange. Jay can retain USD 2000 with him and rest of USD 8000 he is required deposit within 180 days from the date of his return to India.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

(A) As per Section 26 and 27 of the Competition Act, 2002, the procedure that would have been followed by the commission would be as follows:

Section 26 provides that on receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the that there exists a prima facie case, it shall have direct the Director-General to cause an investigation to be made into the matter.

The proviso states that if the subject matter of information received was, in the opinion of the Commission, substantially the same as or had been covered by any previous information received, then the new information might have been clubbed with the previous information.

The Director General should have on receipt of direction had submitted a report on his findings within such period as may be specified by the Commission.

The Commission then would have forwarded a copy of the report to the parties concerned.

The report of the Director General should have recommended that there is a contravention of any of the provisions of this Act, and the Commission might have called for further inquiry into such contravention in accordance with the provisions of this Act.

After inquiry, the Commission would have found that the agreement referred to in section 3 or action of an enterprise in a dominant position, was in contravention of section 3 or section 4, as the case may be, and it would have passed an order that the agreement would be null and void as per Section 27 of the Competition Act, 2002 and not to re-enter into such agreement again.

(B) As per rule 5 read with Schedule III of FEM (Current Account Transactions) Rules, 2000, every drawal of foreign exchange for transactions included in Schedule III shall be governed as provided therein.

Para 1 of Schedule III provides that individuals can avail of foreign exchange facilities for the purposes mentioned therein within the limit of USD 2,50,000 only in a financial year. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India. One such purpose mentioned therein is "Any other current account transaction".

Para 2 of Schedule III deals with the matter relating to the facilities for persons other than individual. Its para (iii) states that remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India, shall require prior approval of the Reserve Bank of India.

Explanation- the expression "infrastructure' shall mean as defined in explanation to para 1(iv)(A)(a) of Schedule I of FEMA Notification 3/2000-RB, dated May 3, 2000.

In the given case,

(1) It has been given Ramesh is settled in the US for the past 7 years, so, his residential status would be considered as a "person resident outside India" and the above rules are applicable for an individual who is a "person resident in India" and hence the question of obtaining prior approval of RBI does not arise in case of Ramesh.

(2) The limit of remittance specified in case of any consultancy services in respect of infrastructure projects is USD 10,000,000 per project and here the remittance made is USD 1,200,000 which is much below the limit and hence, approval of RBI is not required.

Answer 7:

(A) Section 3(b) of the FEMA Act, 1999 provides that save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall make any payment to or for the credit of any person resident outside India in any manner.

The RBI has issued general permission permitting any person resident in India to make payment in Indian rupees in few cases, one of which includes the following:

A company or resident in India may make payment in rupees to its non-whole time director who is resident outside India and is on a visit to India for the company's work and is entitled to payment of

sitting fees or commission or remuneration, and travel expenses to and from and within India, in accordance with the provisions contained in the company's Memorandum of Association or Articles of Association or in any agreement entered into it or in any resolution passed by the company in general meeting or by its Board of Directors, provided the requirement of any law, rules, regulations, directions applicable for making such payments are duly complied with.

Hence, there is no requirement to obtain permission from RBI for remuneration paid to Ramesh along with the reimbursement of the cost of travel and accommodation.

(B) (1) As per the provisions of the Foreign Exchange Management Act, 1999,

A person resident outside India may hold, own, transfer or invest in Indian currency, security, or any immovable property situated in India if such currency, security, or property was acquired, held, or owned by such person when he was resident in India or inherited from a person who was resident in India. [Section 6(5)]

It is given that property was acquired by Mr. Ramesh when he was staying in India, so it can be understood that his residential status at the time of acquisition of the said property would have been person resident in India and hence, as per section 6(5) as aforesaid, the act of holding the property by Ramesh being a person resident outside India is valid.

As per the Regulation 3(b)&(c) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, an NRI or an OCI may,

(b) acquire any immovable property in India other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013;
(c) transfer any immovable property in India to a person resident in India.

Hence, the act of Ramesh of transferring the immovable Housing Board is also valid.

(2) Regulation 8 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that-

(a) A person referred to in sub-section (5) of section 6 of the Act, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section.

However, if such a person is an NRI or a PIO (as defined in Foreign Exchange Management (Remittance of Assets) Regulations, 2016) resident outside India, he/ she can utilise the remittance facilities available under the Foreign Exchange Management (Remittance of Assets) Regulations, 2016, as amended from time to time;

(b) In the event of sale of immovable property other than agricultural land/farm house/plantation property in India by a person resident outside India who is a citizen of India or a person of Indian origin, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:

(i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;

(ii) the amount to be repatriated does not exceed (a) the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account, or (b) the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for the acquisition of the property; and

(iii)in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

Ramesh can repatriate the sale proceeds of the immovable property outside India which he had acquired when he was a person resident in India provided he satisfies all the above-mentioned conditions.

Answer 8

(A) As per Section 18 of the Real Estate (Regulation & Development) Act, 2016,

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot, or building,-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

In the given case, it appears the promoter is not able to adhere to the requirements of allottee Mr. Jaykant as per the agreement of sale, and hence as per section 18 as aforesaid, Mr. Jaykant is entitled to claim a refund of the amount paid by him along with the interest as may be prescribed.

(B) As per Section 11(2) of the Real Estate (Regulation & Development) Act, 2016, provides that the advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.

Hence, the prospectus issued by the promoter - Suresh should be in line with the section 11(2).

(C) As per Section 46 of the Prohibition of Benami Property Transactions Act, 1988 -Any person, including the Initiating Officer, aggrieved by an order of the Adjudicating Authority may prefer an appeal in such form and along with such fees, as may be prescribed, to the Appellate Tribunal against the order passed by the Adjudicating Authority under Section 26(3), within a period of forty-five days from the date of the order.

Section 46(2) provides that the Appellate Tribunal may entertain any appeal after the said period of forty-five days, if it is satisfied that the appellant was prevented, by sufficient cause, from filing the appeal in time.

Section 46(3) states that on receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

Thus, Suresh can file an appeal with the appellate tribunal as specified above and the procedure to be followed by him is produced as follows:

Rule 10 of the Benami Transactions Prohibition Rules, 2016 prescribes the following -

(a) An appeal to the Appellate Tribunal under section 46 of the Act shall be filed in Form No. 3 annexed to these rules.

(b) At the time of filing, every appeal shall be accompanied by a fee of ten thousand rupees.

(c) The appeal shall set forth concisely and under the distinct head the grounds of objection to the order appealed against and such grounds shall be numbered consecutively; and shall specify the address of service at which notice or other processes of the Appellate Tribunal may be served on the appellant and the date on which the order appealed against was served on the appellant.

(d) Where the appeal is preferred after the expiry of the period of forty-five days referred to in section 46, it shall be accompanied by a petition, in quadruplicate, duly verified and supported by the documents, if any, relied upon by the appellant, showing cause as to how the appellant had been prevented from preferring the appeal within the period of forty-five days.

CASE STUDY 22

Rahul, Dev, and Raj are brothers, running their family business as directors of their company, RDR Private Limited (RDRPL). An application for initiation of Corporate Insolvency Resolution process against RDRPL, under the Insolvency and Bankruptcy Code, 2016 moved by an assignee of an operational creditor for non-payment of dues. The adjudicating authority admitted his application because there was no intimation of any dispute within the 10 days of the demand notice.

After following all the due procedures prescribed in the Insolvency and Bankruptcy Code, 2016, in the end, adjudicating authority passed an order to liquidate the corporate debtor, on an intimation from the resolution professional to do so, as decided by the committee of creditors by requisite voting, before the approval of any resolution plan.

The relevant information related to RDRPL for the purpose of liquidation is produced as follows:

Share Capital/ Liabilities	**₹ (In lakhs)**	**Assets**	**₹ (In lakhs)**
Equity Share Capital	300	Fixed Assets:	
Preference Share Capital	200	Land & Building	350
Financial Creditors:		Plant & Machinery	150
Secured	250	Current Assets:	
Unsecured	150	Stocks	100
Operational Creditors:		Trade Receivables	300
Secured	60	Other current Assets	50
Unsecured	70	Cash & Cash equivalents	100
Government Dues	50	Fictitious Assets	190
Workmen's Dues	80		
Employees' Dues	80		
	1240		1240

Other Information:

(1) Workmen's dues represent the amount payable for the period of 30 months preceding the liquidation commencement date.
(2) Employee liability includes ₹ 72 lakhs, outstanding to employees for a period of 12 months, preceding the liquidation commencement date.
(3) Land & Building would realize 110% of its book value, Plant & Machinery would realize 60% of its book value, net of any realization cost. Stock and trade receivables would realize 72% of its book value.
(4) The secured financial creditors worth ₹ 45 lakhs decided to enforce their security interest in the other current assets and they could realize 80% of its value.
(5) There has been a pending court case against the company for use of child labour which could result in a penalty of approximately ₹ 30 lakhs. This has been reflected as a contingent liability only. It has been finally decided to pay ₹ 25 lakhs and settle the case.
(6) Based on the amount realized & distributed, the cost of liquidation and insolvency period cost is computed to be ₹ 20 lakhs and ₹ 12 lakhs respectively.

Meanwhile, when Rahul was engaged in providing professional assistance to the liquidator as per Section 34 of the Code, he and his wife Ms. Simran received a notice from the Initiating officer to start proceedings under the Prohibition of Benami Property Transactions Act, 1988, with respect to the 50,000 unquoted shares of DFL Private Limited (DLFPL), held by Rahul in the name of his wife.

The extract of the last audited financial statements of DLFPL is provided as under:

Particulars	**Amount (in ₹Lakhs)**
Land & Building (Market value ₹ 45 lakhs)	35
Plant & Machinery (Gross) (Market Value ₹ 10 lakhs)	20
Stock & trade Receivables	15
Miscellaneous Expenditure deferred for 3 years	3
Income tax paid in advance	2
Total Assets	**70**
Shareholder's Funds (5 lakh equity shares @ ₹ 3 each)	35
Accumulated Depreciation	5
Trade Payables	12
Income Tax Provision	7

Provision for ascertained liabilities	6
Provision for unascertained liabilities	5
Total Liabilities	**70**

Other information:

Contingent liabilities - ₹ 3 lakhs (including ₹ 1 lakh relating to arrears on cumulative preference shares).

As a result of the proceedings made by the Initiating officer as per Section 24 of the Prohibition of Benami Property Transactions Act, 1988, after the valuation of the shares was done as per Rule 3 of the relevant rules, the officer came to know that the source of the purchase of shares by Rahul was the sale proceeds of one of the properties of RDRPL which he had fraudulently/ wrongfully removed before 9 months of the insolvency commencement date and accordingly the Initiating officer after taking approval of adjudicating authority informed the Enforcement director under the Prevention of Money Laundering Act, 2002 as now the property appeared to be proceeds of crime. Also, Rahul was prosecuted as per the penal provisions of the Insolvency and Bankruptcy Code, 2016.

MULTIPLE CHOICE QUESTIONS

1. What should be the minimum value of the property that is fraudulently removed, in order for the penal provisions under the Insolvency and Bankruptcy Code, 2016, to attract and within how many months immediately preceding the insolvency commencement date, such an act should have occurred?
   (a) ₹ 1 lakh or more and 12 months
   (b) ₹ 10,000 or more & 12 months
   (c) ₹ 10,000 & 12 months
   (d) ₹ 10 lakhs or more & 9 months

2. Under which laws, Mr. Rahul can be prosecuted for his fraudulent act?
   (a) The Prohibition of Benami Property Transactions Act, 1988 and the Insolvency and Bankruptcy Code, 2016
   (b) The Prevention of Money Laundering Act, 2002 and the Prohibition of Benami Property Transactions Act, 1988
   (c) The Prohibition of Benami Property Transactions Act, 1988, the Prevention of Money Laundering Act, 2002 and the Insolvency and Bankruptcy Code, 2016
   (d) The Prevention of Money Laundering Act, 2002 and the Insolvency and Bankruptcy Code, 2016

3. As per the given case study, how much amount shall be the distributed to government dues, to secured creditors whose debts remain unpaid following the enforcement of security interest and for the court case-penalty amount, if the funds available with the liquidator after distribution to unsecured financial creditors is ₹ 64 lakhs?
   (a) ₹ 40 lakhs to government dues, ₹ 4 lakhs to secured creditors with unpaid debt and ₹ 20 lakhs for the court case-penalty amount
   (b) ₹ 50 lakhs to government dues, ₹ 5 lakhs to secured creditors with unpaid debt and ₹ 9 lakhs for the court case-penalty amount
   (c) ₹ 39.33 lakhs to government dues, ₹ 5 lakhs to secured creditors with unpaid debt and ₹ 19.67 lakhs for the court case-penalty amount
   (d) ₹ 50 lakhs to government dues, ₹ 2.33 lakhs to secured creditors with unpaid debt and ₹ 11.67 lakhs for the court case-penalty amount

4. If Mr. Rahul had purchased the shares in the name of his wife out of the sale proceeds of the immovable property held by Rahul, as a joint owner with his mother, then whether it can be termed as a benami transaction?
   (a) Yes
   (b) No
   (c) Partially Yes, partially No
   (d) Can't say

5. What could be the punishment to RDRPL and its officers for the use of child labour as per the provisions of the Prevention of Money Laundering Act, 2002?
   (a) Imprisonment for 3 to 7 years and fine without any limit
   (b) Imprisonment for 3 to 10 years and fine without any limit
   (c) Imprisonment up to 2 years and fine up to ₹ 50,000
   (d) Not an offence under the Prevention of Money Laundering Act, 2002, so not punishable under this Act.

DESCRIPTIVE QUESTIONS

6. (A) Whether the decision made by the adjudicating authority of admitting the application filed by the assignee of an operational creditor is valid as per the provisions of the Insolvency and Bankruptcy Code, 2016?
   (B) How the property held by Rahul in the name of his wife can be considered as proceeds of crime and

what action can the Enforcement director take against such property?

7. State the order of priority with notes indicating the relevant section of the Code in which the liquidator shall distribute the proceeds under the Insolvency and Bankruptcy Code, 2016.

8. (A) Assuming that the cost of acquisition and the market value based on discounted cash flow method is ₹ 1.5 lakhs and ₹ 4 lakhs respectively, calculate the fair market value of the shares held by Rahul's wife of DLFPL in accordance with Rule 3 of the Prohibition of Benami Transactions Rules, 2016.
(B) What are the circumstances, other than the situation mentioned in the case study that may also have to lead the adjudicating authority to pass an order of liquidation?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (b) ₹ 10,000 or more & 12 months

Reason
Section 68 of the IBC provides that where any officer of the corporate debtor has-

(i) within the 12 months immediately preceding the insolvency commencement date-

(a) willfully concealed any property or part of such property of the corporate debtor or concealed any debt due to, or from the corporate debtor, of the value of 10,000/- rupees or more.

2. (d) The Prevention of Money Laundering Act, 2002 and the Insolvency and Bankruptcy Code, 2016

Reason
Chapter VII of the IBC deals with the matter of offences and penalties. In the given case Rahul has fraudulent diverted the money in purchasing the shares in the name his wife, so the provisions of the IBC under Chapter VII (Section 68: Punishment for concealment of property, Section 69: Punishment for transactions defrauding creditors) shall be applicable.

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

Therefore, the IBC and PML Act are applicable.

3. (a) ₹ 40 lakhs to government dues, ₹ 4 lakhs to secured creditors with unpaid debt and ₹ 20 lakhs for the court case-penalty amount

Reason
Refer Section 53 of the IBC which describes about the distribution of assets.

4. (b) No

Reason
Section 2(9) of the Prevention of the Benami Transactions Act, 1988 provides that -
"benami transaction" means,-
(A) a transaction or an arrangement-
(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by-

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint- owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual.

Situation: If Rahul purchases shares in the name of his wife from the sale proceeds of the immovable property held jointly by Rahul with his mother. In this case, the money derived from the sale consideration from the joint property is from the known source (assuring that Capital Gains Tax, if any,

arising from the sale of the property, has been paid by Rahul), and this sale consideration is invested in purchasing shares of a company in the name of his wife, which comes within the exempted category of Section 2(9)(A)(b)(iii). It is also presumed that Rahul has utilised the sale consideration of his share only. Even if Rahul utilised the share of sale consideration of his mother, it is presumed that his mother donated that amount to Rahul. Therefore, it shall not be treated as benami transaction.

5. (a) Imprisonment for 3 to 7 years and fine without any limit

Reason

Section 2(y)(i) of the PML Act describes the scheduled offence which means the offences specified under Part A of the Schedule.

Paragraph 14 of Part A of the Schedule provides offences under the Child Labour (Prohibition and Regulation) Act, 1986 and Section 14 provides the punishment for employment of any child to work in contravention of the provisions of section 3.

Section 4 of the PML Act provides that 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.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

(A) As per the provisions of the Insolvency and Bankruptcy Code, 2016;

Default means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. [Section 3(12)]

Operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred; [Section 5(20)]

Serving of demand Notice: On the occurrence of default, an operational creditor shall first send a demand notice and a copy of the invoice to the corporate debtor.

On receipt of demand notice by the corporate debtor: The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor about-

(a) existence of a dispute about the debt, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the payment of an unpaid operational debt- It is possible that the corporate debtor might have already paid the unpaid operational debt, in such a situation, corporate debtor will inform within 10 days -
   (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
   (ii) by sending an attested copy of a record that the operational creditor has encashed a cheque issued by the corporate debtor. [Section 8]

If no reply is received or payment or notice of the dispute under section 8(2) from the corporate debtor within ten days from the date of delivery of the notice or invoice demanding payment, the operational creditor can file the application before Adjudicating Authority (NCLT) for initiating a corporate insolvency resolution process as per Section 9 of the Code.

Section 21(5) provides that where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

In the case of M/s Orator Marketing Pvt Ltd Cs. M/s Samtex Sesinz Pvt Ltd, the Supreme Court of India, dated 26th July 2021 [Civil Appeal No. 2231 of 2021], the issue involved is whether a person who gives a term loan to a Corporate Person, free of interest, on account of its working capital requirements is not a Financial Creditor, and therefore, incompetent to initiate the Corporate Resolution Process under Section 7 of the IBC.

Thus, based on the aforementioned provisions the decision made by the adjudicating authority of admitting the application filed by the assignee of an operational creditor is valid as an operational creditor also includes a person to whom such debt has been assigned.

(B) Section 2(1)(u) of the Prevention of Money Laundering Act, 2002 defines "proceeds of crime" as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken/held outside the country, then the property equivalent in value held within the country or abroad.

Paragraph 29 of Part A of Scheduled Offence prescribes offence under section 447 of the Companies Act, 2013.

In the given case, the offence of fraudulently/ wrongfully removing the property of RDRPL and using the sale proceeds for personal benefit is an offence punishable under section 447 of the Act which is also a scheduled offence mentioned under the provisions of the Prevention of Money Laundering Act, 2002 and any property derived from criminal activity relating to a scheduled offence falls under proceeds of crime as defined above.

The action that can be taken by the Enforcement director against such property is provided on the basis of provisions of section 5 of the Act as follows:

Where the Director or any other officer (not below the rank of Deputy Director authorised by the Director) for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that-

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to the confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

Condition for attachment: The proviso attached to section 5 provides that no such order of attachment shall be made unless, in relation to the scheduled offence:

- a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or
- a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or
- a similar report or complaint has been made or filed under the corresponding law of any other country.

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

The third proviso states that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.

Thus, the director can pass an order of provisional attachment of the property for a maximum period of 180 days subject to the conditions as aforesaid.

Answer 7

Section 53 of the Code states the provisions relating to the distribution of assets from the sale of the liquidation assets.

(1) Distribution of proceeds from the sale of the liquidation assets: Notwithstanding anything to the contrary in any law enacted by the Parliament or any State Legislation for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period as may be specified, namely -

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following;
  (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
  (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:-
  (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
  (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Disregard of the order of priority: Any contractual arrangements between recipients with equal ranking, if disrupting the order of priority shall be disregarded by the liquidator.

(3) Fees to liquidator: The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients, and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation:

(i) It is required to note that, it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full or will be paid in equal proportion within the same class of recipients if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.

Particulars	**Amount (in ₹ Lakhs)**	
Value Realized by Liquidator (350L×110%+150L×60%+100L×72%+300L×72%)		763
Add: Cash		100
Total Amount of Funds Available		**863**
Less: Section 53(1)(a) insolvency resolution process costs and the liquidation costs.		
(i) Cost of Liquidation	20	
(ii) Insolvency Professional related costs*	12	
Balance Available		**831**
Less: Section (53)(1)(b)		
(i) Workmen's dues for the period of 24 months preceding the liquidation commencement date (80 lakhs*24/30)	64	
(ii) Debt owed to a secured creditors:		
(a) SecuredFinancial Creditors (250 lakhs-45 lakhs)	205	
(b) Secured Operational Creditors	60	
Balance available		**502**
Less: Section (53)(1)(c) Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date	72	
Balance available		**430**
Less: Section(53)(1)(d)	150	

Financial debts owed to unsecured creditors		
Balance available		280
Less: Section(53)(1)(e) – Dues to rank equally		
Amount due to the Central Government and the State Government	50	
Penalty for use of child labour - court case	25	
Amount remaining unpaid to secured financial creditors who enforced their security interest (50 lakhs*80% = 40 lakhs, unpaid amount = 45 lakhs-40 lakhs = ₹ 5 lakhs)	5	
Balance available		**200**
Less: Section(53)(1)(f)		
(i) Workmen's dues pending beyond 24 months of liquidation commencement date	16	
(ii) Employees' liability pending beyond 12 months of liquidation commencement date	8	
(iii) Unsecured operational creditors	70	
Balance available		**106**
Less: Section(53)(1)(g) Amount to be given to Preference Shareholders	106	
Balance available		**Nil**
Less: Section(53)(1)(h) Amount to be given to Equity Shareholders	Nil	
Balance available		**Nil**

Answer 8:

1. According to section 2(16) of the Prohibition of Benami Property Transaction Act, 1988, the fair market value", in relation to a property, means-

   (1) the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and

   (2) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with such manner as may be prescribed in Rule 3 of the Prohibition of Benami Property Transaction Rules, 2016.

   As per the said Rule, the price of unquoted equity shares shall be the higher of-
   (i) its cost of acquisition;
   (ii) the fair market value of such equity shares determined, on the date of transaction, by a merchant banker or an accountant as per the Discounted Cash Flow method; and
   (iii) the value, on the date of transaction, of such equity shares as determined by the formula given in the Rules. The value of (iii) above is determined as below:

Particulars	**Amt (₹ in Lakhs)**	**Value considered for calculation (₹ lakhs)**	**Remarks**
Land & Building (Market value ₹ 45 lakhs)	35	45	Market value to be considered
Plant & Machinery (Gross) (Market Value ₹ 10 lakhs)	20	15 (20-5)	Book value net of accumulated depreciation
Stock & trade Receivables	15	15	Book value
Miscellaneous Expenditure deferred for 3 years	3	0	Not to be considered
Income tax paid in advance	2	0	Not to be considered
Total Value of Assets		**75**	
Shareholder's Funds (5 lakh equity shares @ ₹ 3 each)	35	0	Share capital and Reserves not to be considered
Accumulated Depreciation	5	0	Considered in Value of Plant & Machinery above
Trade Payables	12	-12	To be considered

Income Tax Provision	7	0	Not to be considered
Provision for ascertained liabilities	6	-6	To be considered
Provision for unascertained liabilities	5	0	Not to be considered
Contingent Liabilities	3	-1	Arrears of divided on cumulative preference shares to be considered
Total Value of Liabilities		**-19**	
Fair Market Value (Asset-Liabilities) *Paid up Equity		**56**	
Capital/ Paid up value of equity shares			
Value of equity shares acquired i.e. 10% of total (50,000/5,00,000)		**5.6**	

In the said question, the cost of acquisition is assumed at ₹ 5 lakhs, the value, on the date of transaction, of such equity shares as determined by the formula given in the rules is ₹ 5.6 lakhs and the market value based on discounted cash flow method is given as ₹ 4 lakhs. Thus, the fair market value of the acquisition in DLFPL will be ₹ 5.6 lakhs being the highest of above.

2. It is given in the case study that before passing the resolution plan, the committee of creditors decided to liquidate the corporate debtor, so accordingly the other circumstances mentioned hereunder are related to situations where the resolution plan has not been passed or it has been passed but rejected.

   Section 33 of the Code, interalia, provides that where the Adjudicating Authority shall pass an order requiring the corporate debtor to be liquidated in the manner as laid down

   (a) Not received a Resolution plan: Before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process u/s 12 or the fast track corporate insolvency resolution process u/s 56, as the case may be, does not receive a resolution plan u/s 30(6; or

   (b) Resolution plan rejected u/s 31 for the non-compliance of the requirements specified therein, it shall pass an order requiring the corporate debtor to be liquidated.

CASE STUDY 23

The Adjudicating Authority, under the Foreign Exchange Management Act, 1999, based on the complaints received in writing from the officer authorized by the Central Government, had issued show cause notices to various persons accused of committing contravention under the act, to show cause as to why an inquiry should not be held against them as follows:

Sr. No.	Notice issued to whom	Nature of contravention committed by the accusedperson as mentioned in the show-cause notice issued
1	M/s. Saye Enterprises	Received payment from a person resident outside India inUK pounds without a corresponding inward remittance
2	Mr. Raj	Mr. Raj came to India for holiday after 10 years on 05.05.2019 and left for US on 28.07.2020. While on his stay, he traded in transferable development rights received as compensation from the SG for surrender of his inherited land.
3	Wohts LLP	Donation of USD 90,000 made to a reputed institute in US in the field of activity of the donor Company, without prior approval of RBI, as its foreign exchange earnings during the preceding 3 financial years was USD 75,00,000
4	Lernandes P vt. Ltd.	Payment of commission of 23,500 pounds (1 pound= 1.3 USD) to an agent abroad, for sale of commercial property located in Jaipur, for which ₹ 4.2 crores were realized.(1 USD = ₹70) (1 pound = ₹ 91)
5	TFL Pvt. Ltd.	Non-remittance against import of goods from a supplier based in Ireland for a period of more than 14 months from the date of shipment of goods, shipped on 25.03.2020.
6	BMT Associates (An US based firm)	A firm formed outside India invested in an entity engaged inthe real estate business in India.
7	Mrs. Sridevi	She is a person resident outside India in possession of immovable property in India and how she obtained that property in her name is not-known.
8	Mr. Pasha	He was in possession of immovable property in US jointly with a relative outside India and it was observed that there was outflow of funds from India equivalent to USD 3,00,000.

The aforementioned persons made reply to the alleged contraventions as follows:

Sr. No	Notice issued to whom	Reply and supporting documents provided
1	M/s. Saye Enterprises	Payment was received by us through authorized person and invoice was also issued in UK pounds, produced herewith. (Inward remittance could not be produced)
2	Mr. Raj	I was person resident in India for PY 2020-21 and producing herewith, flight bookings and visa documents and accordingly, trading in transferable development rights was not prohibited to me.
3	Wohts LLP	As the donation was less than USD 50,00,000, there was no requirement to take RBI approval to support which the donation receipt for the same is provided.
4	Lernandes Pvt.Ltd.	Accepted the contravention made and producing herewith, a copy of application filed with the office of Directorate of Enforcement for compounding the contravention made.
5	TFL Pvt. Ltd.	The company is in corporate insolvency resolution process due to the application filed by supplier in Ireland for non-payment and producing herewith, a copy of moratorium order passed by the adjudicating authority under the IBC, 2016.
6	BMT Associates	The real estate company is engaged in the business of development of township to support which, the website address of the Authority, wherein all details of the registered project have been entered and also the registration number obtained from the Authority under the RERA Act, 2016, are produced herewith.
7	Mrs. Sridevi	The property was acquired by my father who is a personresident in India in my name but I was not aware of it.
8	Mr. Pasha	The outflow of funds to the extent of USD 2,50,000 was from Resident Foreign Currency (RFC) account held in my name to support the relevant bank statement is produced herewith.

The adjudicating authority considered the replies made. In the case of Mr. Pasha, the adjudicating authority held an inquiry in which it was found that USD 50,000 were sent out of India from the earnings by Mr. Pasha out of the proceeds from the sale of opium without a license, and accordingly the director under the Prevention of Money Laundering Act, 2002 was informed about the same who after recording the reasons in writing took action as prescribed in the provisions of the Prevention of Money Laundering Act, 2002.

MULTIPLE CHOICE QUESTIONS

1. What was the maximum amount of remittance that was allowed to Lernandes Pvt. Ltd. without prior approval of RBI?
   (a) USD 25,000
   (b) USD 30,550
   (c) USD 30,000
   (d) USD 250,000

2. Which of the following transaction is not prohibited for a non-resident Indian?
   (a) Investment in a real estate company engaged in the construction of plantation property
   (b) Subscription to permitted chit fund through banking channel and on non-repatriation basis
   (c) Acquisition of immovable property in India from an NRI who is not a relative
   (d) Acquire a property outside India jointly with a relative in India whereby funds are transmitted out of India after obtaining approval of RBI

3. The adjudicating authority under the Insolvency and Bankruptcy Code, 2016 on the admission of application for corporate insolvency resolution process does not make an order for -
   (a) Appointment of Interim Resolution Professional
   (b) Declaration of Moratorium period
   (c) Causing a public announcement for initiation of the corporate insolvency resolution process
   (d) Formation of the Committee of Creditors

4. Whether the property held in the name of Sridevi by her father be considered as q benami transaction considering the fact that Sridevi got aware of the ownership of the property after receipt of notice from the adjudicating authority under the Foreign Exchange Management Act, 1999?
   (a) Yes
   (b) No
   (c) Partially
   (d) Can't say

5. If the credit period allowed by the importer for payment to TFL Pvt. Ltd. was 3 months, then what was the maximum time limit available with TFL Pvt. Ltd. as per the provisions of the Foreign Exchange Management Act, 1999 to make payment to the importer?
   (a) 3 months
   (b) 6 months
   (c) 9 months
   (d) 12 months

DESCRIPTIVE QUESTIONS

6. In the lights of the provisions of the Foreign Exchange Management Act, 1999 and its regulations, please examine the validity of the contentions made by:
   (i) M/s. Saye Enterprises
   (ii) Mr. Raj
   (iii)Wohts LLP

7. (A) Proceedings instituted by adjudicating authority by the issue of show cause notice to TFL Pvt. Ltd. under the provisions of Foreign Exchange Management Act, 1999 cannot be prohibited because of going on of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016. Please comment on the same.
   (B) What shall be the amount of penalty that could be levied against Lernandes Pvt. Ltd. and if the offence is compounded by the relevant authority, whether the adjudicating authority can take any further action in respect of the show-cause notice issued to Lernandes Pvt. Ltd.?

8. (A) The property owned by Sridevi was acquired by his father but Sridevi was not aware of the ownership of such property. Examine the statement in the light of provisions of the Foreign Exchange Management Act, 1999 and the Prohibition of Benami Properties Transactions Act, 1988?
   (B) What are the possible actions that can be taken against Mr. Pasha for the offence committed by him under the provisions of the Prevention of Money Laundering Act, 2002?

   (C) BMT Associates in its reply provided the website address of the authority under RERA wherein registration details of the project can be obtained. What is the responsibility of the authority under RERA with respect to such a grant of registration?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) USD 30,000

Reason
The commission, per transaction, to agents abroad for the sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is higher.

5% of ₹ 4.2 Crores will be INRs 21 Lakhs, at the exchange rate of ₹ 70 per USD, this will come to USD 30,000, which is more than 25,000 hence answer is USD 30,000.

2. (b) Subscription to permitted chit fund through banking channel and on non-repatriation basis

Reason
FEMA, 1999

3. (d) Formation of the Committee of Creditors

Reason
Section 13(1) The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order -

(a) declare a moratorium for the purposes referred to in section 14;

(b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and

(c) appoint an interim resolution professional in the manner as laid down in section

Section 21(1) of the IBC provides that the interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

It means, the Adjudicating Authority do not constitute CoC, it is constituted by the IRP.

4. (a) Yes

Reason
Section 2(9) of the Prevention of the Benami Transactions Act, 1988 provides that -

"benami transaction" means,-

(A) a transaction or an arrangement-
  (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
  (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

  except when the property is held by-

  (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual

  (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual.

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership.

Thus, the property held in the name of Sridevi by her father comes under the exempted category of section 2(9)(A)(iii) and shall not be treated as benami transaction, provided the consideration paid for purchase of such property was make out of the known sources of income. However, when Sridevi has denied of having property in her name [(as per section 2(9)(C)], then certainly it comes within the definition of benami transaction.

5. (b) 6 months

Reason
The remittances against imports should be completed, not later than six months from the date of shipment, except in cases where amounts are withheld towards the guarantee of performance, etc.

Further, in view of the disruptions due to the outbreak of COVID- 19 pandemic, with effect from May 22, 2020, the time period for completion of remittances against normal imports (except in cases where amounts are withheld towards the guarantee of performance, etc.) has been extended from six months to twelve months from the date of shipment for such imports made on or before July 31, 2020.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6;

(i) As per sub-section (c) of Section 3 of the Foreign Exchange Management Act, 1999, no person shall receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation- For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

Analysis and conclusion of the given case

Even though M/s. Saye Enterprises told that the payment was received by them through an authorised person but due to non-production of inward remittance, it would be deemed that such payment has been received otherwise than through an authorised person and accordingly the contentions made by M/s. Saye Enterprises are not valid.

(ii) As per Section 2(v) of the Foreign Exchange Management Act, 1999, "Person resident in India" means

(i) a person residing in India for more than 182 days during the course of the preceding financial year but, interalia, does not include

(B) a person who has come to or stays in India, in either case, otherwise than -

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances, as would indicate his intention to stay in India for an uncertain period

As per Regulation 4 of the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, a person resident outside India is prohibited to engage, interalia, in trading in transferable development rights, either directly or indirectly.

Analysis and conclusion of the given case

Even though the stay of Mr. Raj during the course of the preceding financial year was more than 182 days but his purpose of stay in India was a holiday and not the one as aforementioned, so his residential status for the financial year 2020-21, is a 'Person resident outside India' and accordingly trading in transferable development rights was prohibited to him. The contentions made by him are not valid.

(iii)As per Para 2 of Schedule III read with Rule 5 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000,

The remittances by persons other than individuals that require prior approval of the Reserve Bank of India, interalia, includes:

Donations exceeding one percent of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for

(a) Creation of Chairs in reputed educational institutes,

(b) Contribution to funds (not being an investment fund) promoted by educational institutes; and

(c) Contribution to a technical institution or body or association in the field of activity of the donor Company.

Analysis and conclusion of the given case

1% of the foreign exchange earnings during the previous three financial years (USD 7,500,000) of Wohts LLP comes to USD 75,000 Or USD 5,000,000, whichever is less.

As obtained above, if the donation made by Wohts LLP exceeds USD 75,000 then prior approval of RBI is required. Here, a donation of USD 90,000 has been made, and hence prior approval was required, the contention is not valid.

Answer 7:

(A) According to section 14 (1) of the Insolvency and Bankruptcy Code, 2016, on the insolvency commencement date, the Adjudicating Authority shall by order, declare a moratorium prohibiting all of the following, namely

(a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority;

(b) Transferring, encumbering, alienating, or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period.

Analysis and conclusion of the given case

As per Section 14(1) (a) of the Code, the proceedings instituted by adjudicating authority by the issue of show cause notice to TFL Pvt. Ltd. under the provisions of Foreign Exchange Management Act, 1999 will be prohibited due to declaration of a moratorium on the commencement of insolvency period. The statement given is not valid.

(B) (i) As per Section 13 of the Foreign Exchange Management Act, 1999, If any person contravenes any provisions of this Act, or contravenes any rule, regulation, notification, direction, or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, a further penalty which may extend to five thousand rupees for every day after the first day which the contravention continues.

As per section 42 of the Foreign Exchange Management Act, 1999, where a contravention of any of the provisions of this Act or of any rule, direction, or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officers of the company, such director, manager, secretary or other officers of the company shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Here, Lernandes Pvt. Ltd. ought to have taken permission for remitting 23,500 pounds or USD 30,550 as it exceeded the prescribed limits (i.e. 5% of ₹ 4.2 Crores will be ₹ 21 Lakhs, at the exchange rate of ₹ 70 per USD, this will comes to USD 30,000, which is more than 25,000 hence allowed limit is USD 30,000). Here the sum involved in such contravention is quantifiable, and the amount in the contravention is USD 550 (i.e. USD 30,550 - USD 30,000). Therefore the penalty amount is USD 1,650 (i.e. 1269.23 pounds or ₹ 1,15,500).

(ii) The adjudicating authority cannot take any further action in respect of the show-cause notice issued to Lernandes Pvt. Ltd. because as per section 15 of the Foreign Exchange Management Act, 1999, where a contravention has been compounded, no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.

Answer 8

(A) As per the Regulation 3 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, an NRI or an OCI may, interalia, acquire immovable property in India other than agricultural land/ farmhouse/ plantation property:

Provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in

any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

Provided further that no payment for any transfer of immovable property shall be made either by traveler's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause.

As per section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, Benami transaction, interalia, means, a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership

Analysis and conclusion of the given case:

Here, Consideration for the immovable property is paid by the father of Sridevi and the owner is Sridevi.

Sridevi, being an NRI, can acquire property in India only if the consideration for the same is through the mode specified above. Since the consideration is paid by her father it can be considered that it would have been paid in Indian rupees which is not the mode specified above, thereby violating the condition of the aforementioned regulation and can be prosecuted further by the adjudicating authority under the Foreign Exchange Management Act, 1999.

Also, Sridevi is not aware that she is the owner of such property in India making it a benami transaction and consequently the property will be considered as a "benami property". Accordingly, Sridevi's father can be prosecuted under the provisions of the Prohibition of Benami Properties Transaction Act, 1988.

(B) Following actions can be taken against Mr. Pasha involved in Money Laundering:-

(a) Attachment of property under Section 5,
Seizure/ freezing of property and records under Section 17; or
Search of persons under Section 18.

The property also includes property of any kind used in the commission of an offence under the Prevention of Money Laundering Act, 2002, or any of the scheduled offences. If required, for taking possession of the property in the US, a letter of request can be transmitted under Section 57 if there is an agreement made by the Central Government of India with the Government of the US under section 56 of the Act.

(b) As it is a scheduled offence committed is under the Narcotics and Psychotropic substances Act, 1985 the punishment shall be imprisonment for a term which shall not be less than three years but which may extend up to ten years and shall also be liable to fine.

(c) As per Section 19(1), the Director may by passing an order, arrest him and shall inform him of the grounds for such arrest.

These are the possible actions that can be taken against Mr. Pasha in the above case for their offences.

(C) Grant of Registration - Section 5 of the Real Estate (Regulation & Development) Act, 2016:

(1) This section provides that the Authority shall within a period of thirty days,

(a) grant registration subject to the provision of the Act and the rules and regulations made thereunder and provide a registration number including a Login Id and password to the applicant for accessing the website of the authority and to create his webpage and to fill therein the details of the proposed project, or

(b) reject that application for reasons to be recorded in writing, if such application does not conform to the provisions of the Act or the rules and regulations made thereunder.

However, no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

(2) This section also provides that if the Authority fails to grant the registration or reject the application, as provided within thirty days, the project shall be deemed to have been registered and the Authority shall within seven days of the expiry of the said thirty days, provide a registration number and a Login ID and password to the promoter.

Thus, the responsibility of the authority under RERA includes providing a registration number including a Login Id and password to the applicant/ promoter and in case the application is ought to be rejected then an opportunity of being heard must be given to the promoter after recording the reasons in writing.

CASE STUDY 24

IOWE Limited, engaged in the business of real estate, is under a corporate insolvency resolution process that commenced from 15.09.2019, in which Mr. Tapan, has been appointed as the resolution professional, who is conducting the entire resolution process and managing the entire operations of the corporate debtor.

Mr. Tapan made an invitation for the names of prospective resolution applicants under clause (h) of sub-section (2) of section 25 of the Insolvency and Bankruptcy Code 2016 (here-in-after referred as to the Code) pursuant to which the candidates who submitted their names, are as follows:

Name	Status of the person
Tryl ARC Ltd.	An asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which is managing one of the receivable accounts of IOWE Limited classified as NPA since 05.08.18 and also possesses 21% equity shares of IOWE Limited obtained against convertible debentures of IOWE Limited prior to 31.03.2019.
Raj	He is a brother in law of Mr. Deepak who shall be the managing directorof IOWE Ltd. during the time of implementation of the resolution plan and Mr. Raj, himself is disqualified to act as a director under the Companies Act, 2013
Prem	He was CEO of IOWE Ltd. when the adjudicating authority under section 44 of the Code passed an order requiring the resolution professional, Mr. Tapan, to release the security interest created in favour of one of the operational creditors on 25.02.2019.
Bhavesh	He is a spouse of the sister of Mrs. Asmita who shall be the woman director, going to be involved in the management of IOWE Limited during the time of implementation of the resolution plan, and Mr. Bhavesh, being a person resident in India was convicted under the provisions of FEMA Act, 1999, with imprisonment for 2 years and only 1 year has expired from the date of his release of imprisonment, for not paying penalty arose due to retaining possession of foreign currency notes of USD 560,000 for more than the prescribed period acquired as payment of services provided in the USA.
Jayesh	He was an ex-director of IOWE Ltd., convicted under the provisions ofthe Prohibition of Benami Property Transactions Act, 1988, as he was a beneficial owner of a property in which his friend, an ex-employee of IOWE Ltd., Mahesh, was made benamidar of the property, with imprisonment for 3 years and only 6 months have expired from the date of his release of imprisonment.
Urmila	She is a spouse of the nephew of Mr. Raman, who shall be the promoter of IOWE Limited during the time of implementation of the resolution plan, and Mrs. Urmila, herself, was convicted under the provisions of the Competition Act, 2002, for violating the order of the commission by re-entering into an agreement of anti-competitive nature on behalf of PKC Private Limited in which she was the managing director, with imprisonment for 2.5 years and 2 years have expired from the date of her release of imprisonment.

Mr. Tapan rejected a few of the prospective applicants' candidature as they were not found to be eligible under section 29A of the Insolvency and Bankruptcy Code, 2016 and few were not satisfying the criteria laid down by him i.e. not having experience in the real estate industry for minimum 2 years.

Mr. Tapan provided the eligible resolution applicants with access to all the relevant information including the financial position of IOWE Limited as follows:

Share Capital/ Liabilities	₹ (In lakhs)	Assets	₹ (In lakhs)
Equity Share Capital	150	Fixed Assets:	
Preference Share Capital	50	Land & Building	120
Financial Creditors (Secured)	80	Plant & Machinery	60
Operational Creditors (Unsecured)	38	Current Assets:	
Government Dues	20	Stocks	40
Workmen's Dues pending for 27 months before 15.09.2020	18	Trade Receivables	90
Employees' Dues	22	Other current Assets	38
		Cash & Cash equivalents	30
	378		400

Based on the information provided, Mr. Tapan received 3 resolution plans from the approved resolution applicants wherein all the 3 plans provided for:

1. The insolvency resolution process costs, estimated at ₹ 40 lakhs,
2. Payment of the debts of operational creditors at ₹ 38 lakhs provided by Plan no. 1 and Plan no. 2 respectively whereas Plan no. 3 provided at ₹ 28 lakhs only.
3. All the plans included the provisions for matters such as payments of debts to financial creditors who do not vote in favour of the plan as per priority order mentioned in sec 53 of the code, management of the affairs of the Corporate debtor after approval of the resolution plan, implementation and supervision of the resolution plan and conformed to such other requirements as may be specified by the Board.
4. With regards to the comment on the contravention with any of the provisions of the law for the time being in force in the plan, in the plan no. 2, it was mentioned that as one of the mortgaged properties which were in favour of a financial creditor of IOWE Limited got provisionally attached under section 5 of the Prevention of Money Laundering Act, 2002 after the insolvency commencement date, but the proceedings of which were going on before the insolvency commencement date, that particular financial creditor would be treated as unsecured. In Plan no. 1 and Plan no. 3, it has been considered that attachment of property under section 5 of PMLA Act, 2002 will not have effect during the IBC proceedings and that financial creditor will continue to be a secured creditor.

It is also to be noted that the aforementioned mortgaged property was not purchased from "proceeds of crime". It was purchased and mortgaged in favour of a financial creditor prior to the crime period.

Prior to the insolvency commencement date, Mr. Jayesh who was a past director in IOWE Limited, purchased a property out of the cash money earned by him, which were not disclosed anywhere in order to avoid Income tax, registered in the name of Mahesh, an ex-employee of IOWE Limited, after making an oral agreement with him in exchange of some commission in cash. In the proceedings under the Prohibition of Benami Property Transactions Act, 1988, it was held that the property is benami in nature after which the shareholders of IOWE Limited in the general meeting removed Jayesh and Mahesh from the company and IOWE Limited filed a suit against Jayesh and Mahesh claiming that the property purchased by Jayesh in the name of Mahesh was from the cash illegally earned by Jayesh from the company and so IOWE Limited being the real owner of the property be given the title and possession of the property.

MULTIPLE CHOICE QUESTIONS

1. If Mr. Prem had created a security interest in favour of one of the operational creditors to substitute its existing operational debt with financial debt then whether it can be considered as a preferential transaction and within what time Mr. Prem should have entered into such transaction?
   (a) Yes, during the period of two years preceding the insolvency commencement date
   (b) No
   (c) Yes, during the period of one year preceding the insolvency commencement date
   (d) Cant' say, it depends
2. By the decision of which authority, Mrs. Urmila would have been convicted with imprisonment for 2.5 years under the provisions of the Competition Act, 2002?
   (a) Competition Commission of India
   (b) Chief Metropolitan Magistrate
   (c) Director General
   (d) The Central Government
3. Which of the following relations, between persons mentioned hereunder, will not fall under the meaning of relative as per the provisions of the Insolvency and Bankruptcy Code, 2016?
   (1) Raj and Deepak
   (2) Bhavesh and Asmita
   (3) Urmila and Raman
   (4) Jayesh and Mahesh
   (a) 1,3 & 4
   (b) 3 & 4
   (c) 4
   (d) 2 & 4
4. Had IOWE Limited filed a suit or claim, prior to the initiation of proceedings under the Prohibition of Benami Property Transactions Act, 1988, that it is the real owner of the property purchased by Jayesh, then to whom notice was required to be issued for adjudication of benami property and by which authority?
   (a) Initiating officer shall issue notice to Jayesh, Mahesh and IOWE Limited
   (b) Adjudicating Authority shall issue notice to Jayesh and Mahesh
   (c) Initiating officer shall issue notice to Jayesh and Mahesh
   (d) Adjudicating Authority shall issue notice to Jayesh, Mahesh and IOWE Limited
5. How much amount of foreign currency, Mr. Bhavesh, ought to have surrendered to the authorized dealer to avoid the penalty under the FEMA Act, 2002, assuming that Bhavesh had received USD

290,000 out of USD 560,000 in India, in rupees (INR) from a bank account in the US, maintained with an authorized dealer?

(a) $ 270,000
(b) $ 268,000
(c) $ 560,000
(d) $ 290,000

DESCRIPTIVE QUESTIONS

6. Who among the candidates named above are eligible to be resolution applicant to submit a resolution plan and also mention the reasons for their eligibility or ineligibility in the lights of the provisions of the Insolvency and Bankruptcy Code, 2016?
7. (A) You are the resolution professional and need to comment that which of the resolution plans as aforementioned in the case study according to you confirms the requirements as per the provisions of the Insolvency and Bankruptcy Code, 2016.

   To support your answer, please prepare an estimated calculation showcasing the priority with respect to payments as per Section 53 of the Code, based on the balance sheet as provided above, assuming the estimated value that can be realized from the sale of assets, if sold, is ₹ 180 lakhs. (Ignore the fact that plan no. 2 has considered a certain amount of financial creditors as unsecured.)

   (B) How the commission would have come to know about the violation of the order by the company in which Mrs. Urmila was a managing director and what penalty could have been imposed on her?

8. (A) Whether the provisional attachment under section 5 of the PMLA Act, 2002, of property of IOWE Limited could be justified considering the fact that it was mortgaged in the favour of one of the financial creditor and that it was purchased and mortgaged prior to the crime period? Provide your answer based on the decision of relevant case law.

   (B) Whether the act of IOWE Limited of filing suit against Jayesh and Mahesh claiming that the company is the real owner of the property and be given the title and possession of the property is valid in the lights of the provisions of the Prohibition of Benami Property Transactions Act, 1988?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) Yes, during the period of one year preceding the insolvency commencement date

   Reason

   Section 43(4)(b) of the OBC provides that a preference shall be deemed to be given at a relevant time, if-
   (b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.
   Hence, the option (c) is correct.

2. (b) Chief Metropolitan Magistrate

   Reason

   Section 52Q of the Competition Act, 2002 provides that without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he shall be liable for a penalty of not exceeding rupees one crore or imprisonment for a term up to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit.
   Hence, the option (b) is correct.

3. (b) 3 & 4

   Reason

   Explanation (a) attached to section 24A of the IBC provides that "relative", with reference to any person, means anyone who is related to another, the following maner, namely: (i) members of a HUF, (ii) Husband, (iii) wife, (iv) father, (v) mother, (vi) son, (vii) daughter, (viii) son's daughter and son, (ix) daughter's daughter and son, (x) grandson's daughter and son, (xi) grand daughter's daughter and son, (xii) brother, (xiii) sister, (xiv) brother's son and daughter, (xv) sister's son and daughter, (xvi)father's father and mother, (xvii) mother's father and mother, (xviii) father's brother and sister, (xix) mother's brother and sister; and

   (b) wherever the relating is that of a son, daughter, sister or brother, their spouses shall also be included.
   In the given case:
   Option 3: Urmila and Jayesh ' Urmila is a spouse of the nephew of Mr. Raman
   Option 4: Jayesh and Mahesh ' Jayesh was an ex-director of IOWE Limited, and his friend Mahesh is an ex-employee of IOWE Limited,

Both the options of 3 and 4 do not come in the category of the definition of relative as provided under the provisions of IBC.

4. (c) Initiation Officer shall issue notice to Jayesh and Mahesh

Reason

Section 24(1)&(2) of the PBTP Act, 1988 provides as under:

(1) Where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.

(2) Where a notice under sub-section (1) specifies any property being held by a benamidar referred to in that sub-section, a copy of the notice also be issued to the beneficial owner if his identity is known.

In the given case, Jayesh is beneficial owner and Mahesh is the benamidar. As mentioned in the case that IOWE Ltd has itself filed a suit prior to the initiation of proceedings under the PBTP Act, 1988, so the notice shall be served by the Initiating Officer to Jayesh and Mahesh.

5. (b) $ 268,000

Reason: [($560,000 - $290,000) - $2,000] = $268,000

USD 2000 can be retained by Bhavesh, so it has been reduced and the net USD to be surrendered comes to USD 268000.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

The eligibility criteria for a resolution applicant is mentioned in section 29A of the Code and accordingly the question is answered on the basis of its provisions as follows:

Name	Eligible for resolution applicant?	Reason
Tryl ARC Ltd.	Yes	As per clause (c) of Section 29A of the Code, a person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person- At the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor. Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan. Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor. As per Explanation I to the said clause, the related party shall not include a financial entity of the corporate debtor, if it is a financial creditor of the corporate debtor and is a related party solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date. Further, Explanation II of section 29A(j)(d), provides that the financial entity includes an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Hence, Tryl ARC Ltd. is eligible.

Raj	Yes	As per Section 29A(e), a person is ineligible if he is disqualified to act as a director under the Companies Act, 2013: Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I. Explanation I. - For the purposes of this clause, the expression "connected person" means- (i) any person who is the promoter or in the management or control of the resolution applicant; or (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or (iii)the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii): Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor. Raj is the brother-in-law of Deepak so it is a related party of Deepak, in terms of section 5(24A)(a) & (b) of the Code, who shall be the managing director of IOWE Limited during the time of implementation of the resolution plan and hence, Mr. Raj is eligible even though he is disqualified to act as a director.
Prem	No	As per clause (g) of Section 29A, Mr. Prem being the CEO will be considered in the management of the company at the time when the preferential transaction had taken place and in respect of which an order has been made by the Adjudicating Authority under this Code. Therefore, Mr. Prem is ineligible.
Bhavesh	Yes	As per clause (d) of Section 29A, Mr. Bhavesh has been convicted for an offence punishable with imprisonment for two years or more under the FEMA Act, 1999, specified under the Twelfth Schedule but this clause is not applicable to a person who is a connected person referred to in clause (iii) of Explanation I, which includes a related party of a person who shall be in management of the business of the corporate debtor during the time of implementation of the resolution plan and Mr. Bhavesh being sister's spouse will be considered as a related party to Mrs. Asmita as per section 5(24A) of the Code, who shall be in the management of IOWE Limited as a woman director, during the time of implementation of the resolution plan and hence, Mr. Bhavesh is eligible.
Jayesh	No	As per clause (d) of Section 29A, Mr. Jayesh has been convicted for an offence punishable with imprisonment for two years or more under the Prohibition of Benami Property Transactions Act, 1988 specified under the Twelfth Schedule and since only 6 months have expired from the date of imprisonment, Mr. Jayesh is ineligible.
Urmila	Yes	As per clause (d) of Section 29A, Mrs. Urmila has been convicted for an offence punishable with imprisonment for two years or more under the Competition Act specified under the Twelfth Schedule and 2 years have expired from the date of imprisonment, Mrs. Urmila is eligible.

Answer 7:

(A) The following calculation is done on estimated basis according to the provisions of sec 53 of the Code.

Particulars	**(₹ in lakhs)**
Value Realized by Liquidator	180
Add: Cash	30
Total Amount of Funds Available	**210**
Less: Section 53(1)(a) Estimated Insolvency resolution process costs	40
Balance Available	**170**
Less: Section (53)(1)(b)	
(i) Workmen's dues for the period of 24 months preceding the liquidation commencement date (18 lakhs*24/27)	16

(ii) Debt owed to a secured financial creditors	80
Balance available	**74**
Less: Section(53)(1)(c) Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date	22
Balance available	**52**
Less: Section(53)(1)(d) Financial debts owed to unsecured creditors	-
Balance available	**52**
Less: Section(53)(1)(e) –	
Amount due to the Central Government and the State Government	20
Balance available	**32**
Less: Section(53)(1)(f) (Pending payable amount = ₹ 2 lakhs+₹38 lakhs = ₹40 lakhs)	
(i) Workmen's dues pending beyond 24 months of liquidation commencement date (2 lakhs * 32/40)	1.6
(ii) Unsecured operational creditors (38 lakhs * 32/40)	30.4
Balance available	**Nil**
Less: Section(53)(1)(g) Amount to be given to Preference Shareholders	Nil
Balance available	**Nil**
Less: Section(53)(1)(h) Amount to be given to Equity Shareholders	Nil
Balance available	**Nil**

Comments:

Plan no. 2 contravenes the provisions of the IBC, 2016 as treating secured creditor as unsecured one because of attachment of property under section 5 is incorrect and against the law, thereby it is not eligible.

Plan no. 3 provides for payment to operational creditors at ₹ 28 lakhs whereas they should be paid at a higher of: amount to be paid in the event of a liquidation of the corporate debtor under section 53 i.e. liquidation value (not given in question) or amount to be paid in order of priority under section 53, i.e. ₹ 30.4 lakhs. Since plan no. 3 provides only for ₹ 28 lakhs payment, hence it is ineligible.

Plan no.1 satisfies all the requirements of section 30(2) of the Code and therefore is an eligible resolution plan.

(B) Section 42 of the Competition Act, 2002, deals with the matter of Contravention of orders of Commission. It reads as under:

(1) The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.

(2) If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

(3) If any person does not comply with the orders or directions issued or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit. Provides that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.

Section 48 deals with the matter relating to the contravention by companies. It reads as under

(1) Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, an order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any

punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act, or of any rule, regulation, an order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officers of the company, such director, manager, secretary or other officers shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

Analysis and conclusion of given case

The commission might have caused inquiry that whether PKC Pvt. Ltd. is complying with the provisions of the order passed by it, by which it would have come to know about the violation by the company and Mrs. Urmila being a managing director of the company would have been involved in it because of which she was also punished.

The penalty that would have been imposed would be imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may have deemed fit, for not complying with the order of the commission.

Answer 8

(A) The facts in the given case commensurate with the case of M/s. PMT Machines Ltd. vs The Deputy Director, Directorate of Enforcement, Delhi, for which the key ratio decidendi is produced hereunder,

(1) The Appellate Authority of the Prevention of Money Laundering Act, 2002 (PMLA) has upheld the prevalence of the IBC over the provisions of PMLA.

(2) The PMLA Appellate Tribunal, distinguished between the objectives of the PMLA and IBC, and was of the view that "the objective of the PMLA was to deprive the offender from enjoying the 'illegally acquired' fruits of crime by taking away his right over property acquired through such means. The Bench opined that the IBC's objective on the other hand was maximization of value of assets, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders."

(3) The Appellate Bench observed that, if the attachment, in this case, were lifted, the RP would be able to take steps to get a viable Resolution Plan. It was noted that the attachment order was passed in relation to mortgaged properties in favour of banks, which were not purchased from "proceeds of crime", as they were purchased and mortgaged with the banks prior to the crime period.

Analysis and conclusion of a given case

Based on the decision given by the appellate tribunal in the above case, it can be understood that the act of the provisional attachment under section 5 of the PMLA Act, 2002, of property of IOWE Limited cannot be justified as there is the prevalence of the IBC over the provisions of PMLA and the attachment needs to be lifted so that the resolution professional would be able to take steps to get a viable Resolution Plan.

(B) As per Section 4 of the Prohibition of Benami Property Transactions Act, 1988,

(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

Since the property acquired by Jayesh is held to be benami, the filing of a suit by IOWE Limited is not a valid act because as per section 4 of the Act, no such suit shall lie against the person in whose name the property is held to be benami or against any other person.

CASE STUDY 25

Tri-Bros Private Limited is an IT company, incorporated on 20.03.2015, by three college friends, Jack, Joe, and Sam respectively, having an equal stake in the company. The company provides anti-virus software to its clients, mostly to companies, according to their IT security requirements.

Jack has a brother, Hemant, who left India on 12.08.2015, for pursuing business studies in Ireland for 4 years. On 01.09.2017, Hemant came to India for 3 months for vacation, during holidays, from Ireland and his father spent ₹ 1,20,000 (equivalent to USD 2,000) on account of his expenses relating to boarding, lodging, and travel within India. Hemant, after completing his graduation, returned to India on 30.09.2019. He was appointed as the director in Tri-Bros Private Limited and to financially support the company, he acquired a 7% stake in the company, from his earnings through part-time jobs in Ireland.

WFH Limited is also an IT company that developed unique software, "WFH monitor" during the Covid pandemic that can monitor the movement of employees working from home and provide their work reports to their employers. WFH Limited's software was in high demand, due to which it imposed a condition on sale to its customers that they would require to purchase antivirus software provided by Tri-Bros Private Limited along with WFH monitor software, and simultaneously it made an agreement with Tri-Bros Private Limited on 15.09.2018 that it would be sharing 50% profits with it, that is earned by its selling anti-virus software to the customers of WFH Limited.

Tri-Bros Private Limited faced a financial crisis due to which it had undergone a corporate insolvency resolution process, which got completed on 08.07.2018 and the company was revived. Even after its revival, the company was not performing well, due to which the directors of Tri-Bros Private Limited., decided to enter into such an agreement with WFH Limited, as aforementioned.

But this could not stay longer, when one of the IT companies filed a complaint with the Competition Commission of India relating to the agreement between Tri-Bros Private Limited and WFH Limited, whereby, the CCI after following the due procedures prescribed in the Competition Act, 2002, passed an order on 31.12.19, that the agreement between Tri-Bros Private Limited and WFH Limited and also the agreements made by WFH Limited with its customers shall be null and void and they shall not re-enter into such agreements.

Due to the cancellation of the above agreement of Tri-Bros Private Limited., it faced a financial crunch, whereby, it was not in a position to pay its debt dues because of which it made an application for corporate insolvency resolution process on 20.02.2020, which got admitted on 15.03.2020. The adjudicating authority made all the necessary orders on the admission of the application.

The committee of creditors was constituted by the interim resolution professional, Mr. Yash, who was further appointed as resolution professional, as follows:

Name of financial creditor	Debt owed (₹ in cr)
TDF Bank	17
ALC Bank	10
Finco Pvt. Ltd.	15
TSB Bank	20
Mr. G (related party)	15
KM LLP	5
Ti-Fin Corp.	18
Debts owed in aggregate to 20 unrelated parties (₹ 1cr each)	20

TDF Bank, ALC Bank, and Finco Private Limited provided consortium finance (individual contributions as mentioned above) and they appointed Mr. Verma, an insolvency professional as their authorised representative. Also, the adjudicating authority approved the name of the insolvency professional, Mr. Bhargav, suggested by Mr. Yash to act as the authorised representative under section 21(6A)(b) of the Code, for the 20 financial creditors to whom ₹ 20 crores in the aggregate are owed.

Mr. Yash presented the resolution plan to the committee of creditors which got approved by the requisite majority and then after was submitted to the adjudicating authority which also approved the plan. Accordingly, Tri-Bros Private Limited has revived once again.

Meanwhile, a sting operation was conducted in a bank, in which Mr. Sam has an account, in which the undercover reporters of the media channel, "Satark Rahiye" approached its employees representing themselves to be customers who required to open a bank account to deposit black money belonging to a businessman and for laundering the same. The video indicated that officials of the banks had expressed willingness to accept deposits of black money. Consequently, the director issued letters to the respondent

bank asking it to provide certain information under Section 12A of the Prevention of Money-Laundering Act, 2002, in reference to the sting operation.

Director while scrutinizing the information received from the respondent bank observed some suspicious transactions made by Sam with the bank that gave a hint that some money laundering activities are going on and Sam was issued summons under section 50 of the Prevention of Money-Laundering Act, 2002, to attend the office of the director with the supporting documents for the transactions with the bank.

MULTIPLE CHOICE QUESTIONS

1. What could be the penalty that could be imposed by the Competition Commission of India for the profits earned by Tri-Bros Private Limited and WFH Limited due to the agreement entered into by them, if the average turnover during the period of such agreement of Tri-Bros Private Limited was ₹22,00,00,000 and the profits earned were ₹ 1,32,00,000?
   (a) ₹ 2,20,00,000
   (b) ₹ 3,96,00,000
   (c) ₹ 1,32,00,000
   (d) ₹ 66,00,000

2. By what voting share the resolution plan would have considered being passed if the financial creditors voted as follows;

Name of financial creditor	Type of vote given
TDF Bank	In favour
ALC Bank	Not in favour
Finco Pvt. Ltd.	In favour
TSB Bank	In favour
Mr. G (related party)	-
KM LLP	Not in favour
Ti-Fin Corp.	In favour
Debts owed in aggregate to 20 partie (11 parties were in favour and 9 voted against theplan)	The Authorised Representative voted accordingly

   (a) 75%
   (b) 85.71%
   (c) 77.14%
   (d) 67.5%

3. In case, if Mr. G was not a related party and had abstained from voting, and out of the 20 unrelated parties, 10 voted in favour, 3 voted against the plan and the remaining didn't vote, then by what voting share the resolution plan would have considered being passed if other details remain same as per question no. 2 above?
   (a) 75.00%
   (b) 66.67%
   (c) 81.63%
   (d) 67.5%

4. On inquiry under section 50 of the Prevention of Money-Laundering Act, 2002, Sam was found to be using a forged passport, which can be penalized under which of the following Scheduled offence?
   (a) Offences under the Emigration Act, 1983
   (b) Offences under the Passports Act, 1967
   (c) Offences under the Indian Penal Code
   (d) Offences under the Foreigners Act, 1946

5. Which of the following entities is not obligated to provide information under section 12A of the Prevention of Money-Laundering Act, 2002?
   (a) Department of posts
   (b) Real estate investment trust
   (c) Real estate agents
   (d) Person running a casino

DESCRIPTIVE QUESTIONS

6. (A) Please comment in the light of the provisions of the Foreign Exchange Management Act, 1999 that whether Hemant's father making a payment towards hospitality expenses of Hemant and acquisition of a stake in Tri-Bros Private Limited by Hemant are valid transactions or not?

   (B) Who shall be liable to pay remuneration to the authorised representatives, Mr. Verma and Mr. Bhargav respectively, and whether a single creditor in the committee of creditors can appoint an insolvency professional as his authorised representative and who shall borne fees for the same?

7. (A) Please comment in the lights of the provisions of the Competition Act, 2002, about the nature of the agreements entered into by WFH Limited with Tri-Bros Private Limited and by WFH Limited with its customers and how it affected the competition in the relevant market?

   (B) Whether the director's act of issuing letters to the respondent bank under the PMLA Act, 2002 based on the video of a sting operation was valid and if yes, then what authority does the director have in case he finds that the bank has failed to comply with the obligations imposed on it by the Act?

8. (A) What could have been the consequences, if, Mr. Sam after receiving the summons under section 50 of the Prevention of Money-Laundering Act, 2002, omits to attend? Would there be any difference, if, Mr. Sam intentionally refrains from attending the office of the director?

   The resolution plan submitted by Mr. Yash got approved by the adjudicating authority. What is the consequence of the same and what is the duty of the resolution professional with respect to the same?

   (B) Tri-Bros Private Limited had already undergone a corporate insolvency resolution process and again it went into the insolvency resolution process. Whether it was entitled to do so? Please comment and also provide in which circumstances a person is not entitled to make an application to initiate the corporate insolvency resolution process?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (a) ₹ 2,20,00,000

   Reason

   Section 27(b) of the Competition Act, 2002 provides that where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

   In the given case, the average turnover for last 3 years is gives as ₹ 22,00,00,000 and 10% of it comes ₹ 2,20,00,000.

2. (c) 77.14%

   Reason

   Section 21(2) of the IBC reads as under

   The committee of creditors shall comprise all financial creditors of the corporate debtor:

   Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors

   Section 30(4) of the IBC reads as under:

   The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board.

Name of financial creditor	Type of vote given	Debts	Voting % Total Debt
TDF Bank	In favour	17	16.19
ALC Bank	Not in favour	10	9.52
Finco Pvt. Ltd.	In favour	15	14.29
TSB Bank	In favour	20	19.04
Mr. G (related party)	-	To be ignored	--
KM LLP	Not in favour	5	4.78
Ti-Fin Corp.	In favour	18	17.15
Debts owed in aggregate to 20 partie (11 parties were in favour and 9 voted against the plan)	The Authorised Representative voted accordingly	11 9	10.47 8.57
	Total	105	100.00

The FCs who voted in favour of Resolution Plan 16.19+ 14.29+19.04+17.15+ 10.47 =77.14%

[Note: Since Mr G is related party, hence his debt has not been counted in total of debt for the purpose of arriving at the voting share.]

3. (c) 81.63%

Reason

Name of financial creditor	Type of vote given	Debts	Voting % Total Debt
TDF Bank	In favour	17	14.16
ALC Bank	Not in favour	10	8.33
Finco Pvt. Ltd.	In favour	15	12.50
TSB Bank	In favour	20	16.67
Mr. G (Treating it as not related party)	Remained absent from voting	15	12.50
KM LLP	Not in favour	5	4.17
Ti-Fin Corp.	In favour	18	15
Debts owed in aggregate to 20 partie (10 parties were in favour, 3 voted against the plan, 7 absented)	The Authorised Representative voted accordingly	10 3 7	8.33 2.50 5.84
	Total	120	100.00

Section 5(28) of the IBC provides that "voting share" means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor.

Further the Regulation 2(1)(f) of (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has been OMITTED by Notification No. IBBI/2018-19/GN/REG032, dated 5th Oct, 2018 (w.e.f. 05.10.2018), which provided that "dissenting financial creditor" means a financial creditor who voted against the resolution plan or abstained from voting for the resolution plan, approved by committee;".

Since the Regulation 2(1)(f) has been omitted, we may ignore in counting the votes who remained absented then re-calculate the voting share of the FCs who were present in the CoC meeting and voted in favour of the Resolution plan.

Name of financial creditor	Type of vote given	Debts	Voting % Total Debt
TDF Bank	In favour	17	17.35
ALC Bank	Not in favour	10	10.21
Finco Pvt. Ltd.	In favour	15	15.30
TSB Bank	In favour	20	20.40
Mr. G (Treating it as not related party)#	Remained absent from voting	xxx	
KM LLP	Not in favour	5	5.10
Ti-Fin Corp.	In favour	18	18.37
Debts owed in aggregate to 20 partie (10 parties were in favour, 3 voted against the plan, 7 absented)#	The Authorised Representative voted accordingly	10 3 xxx	10.21 3.06
	Total	98	100.00

Not counted in the total voting share.

17.35 + 15.30 + 20.40 + 18.37 + 10.21 = 81.63%

4. (d) Offences under the Foreigners Act, 1946

Reason

Paragraph 19 of Part A of Schedule of PML Act deals with the offences under the Foreigners Act, 1946. Under this section 14B of the Foreigners Act, 1946 deals with the penalty for using forged passport.

5. (b) Real Estate Investment Trust

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

(A)

(i) Section 3(b) of the FEMA Act, 1999, provides that save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no

person shall make any payment to or for the credit of any person resident outside India in any manner.

The RBI has issued general permission permitting any person resident in India to make payment in Indian rupees in few cases, one of which includes the following:

Any person resident in India may make payment in rupees towards meeting expenses on account of boarding, lodging, and services related thereto or travel to and from and within India of a person resident outside India who is on a visit to India

Accordingly, made by Hemant's father towards hospitality expenses is a valid transaction.

(ii) Under Section 6(2), the RBI has issued the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, that specify the list of transactions, which are permissible in respect of person resident outside India in Schedule-II, which, interalia, includes:

Investment in India by a person resident outside India, that is to say, issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and

Hence, the acquisition of a stake in Tri-Bros Private Limited by Hemant is also a valid transaction.

(B) As per section 21(6)(c) of the Insolvency and Bankruptcy Code, 2016, the cost of appointment of authorised representative in case of consortium finance shall be borne by financial creditors themselves who provided consortium finance i.e. TDF Bank, ALC Bank and Finco Private Limited shall bear the cost of appointing, Mr. Verma, as their authorised representative.

As per Section 21(6B) of the Code, the remuneration payable to authorised representative appointed under section 21(6A)(b), shall form part of the insolvency process costs.

Accordingly, the remuneration of Mr. Bhargav shall be form part of the insolvency process costs.

As per section 24(5) of the Code, subject to sub-sections (6), (6A), and (6B) of section 21, any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

Hence, a single creditor in the committee of creditors can appoint an insolvency professional as his authorised representative and he shall bear fees for the same.

Answer 7:

(A) As per section 4 of the Competition Act, 2002, there shall be an abuse of dominant position if an enterprise or a group - directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or services; or makes the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

WFH Limited in the agreements with its customers imposed a condition that they would be required to purchase anti-virus software provided by Tri-Bros Private Limited along with WFH monitor software. Hence it is a tie-in arrangement that WFH Limited entered in order to earn more profits, and the same is anti-competitive under section 3 of the Act.

The agreement entered into by WFH Limited with Tri-Bros Private Limited for sharing 50% of the profits earned by it, from selling anti-virus software to the customers of WFH Limited, will also be considered as an agreement of anti-competitive nature under section 3 of the Act.

Through both these agreements, WFH Limited is abusing its dominance to earn more profits.

Due to this agreement, the market share of other companies selling anti-virus software might have got affected, and also the customers of WFH Limited might have been deprived of using anti-virus software of better quality provided by other companies than that of Tri-Bros Private Limited

(B) As per section 12A of the Prevention of Money Laundering Act, 2002:

1. The Director may call for from any reporting entity any of the records referred to in section 11A, sub-section (1) of section 12. Sub-section (1) of section 12AA, and any additional information as he considers necessary for the purposes of this Act.
2. Every reporting entity shall furnish to the Director such information as may be required by him

under sub-section (1) within such time and in such manner as he may specify.

3. Save as otherwise provided under any law for the time being in force, every information sought by the Director under sub-section (1), shall be kept confidential.

As per section 13 of the Prevention of Money Laundering Act, 2002:

The Director may, either of his own motion or on an application made by any authority, officer or person, may make such inquiry or cause such inquiry to be made, as he thinks fit to be necessary, with regard to the obligations of the reporting entity, under this chapter.

Further, if the Director, in the course of any inquiry, finds that a reporting entity or its designated director on the Board or any of its employees has failed to comply with the obligations under this Chapter, then, without prejudice to any other action that may be taken under any other provisions of this Act, he may:

(a) issue a warning in writing; or

(b) direct such reporting entity or its designated director on the Board or any of its employees, to comply with specific instructions; or

(c) direct such reporting entity or its designated director on the Board or any of its employees, to send reports at such interval as may be prescribed on the measures it is taking; or

(d) by order, impose a monetary penalty on such reporting entity or its designated director on the Board or any of its employees, which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure.

By combined reading of above 2 sections, it can be understood that the director's act of issuing letters to the respondent bank under the PMLA Act, 2002 based on the video of a sting operation was valid, as the director may on his own motion make an inquiry with regard to the obligations of the reporting entity and section 12A provides him authority to call for records and information from reporting entity.

If the director finds that the bank has failed to comply with the obligations imposed on it by the Act, then he has the authority to take aforesaid actions as per section 13.

Answer 8

(A) As per Section 63(2)(c) of the Prevention of Money-Laundering Act, 2002, provides that, if any person, to whom a summon is issued under section 50 either to attend to give evidence or produce books of account or other documents at a certain place and time, omits to attend or produce books of account or documents at the place or time, he shall pay, by way of penalty, a sum which shall not be less than 500 rupees but which may extend to 10,000 rupees for each such default or failure.

Section 63(4) provides that if a person who intentionally disobeys any direction issued under section 50 shall also be liable to be proceeded against under section 174 of the Indian Penal Code 1860.

Hence, Mr. Sam shall face the consequences, as aforementioned, in both cases.

(B) As per section 31 (3) of the Insolvency and Bankruptcy Code, 2016 (the Code), consequent to the order of adjudicating authority regarding approval of the resolution plan,

(a) Moratorium order passed by adjudicating authority under section 14 of the code shall cease to have effect; and

(b) The resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(C) As per Section 11 of the Insolvency and Bankruptcy Code, 2016 (the Code), the following persons shall not be entitled to make an application to initiate the corporate insolvency process;

(a) A corporate debtor (which includes a corporate applicant in respect of such corporate debtor) undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process; or

(aa) A financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or

(b) A corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(ba) A corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or

(c) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) Corporate debtor in respect of whom a liquidation order has been made.

Explanation I: For the purpose of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

Explanation II.- For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

Tri-Bros Private Limited had undergone a corporate insolvency resolution process which had completed on 08.07.2018 and again the application for corporate insolvency resolution process was made on 20.02.2020 which got admitted on 15.03.2020 i.e. after more than 18 months, Tri-Bros Private Limited again went for insolvency process. It was entitled to do so, as 12 months had elapsed from the date of completion of the previous insolvency resolution process.

CASE STUDY 26

Mr. Suresh Agarwal is a Jaipur-based banker, who joined the Samridhi National Bank in the year 2008, as an executive. He got his first posting at the Jodhpur branch. After five years in the job, he was transferred and promoted as Assistant Manager at a branch in Bikaner of Samridhi National Bank. One day, he happened to meet, Ms. Archana, a director in the Newtech Software Company, who visited the bank frequently to discuss some loan issues of her company with the branch manager and then, slowly they started meeting each other and eventually both got married, as they decided to move forward.

After marriage, Archana needed to visit America for some business meetings with a foreign client. So, they both planned their personal trip alongside the business trip, to America. Archana got an international credit card in the name of her company, for meeting all her expenses abroad. After two days of prolonged business meetings, Archana finally got free to enjoy the trip with her husband. They went to Las Vegas and purchased some lottery tickets for which she paid USD 2,000 with the forex card. They hardly won any amount out of it. They enjoyed shopping and had all the fun. After 10 days of stay, they returned back to India. Archana returned the business card, back to the company.

Back to their daily routine, they both got busy with their respective work schedules. As an Assistant Manager, Mr. Suresh got some gifts in form of cash as well as in-kind, all year round. He came in contact with many influential and successful business persons from different walks of life. They all were happy with his services as mostly they got their work done through a single phone call. In the year 2016, post demonetization, Mr. Suresh helped many of his bank customers in exchanging their old currency notes against newly issued currency for a charge of 10 percent commission. Mr. Suresh also had helped Mr. A.K. Bajaj, a businessman, to exchange his old currency notes at the bank, through the IDs' of Mr. Bajaj's workers. Mr. Bajaj had employed nearly 200 workers of his manufacturing units to get the demonetized notes exchanged. The demonetization period became a blessing in disguise for Mr. Agarwal as he was able to amass huge profits out of it.

Mr. Chetan Singh, a director of XYZ Ltd., used to share good relations with Mr. Suresh. Mr. Chetan, one day came to Mr. Suresh for getting a loan sanctioned of INR 0.50 crores. However, the documents required to process the loan were incomplete and hence, were found ineligible. The branch manager refused to sanction the loan without completing all the formalities. Mr. Chetan had a talk with Mr. Suresh and promised him to pay, 5% of the total sanctioned loan amount, as commission and so, both of them arranged for some concocted documents to complete the file, with help of Mr. Piyush Sharma, an accountant friend of Mr. Suresh. After the completion of all the formalities, Mr. Suresh gave his clearance regarding the completion of the documents, after which his branch manager sanctioned the loan. The deal brought all of them close to each other. After that Suresh, Chetan and Piyush became good friends.

As Piyush was an accountant and an employee in a financial advising company, he used to meet many people. He got a couple of loans sanctioned with the help of Mr. Suresh. As a result, on a performance evaluation basis, Mr. Suresh got the promotion as a branch manager of the bank and was transferred to the other branch in Bikaner.

During his period of service in the bank, Mr. Suresh was able to accumulate INR 30 lakhs from his unaccounted and unauthorized sources. With this money, he bought a plot in his hometown, Jaipur, in his mother's name. The cost of the plot was INR 50 lakhs. To cover up the balance money, he took a loan of INR 20 lakhs from his bank.

Since Mr. Suresh and his wife are working individuals, hence his niece, Ms. Anu (an Indian Citizen) takes care of Mr. Suresh's mother. Ms. Anu is very close to Mr. Suresh's mother hence she treats Anu like her daughter. Ms. Anu came to India just six months back after the completion of her studies in Australia, where she used to reside with her parents. Anu holds the status of a person resident outside India. Mr. Suresh's mother thought of gifting the said plot bought on her name, to Anu.

With the passing of time, his wife, Archana, was appointed in 2016, as a director in Zippy International Limited, a foreign based company. For a couple of months, she stayed in Italy for attending board meetings and for giving financial advice regarding business transactions. For meeting her expenses abroad, she remitted USD 280,000 during the financial year apart from the money, the company gave to her.

In 2017, Archana again went to Italy for some business of the company. She stayed there for a duration of six months. With a view to investing abroad, she bought a flat there, through outward remittance.

Mr. Suresh and his wife Archana went on a tour to Qatar and Dubai in 2018. They booked the flight tickets online through their credit cards; the rest all the expenses of lodging and boarding were borne by Oyster Tour and Travel Agency, a company which recently opened its new branch office in Dubai. The company's

AD bank is the bank in which Mr. Suresh is the branch manager. He made all the transactions of Oyster Tour and Travel Agency, smooth and easy. Whenever exchange was required by the branch office in Dubai, it was easily released for them.

Subsequently, Mr. Chetan had a plan to earn money through the conduct of new export and import business. He submitted a fake factory proposal of garment manufacturing to the bank whose branch manager was Mr. Suresh. Mr. Chetan had a plot in the outskirts of the city, where he made some constructions to give it a factory look. As per the mutual understanding between both of them, a loan of INR 2 crore was sanctioned for shipment of the machines and other products from abroad. Some fake invoices were prepared to show the dispatch of garment orders on record but in reality, had sent almost nothing. Mr. Suresh and Mr. Chetan jointly did all the invoice manipulation.

MULTIPLE CHOICE QUESTIONS

1. Archana went to Italy for some business of the company and bought a flat there, through outward remittance. Whether Archana can hold such property, had such property acquired by her in the status of a person resident outside India?
   (a) With the permission of the Reserve Bank of India, she can hold the property acquired abroad.
   (b) Without the permission of the Reserve Bank of India, she can hold the property acquired abroad.
   (c) The property needs to be sold and the funds should be repatriated back to India.
   (d) The property needs to be sold out and the funds should be repatriated to her FCNR account.

2. In the given case, the plot was bought by Mr. Suresh from his income, in his mother's name. Mr. Tarun, an NRI made a proposal to Mr. Suresh, for the purchase of that plot. Advise Mr. Tarun with respect to purchasing of such plot.
   (a) Mr. Tarun can buy the plot only with the permission of RBI.
   (b) Mr. Tarun can buy the plot through normal banking channels in India without RBI permission.
   (c) Mr. Tarun can purchase the plot in foreign currency with the permission of RBI.
   (d) Mr. Tarun cannot purchase the plot as this purchase of the plot will be not considered valid.

3. For meeting her expenses abroad, Archana remitted USD 280,000 during the financial year apart from the money, the company gave to her, without any permission from RBI. Whether she is liable to any penalty under the provisions of the Foreign Exchange Management Act 1999, and if yes, please state the amount as well.

   (a) Yes, USD 30,000
   (b) Yes, USD 90,000
   (c) Yes, USD 8,40,000
   (d) No, she is not liable to any penalty

4. Whether there is any contravention of the provisions of the Foreign Exchange Management Act, 1999 in respect of payment made by Archana of USD 2,000 for purchase of some lottery tickets with the forex card?
   (a) There is no contravention of any of the provisions of the Foreign Exchange Management Act, 1999 as the money was issued to her in an official capacity for her trip.
   (b) Yes, as the card has been used for a transaction prohibited under the provisions of the Foreign Exchange Management Act, 1999
   (c) There is no contravention of any of the provisions of the Foreign Exchange Management Act, 1999 as the transaction was within the permissible limit.
   (d) They would be liable under the Foreign Exchange Management Act, 1999 only if they had won more than USD 2000 and the excess amount was not remitted back to India.

5. Post demonetization, Mr. Suresh helped many of his bank customers in exchanging their old currency notes with newly issued currency. Is he liable for punishment under any of the provisions of the law applicable in India, if the total value involved in such transactions is less than INRs 1 crore?
   (a) Mr. Suresh is not liable for any punishment under any of the provisions of the law applicable in India.
   (b) Mr. Suresh is liable for the commission of offence under the Indian Penal Code, 1860 as well as under the Prevention of Money Laundering Act, 2002.
   (c) Mr. Suresh is liable to be punished under the Indian Penal Code, 1860 for the commission of offence but he is not liable under the Prevention of Money Laundering Act, 2002 as the total value involved is less than INRs 1 crore.
   (d) Mr. Suresh is liable under the Foreign Exchange Management Act, 1999 for non-compliance with regulations related to foreign exchange.

DESCRIPTIVE QUESTIONS

6. Provide your opinion. Mr. Suresh bought a plot in his mother's name. He decided to further lease the said plot to a foreign company that wants to open its liaison office in India. Whether a foreign company can take such immovable property in India?

7. Can Mr. Suresh's mother gift the plot, bought in her name, to Anu?

8. (i) Whether the property brought by Mr. Suresh in the name of his mother, can be considered as a Benami property?

   (ii) If in case, Mr. Suresh Agarwal transfers the plot to a third party prior to the issue of notice under section 24 by the Initiating Officer, then whether confiscation of such property can take place after it is held to be 'benami' by the Adjudicating Authority?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (b) Without the permission of the Reserve Bank of India, she can hold the property acquired abroad.

   Reason
   Section 6(4) of the FEMA provides that a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

   Therefore, as per section 6(4) of FEMA no permission is required by a person resident in India, acquiring immovable property when he was resident outside India.

2. (d) Mr. Tarun can purchase the plot as this purchase of the plot will be not considered valid.

   Reason
   In the terms of Section 2(9) of the PBTA "benami transaction" means,-

   (A) a transaction or an arrangement-

   (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

   (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

   except when the property is held by-

   (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual.

   In the given case the Suresh has purchased the property in his mother's name only and not in joint name of him and mother.

   Further in terms of Regulation 3 of FEM (Acauisition and Transfer of Immovable Property in India) Regulations, 2018 which reads as under:

   AN NRI or an OCI may

   (a) acquire immovable property in India other than agricultural land/ farm house/ plantation property:

   Provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

   Therefore, Tarun cannot purchase the immovable property from this mother (transaction being a benami transaction)

3. (b) Yes, USD 90,000

   Reason
   Section 13(1) of the FEMA provides that if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank,

he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

Amount in the contravention is USD 30,000 (i.e. USD 280,000 - USD 250,000), hence the amount of penalty shall be USD 90,000 (i.e. three times to USD 30,000, because here the amount in the contravention is quantifiable)

4. (b) Yes, as the card has been used for a transaction prohibited under the provisions of the Foreign Exchange Management Act, 1999

Remittance

Para 3 of Schedule I of the FEM (Current Account Transactions) Rules, 2000, Remittance for purchase of lottery tickets, banned / proscribed magazines, football pools, sweepstakes etc., is prohibited.

5. (b) Mr. Suresh is liable for the commission of an offence under the Indian Penal Code, 1860 as well as under the Prevention of Money Laundering Act, 2002.

Reason

Mr. Suresh shall be charged under sections 417 & 418 of Indian Penal Code 1860. Both these sections are considered as a scheduled offence under Paragraph 1 to part A of schedule to the Prevention of Money Laundering Act, 2002.

In addition to these, charges shall be framed under the Banking Regulation Act, 1949 (as well as under service rule) apart from the Prevention of Corruption Act, 1988 (because he comes under the definition of public officer).

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

A body corporate incorporated outside India (including a firm or other association of individuals), desirous of opening a Liaison Office (LO) / Branch Office (BO) in India has to obtain permission from the Reserve Bank under provisions of the Foreign Exchange Management Act, 1999. The establishment of Project Offices/Liaison Offices in India is regulated in terms of Section 6(6) of Foreign Exchange Management Act, 1999 read with Notification No. FEMA 22/2000-RB dated May 3, 2000.

Section 6(6) of the FEMA provides that without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

Further, Regulation 3 of the Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000 provides that no person resident outside India shall, without prior approval of the Reserve Bank, establish in India a branch or a liaison office or a project office or any other place of business by whatever name called.

So, if the foreign company wants to establish a Liaison Office in India, it cannot acquire immovable property. However, the company needs to acquire property by way of a lease not exceeding 3 years, for its Liaison Office.

A liaison office of a foreign company in India should be established only with requisite approvals wherever necessary and is eligible to take any immovable property on lease, in India which is necessary for its activities, provided that all such applicable laws, rules, regulations, or directions in force are duly complied with.

Hence, the foreign company can take such immovable property in India on lease provided the above conditions are duly satisfied.

Answer 7:

As per regulation 3 to the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, a Non-Resident Indian (NRI) or Overseas Citizen of India (OCI), may acquire any immovable property in India by way of gift from a person resident in India provided the property is not agricultural land/ farmhouse/ plantation property.

It appears from the information given in the case study that Mr. Suresh's mother is a person resident in India, in the name of whom the plot was bought, and Anu, being a person resident outside India, but Indian

citizen (as specifically mentioned in case) can acquire immovable property (plot in this case) by way of gift from Mr. Suresh's mother, but Mr. Suresh's mother can't transfer to said plot to her.

Original transaction wherein plot was bought by Mr. Suresh from his income, in his mother's name is benami transaction.

Since Mr. Suresh's mother is benamidar hence her right to right to re-transfer the property back to Mr. Suresh or any other person (like Ms. Anu in this case) is prohibited under section 6 of The Prohibition of Benami Property Transactions Act, 1988.

Answer 8:

(i) Section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, lays down the definition of a Benami Transaction. It says it is a transaction where a property is transferred to a person and consideration paid by another person and the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration. Further, one of the exceptions to a benami transaction provides that when the property is held in the name of any person who is individual's lineal ascendant or descendant and such a lineal ascendant or descendant appear as a joint owner in the property and the consideration has been paid from known sources of the individual. Mother is a lineal ascendant.

Further, as per section 2(8) of the Prohibition of Benami property transactions Act, 1988, benami property means any property which is the subject matter of a benami transaction and also includes the proceeds from such property.

In the given case, the plot purchased by Mr. Suresh is not held jointly held by him and his mother. And for the exception to apply the property is held jointly along with the individual's lineal ascendant or descendant. Further, in the given case studies the consideration to the extent of INRs 30 lakhs out of INRs 50 lakhs is made from unaccounted and unauthorized sources, making it a benami transaction and consequently, the property will be considered as a benami property.

(ii) As per section 6 of the Prohibition of Benami property transactions Act, 1988, no person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf.

In the case where any property is re-transferred in contravention of the aforesaid provision, the transaction of such property shall be deemed to be null and void. In case, if after the issuance of the initial notice by the Initiating Officer, the property in question, is transferred to a third party secretively, the said transaction shall be deemed to be null and void and confiscation of such property can take place.

However, as per proviso to section 27 of the said Act, nothing contained in section 27(1) shall apply i.e. no confiscation order shall be passed if the property is held or acquired by a person from the benamidar for adequate consideration, prior to the issue of notice under section 24 without his having knowledge of the benami transaction.

Hence, if in case, Mr. Suresh transfers the plot to a third party prior to the issue of notice under section 24 by the Initiating Officer, then confiscation of such property cannot take place if the said property was acquired by the said third party for adequate consideration and without his having knowledge of the benami transaction.

CASE STUDY 27

Mr. Mukesh Shroff is one of the biggest business tycoons of Delhi. His wifes' name is Mrs. Sanjana Shroff. They got married in the year 1989. At that time Mr. Shroff was working as a manager in a finance company. After his marriage, Mr. Shroff decided to quit his job. He decided to start a business on his own. He laid the foundation of the company, Shroff Limited, in the year 1990.

Mr. and Mrs. Shroff have three children. Their elder son's name is Anuj who did MBA (Finance) from Stanford and has a wife named, Amrita, and they both have two children named, Somya and Ronit.

Mr. Mukesh Shroff's daughter's name is Ranjana, who got married in the year 2014 to a foreign national, named, Mr. George Samuel, a citizen of London, United Kingdom. Mr. Mukesh Shroff's youngest son is Rohit and his wife's name is Ashima. They have one child, who is four years of age, named, Anshul.

Mr. Mukesh Shroff's Company became a leading company and a well-known brand in its market segment. One of the units of his company manufactures cement in India. Since 2002, Mr. Shroff's company has become the second-largest company in India in the field of cement manufacturing. The other four top companies of India in cement manufacturing include Rajasthan Cement, Alen Cement, Rudra Cement, and J.V.P. Cement Company respectively. Jointly, all these five companies (including Shroff Ltd.) owned 82% of market shares in cement manufacturing in India. All these companies are not only leading manufacturers, but they also directly deal in the distribution and selling of cement in India. In the year 2013, all these five companies made an oral agreement and raised cement price by 2%. All these companies restricted the production and supply of cement against the available capacity of production.

Again in the year 2014, the above-mentioned companies raised the sale price of cement by 1.5%. Despite the increase in prices, production never increased. As a result, the cost of real estate went high, and due to which the real estate business got affected terribly. The "All Indian Builders Association" raised their objections to the constant rise in the prices. They concluded it to be a monopolistic and restrictive trade practice and they all decided to file a complaint with CCI.

Mr. Anuj is a director of Shroff Limited and has a huge passion for investing in lucrative properties as an individual. In the year 2017, he wanted to invest in two flats, located near the lush green vicinity of Noida. The project in which he wanted to buy the two flats was constructed by Rainbow Estate Construction Company. The area in which the building was going to be constructed was 700 Square meters. The project was registered with the authority as per the provisions of RERA. He had made all the enquiries regarding the project details, sanctioned plans, and plan layouts. He had also cross-checked all the details, listed on the authorised website of RERA.

The stage-wise schedule for completion of the work listed in the plan. The work commencement certificate was issued in February 2017. The carpet area of the 3BHK flat was 1340 sq. meters with a modular kitchen. The agreement of sale was signed between the builder and Mr. Anuj. Mr. Anuj paid ten percent of the total amount via cheque. The proposed date for the completion of the project was December 2019. But the builder was not able to complete the work as per the stage-wise schedule listed in the plan, due to some unavoidable circumstances. The builder held the meeting of all the allottees to intimate them about such delay and also apologised for it.

In the nearby state, there are eight sugar mills under the control of State Sugar Corporation Limited. The concerned State Government, after making numerous unsuccessful attempts for rehabilitation of these mills, decided to disinvest part of their stake in State Sugar Corporation Limited. But that strategy didn't work out, hence State Government finally decided to sell all these 8 mills to private companies. The government invited the bids. Shroff Limited submitted the tender and got qualified as a bidder for four of such mills. Mr. Shroff participated in the bidding and got two bids finally in his name. Against the total expectation of INRs 370.30 crore, only INRs 183.80 crore was realized, resulting in a short realization of INRs 186.5 crore.

There were three other bidders named Sakshi Sugar Mill Company, Triveni Company, and Amar Sugar Company. It was found that 5 of the directors were common in these 3 companies and made an agreement with each other before the bidding process. Amar Sugar Company is the holding company of Triveni Company. So the correspondence address, email-id, and contact numbers of both, Triveni Company and Amar Sugar Company were the same. Amar Sugar Company held 79.6% of the equity shares in the Triveni Company. A case was filed by the Union of workers of two mills challenging the bidding process and the privatisation policy of the State Government with the civil court. The CCI on a report published by CAG, suo-moto initiated an investigation on the slump sale and found that there were serious irregularities in the process.

Mrs. Ranjana who is married to Mr. George Samuel visited India last year in January 2018 to meet her family. Mrs. Ranjana wanted to invest in a farmhouse near Gurugram. The lush green farmhouse is widespread having a total area of 25 acres. Both Mr. George and Mrs. Ranjana agreed to buy the farm house as it deemed to be a fruitful investment. An agreement to sell was signed between the farm house owner and Mr. & Mrs. Samuel. Thereafter the property got jointly registered in the name of Mr. & Mrs. Samuel. They organised a grand party there and flew back to London after a month. In December 2019, Mrs. Ranjana and Mr. George visited back to India as Mr. Shroff met with an accident. While their visit to India they came across a very lucrative deal. A 4BHK was available in Mumbai at a cost of INRs 8 crore. The property was sea facing and in one of the posh localities of Mumbai. They met the promoter and finalised the deal. The flat was jointly registered in the name of Mr. & Mrs. Samuel.

Mr. Mukesh Shroff incorporated Gizmo Limited last year, which manufactured mobile phones in India. The company was managed by Mr. Shroff's youngest son, Mr. Rohit Shroff, who became the CEO of this company. Mr. Rohit on 20th November 2019, signed an agreement with one of the leading e-commerce giants in India to sell mobile phones through its platform. One of the consumers, who wanted to purchase this phone made a complaint to CCI that these e-commerce websites have been indulging in anti-competitive practices by making exclusive agreements with the sellers of goods/services. The informant further stated in his application that the consumer was left with no option and was bound to either purchase the product as per the terms of the website or not to purchase the same.

MULTIPLE CHOICE QUESTIONS

1. All the five Companies including Shroff Ltd., twice raised the price of cement by a total of 3.5%. The All India Builders Association filed a complaint with CCI against it. Determine the correct statement according to the provisions of the Competition Act, 2002?

   (a) The Companies marginally increased the price so it doesn't affect the competition in India in the relevant market.

   (b) There is no such written agreement between the companies, by which it can be proved that it had adversely affected the market.

   (c) The rise in price by all the five companies will adversely affect competition in India and is void.

   (d) Only the cement manufacturing companies, which are affected by such an increase in price can file a complaint.

2. Considering the provisions of the Competition Act 2002, choose the correct statement out of the following.

   (a) Exclusive agreement between e-commerce platform and Gizmo Limited violates the provision of section 3(4).

   (b) Exclusive agreement between e-commerce platform and Gizmo Limited is not violating section 3.

   (c) Under section 3(1) the exclusive agreement in respect of manufacturing, supply, and sale via e-commerce platform, will cause an appreciable adverse effect on competition within India.

   (d) The e-commerce platform being leading e-commerce giants is misusing its position as per section 4 of the Competition Act.

3. Mr. George Samuel, being a foreign national and resident, acquired 4BHK, jointly with his spouse, in Mumbai. Identify the correct statement out of following;

   (a) Mr. George can't acquire any property, only NRI or OCI can purchase property in India apart from Indian residents.

   (b) Mr. George can acquire property other than agricultural land/ farm house/ plantation property in India but jointly with his spouse.

   (c) Mr. George can acquire any property in India but jointly with his spouse.

   (d) Mr. George can acquire any property in India Individually

4. Mr. George and his wife, Mrs. Ranjana, jointly purchased a farm house near Gurugram. Identifying the correct statement out of following;

   (a) Mr. George Samuel, being a foreign national and resident can acquire any property in India, but jointly with his NRI spouse only.

(b) Mrs. Ranjana being NRI can acquire any property in India, but only in joint ownership with any resident individual.

(c) Mrs. Ranjana being NRI can acquire any property in India, but such acquisition shall not in joint ownership with her husband (Mr. George Samuel), who is a foreign national and resident

(d) Mrs. Ranjana being NRI can't acquire a farm house in India.

5. It seems that three companies i.e. Sakshi Sugar Mill Company, Triveni Company, and Amar Sugar Company are involved in some sort of arrangement within themselves for sugar mill tenders and acquisition process. In what perceptive will you view this transaction?

(a) The agreement between the companies may be viewed as a partial agreement of understanding.

(b) The agreement between the companies can be viewed as an exclusive agreement, adversely affecting the process and manipulating the bidding completely.

(c) The agreement between the companies was to share the market or source of production by way of allocation of the geographical area of the market after bidding.

(d) The agreement between the companies can be viewed as a collateral agreement only to restrict the price of each mill before bidding.

DESCRIPTIVE QUESTIONS

6. The Rainbow Estate Construction Company assured the allottees of the flats that they will be given possession on time. But it was unable to complete the construction on time. In light of the provisions of the relevant Act, explain the remedies available to Rainbow Estate Construction Company in the said situation.

7. The Competition Commission of India on its own motion, issued a notice to all the bidders under Section 41(2) and Section 36(2) of the Competition Act, 2002, regarding the entire tendering process. None of the bidders replied to the notice, and took a plea that the said case is pending with the civil court, and the matter is sub-judice. Whether the commissioner has the power to make an inquiry into the matter or not, on its own, in such a case, and what orders commission can pass if there appears contravention after an inquiry? Whether the pending matter in the civil court will affect the investigation to be conducted by the CCI? Analyse the given situation according to the provisions of the Competition Act, 2002.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) The rise in price by all the five companies will adversely affect competition in India and is void.

Reason

In case No. 29 of 2010 based upon information furnished by Builders Association of India against 11 cement companies, the Competition Commission of India (CCI) vide its order found that the act and conduct of the cement companies to be a 'Cartel' as the cement companies were acting together to limit, control, and also attempted to control the production and the price of cement in the market in India.

It was alleged that these 11 companies collectively control around 65% of the market, whereas the remaining 43 players have control over only 35% of the market share, hence these 11 companies collectively capable to control the price by controlling the production and supply.

In terms of Sec 2(c) of the Competition Act, 2002, "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves limit/control/attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Further as per sec 3(3) cartel is shall be presumed to have an appreciable adverse effect on competition.

In the given case all the five cement companies increased the prices which comes in the category of cartel and thus have an appreciable adverse effect on competition.

2. (b) Exclusive agreement between e-commerce platform and Gizmo Limited is not violating section 3.

Reason

In Re Mr. Mohit Manglani and M/s Flipkart India Private Limited and 4 Ors. (Case No. 80/2014), it was alleged that e-commerce websites are indulged in anti-competitive practices through exclusive natured agreements with sellers/manufacturers. Consumers either have to buy as per the term of reference mentioned by the e-commerce portal or not buy.

E-commerce platforms replied that consumer has the option to switch to near substitute products hence relevant mearket (include substitute products) not force customer 'not to buy' secondly their agreement are not of exclusive nature with sellers, the same seller can sell through other platforms and means.

The Commission observed that e-commerce platforms provide an opportunity for consumers to compare the prices as well as the pros and cons of the product. Furthermore, it offers delivery right at the doorsteps of consumers. Therefore, it does not appear that the exclusive arrangement between manufacturers and such e-commerce platforms leads to an appreciable adverse effect on competition in the market.

3. (b) Mr. George can acquire property other than agricultural land/ farm house/ plantation property in India but jointly with his spouse.

Reason
Regulation 3 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that

An NRI or an OCI may-

(a) acquire immovable property in India other than agricultural land/ farm house/ plantation property: Provided that the consideration, if any, for transfer, shall be made out of funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

4. (d) Mrs. Ranjana being NRI can't acquire a farm house in India.

Reason
Regulation 3(a) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that "An NRI or an OCI may acquire immovable property in India other than agricultural land/ farm house/ plantation property".

5. (b) The agreement between the companies can be viewed as an exclusive agreement, adversely affecting the process and manipulating the bidding completely.

Reason

Section 3(4)(b) of the Competition Act, 2002 provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including exclusive supply agreement, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:
Delay in handing over of projects by the developer within the stipulated time frame has been a major woe of the buyers and hence the Real Estate (Regulation and Development) Act, 2016 came in as a saviour for the buyers. All the promoters or builders at the time of registration have to specify a time line during which they will complete and hand over the project to the buyer. The builder or promoter should be very particular about the date of completion, because if he fails to do so within the stated time, then there are rigorous provisions prescribed in this Act. As per section 7 of the said act, his registration would be revoked and his project would be usurped by the Regulatory Authority apart from other actions and penalties.

Section 4(2)(l)(C) provides that while making application for registration of real estate, the promoter shall enclose the various documents along with the application, one of which is to mention the time period within which he undertakes to complete the project or phase thereof, as the case may be.

According to section 6, the registration granted U/s 5 may be extended by the Authority on an application made by the promoter due to force majeure, in such form, and on payment of such fee as may be prescribed.

The first proviso to section 6 provides that the Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year.

The second proviso to section further states that the no application for extension of registration shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

The explanation to section 6 provides the meaning of Force majeure. It shall mean a case of war, flood, drought, fire, cyclone, earthquake, or any other calamity caused by nature affecting the regular development of the real estate project.

Hence in the above-mentioned case, the date of completion of the project may be extended on the application made to the Regulatory Authority by Rainbow Estate Construction Company. The promoter needs to mention in the application all the reasonable causes of delay and how much time is needed to extend the date of completion of the project.

Answer 7:

According to Section 19 of the Competition Act, 2002, the Commission may inquire into any alleged contravention of the provisions contained in Section 3(1) or Section 4(1) either on its own motion or on -

(a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulation, from any person, consumer or their association or trade association; or
(b) on a reference made to it by the Central Govt or the State Govt or the statutory authority.

Section 26(1) provides that on receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.

Sub-section (3) of section 26 states that the Director General shall, on receipt of direction, submit a report on his findings within such period as may be specified by the Commission.

Sub-section (4) of section 26 states that the Commission shall forward a copy of the report referred to in sub-section (3) to the parties concerned.

As per section 27 of the Competition Act 2002, where after an inquiry the Commission finds that agreement referred to in section 3 or action of any enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders:-

- **direct** any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be.
- **impose** such penalty as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.
- **direct** that agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
- **direct** the enterprises concerned to abide by such other orders as the commission may pass and comply with the directions, including payment of costs if any.
- Such **other** order or issue such directions as it may deem fit.

Competition Act, 2002 to have overriding effect: Section 60 states that the provisions of this Act shall have an overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Section 61 further lays down that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Further, as per section 62, the provisions of this Act shall be in addition to and not barring application of other laws.

Section 38(3) of the RERA states that where an issue is raised relating to agreement, action, omission, practice or procedure that-

(a) has an appreciable prevention, restriction or distortion of competition in connection withth development of a real estate project; or
(b) has effect of market power of monopoly situation being abused for affective interest of allottees adversely,

then the Authority, may, suomoto, take reference in respect of such issue to the CCI.

Hence, the plea made by the bidders that the matter is under litigation with the civil court and so the commission is not having jurisdiction to investigate the said matter is not valid. Therefore, matters pending in civil court will not affect CCI's power of investigation.

CASE STUDY 28

Mr. Aditya Chopra is a renowned industrialist. He is the CEO of Bangalore based Avon Limited. Last year, Mr. Aditya Chopra went to Italy along with his daughter Ruhi for her admission to the Fine Arts College of Italy. Mr. Chopra on 25th April 2019 remitted USD 50,000 from his current account for the education of Ruhi in Italy. Ruhi did shopping for USD 5,000 on the same date. While returning from Italy, Mr. Chopra bought one painting and artefacts of Italian marble worth USD 25,000. All these shopping and purchasing of paintings and artefacts were done via Mr. Chopra's International Credit Card. Ruhi wanted to participate in the famous sweepstake of Italy. To see her daughter happy, Mr. Chopra did a payment of USD 500 via his International Credit Card. After returning to India, Mr. Aditya Chopra transferred USD 150,000 to Ruhi for purchasing a flat in Italy for her comfortable stay. He also remitted USD 25,000 to Ruhi for purchasing a car in Italy. After six months, Ruhi met with an accident in Italy. She was hospitalised in Italy and then Mr. Chopra further remitted USD 80,000 for her medical expenses.

Mr. Aditya Chopra owns a construction company called, Chopra Real Estate Developers Limited (CREDL), which is one of the biggest names among the real estate companies. CREDL is a subsidiary of Avon Limited. The turnover of CREDL is INRs 500 crores. In the last five years, CREDL has completed many successful projects in its name, both for the development of housing plots as well as construction and development projects. In 2014, CREDL won the award for the best Real Estate Company in India.

Mr. Aditya Chopra decided to construct and develop a township on the Bengaluru-Mumbai highway. The land is just 5 km away from Bengaluru city. Mr. Chopra purchased this land at a price of INR 40 crores in the year 2017. Due to a shortage of funds, he was not able to start the project. So, in September 2018, Mr. Chopra thought to start the project with the investment in a Joint venture with a foreign company. He was having talks with foreign-based companies and in the end, two companies were short-listed. One is the Val Group of Companies and the other one is the Aviance Group of Companies. After few rounds of meeting with both the companies, Mr. Chopra finalised a joint venture with Aviance Group of Companies.

Aviance Company is a Swedish company dealing in Steel manufacturing, cable wire manufacturing, and Infrastructure building company. On 3rd October 2018, the joint venture deal was signed between both companies. The Aviance Company agreed to invest USD 5 Million and will hold a 42 percent share in the joint venture. All the necessary work permission approvals had been taken including the building/layout plans, developing internal and peripheral areas and other infrastructures facilities, external development, and other changes and complying with all other requirements as prescribed under applicable rules/ by-laws/ regulation of the State government/ Municipal Bodies/Local body concerned.

Avon Limited wanted to build a world-class facility-based township. For this purpose, it hired "Alex Architectural and landscaping consultancy" a UK-based firm. Alex consultancy will receive USD 200,000 according to the contractual agreement for the project. To facilitate smooth working in India, Alex consultancy planned to open its branch office in India as it will be an ongoing project for 3 to 4 years.

Alex Consultancy was in search of some good property. After few days of search, the company was able to locate a good property which belonged to Mr. Naveen who is working as an IT professional in a company in Mumbai for 5 years. After few talks with Mr. Naveen, Alex Consultancy finalised the lease for four years, with a rent of Rs. 15 Lacs per annum. In July 2019, Mr. Naveen's company gave him a promotion and send him to its U.S.A branch and Mr. Naveen got shifted to the U.S.A. on 1st August 2019.

Mr. James Demello was appointed as head of the team in India to lead the above project by Alex Consultancy. He visited India on 20th April 2019 with his team. He held a joint meeting and discussion with Mr. Chopra and other officials of Aviance Company about the layout plan and the whole look of the project. He went back to the U.K. on 8th May 2019. He again came back to India on 14th June 2019 and decided to stay in India, as the project was in the initial stage and he needed to be at the project site for monitoring all the details of the ongoing construction. Due to some urgent personal work, he went back to the U.K. on 1st September 2019 and returned on 25th September. On 20th December 2019, he went to the U.K. for Christmas and New Year's vacation. After his vacation, Mr. Demello came back to India on 15th January 2020. He went back to London on 28th February 2020.

Meanwhile, Mr. Chopra got an invitation from abroad to attend the International Conference, to be held in London. Mr. Chopra sent one of the company's directors, Mr. Avinash to attend the International Conference. Mr. Avinash was issued a multicurrency forex travel card of value 50,000 USD from the company. Out of USD 50,000, ninety percent of the amount was loaded into the card, and the rest of USD 5,000 was given in cash. After he returned back to India, Mr. Avinash had unspent USD 2,000, left with him, which he kept with himself for future use.

In April 2020, Mr. Demello came back to India to resolve some issues pertaining to the structure of the floors. This time his wife, Mrs. Heena Demello accompanied him who is an NRI. Mrs. Demello with her husband went to see the property in her native place which she inherited from her maternal grandmother. She refreshed and shared some memories of her childhood with Mr. Demello. Mr. Chopra organised a party for Mr. and Mrs. Demello wherein the cultural group performed the traditional dance on the folk songs. Mr. Demello impressed with the performance, that he invited the cultural group to perform in London on the annual day function of Alex Consultancy. Mr. Demello during this visit bought a 3BHK flat in the same project (in which he is working) jointly with his wife, because of the serene view and lake-facing location. After a couple of weeks, he went back to carry on his employment with Alex Consultancy to work on other projects. Before leaving, he gave necessary instructions to his team for the ongoing construction work.

MULTIPLE CHOICE QUESTIONS

1. Mr. Aditya Chopra went to Italy for Ruhi's admission to Fine Arts College. Including the total fees of college, purchase of artefacts and painting, house and car bought by Ruhi in Italy along with all her medical expenses has exceeded the prescribed limit of USD 250,000 during the financial year. Advice Mr. Chopra with the correct course of action
   (a) Mr. Aditya Chopra needs to submit the estimate from the college university and also an estimate from the hospital/doctor abroad, to the authorised dealer.
   (b) Mr. Aditya Chopra can transfer USD 130,000 in excess of the limit of USD 250,000, without permission of RBI and without submitting any evidence.
   (c) Mr. Aditya Chopra can transfer any amount to meet expenses abroad.
   (d) Mr. Aditya Chopra will need RBI approval for remittance beyond USD 250,000.

2. Presuming in the given case, the Aviance Company has appointed an agent in Sweden for the sale of units in the township near Bengaluru, and commission @ 6% per property sold was agreed with him after deduction of taxes applicable in India. The sale price of each unit is much more than USD 500,000. In light of provisions of the Foreign Exchange Management Act, 1999 is there any prior permission required for his appointment in consideration of the limit of commission to be paid to him? (Ignore the provisions contained under the Real Estate (Regulation and Development) Act 2016)
   (a) No prior approval is required as the property is situated in India.
   (b) Prior approval of Central Government is required as the commission exceeds limit of five percent.
   (c) Prior approval of RBI is required as the commission exceeds the limit of five percent.
   (d) No prior permission is required as agent commission will be remitted after deduction of taxes applicable in India.

3. Mr. Demello invited the cultural group to perform in the London, Does any prior permission required for drawl of foreign exchange for the same?
   (a) Since it is an unofficial cultural tour they don't require any prior permission.
   (b) The cultural group will require prior permission from the concerned State government.
   (c) The cultural group will require prior permission from RBI.
   (d) The cultural group will require prior permission from the Central Government.

4. Whether the rental income received by Mr. Naveen can be repatriated outside India to the U.S.A.?
   (a) The lease was finalised when Mr. Naveen was a resident Indian, hence the income cannot be repatriated.
   (b) The rental income can be freely repatriated outside India subject to payment of applicable taxes.
   (c) The rental income cannot be repatriated outside India without prior approval of RBI.
   (d) The rental income can only be repatriated after making an application to AD Bank.

5. Naveen got a promotion in his company and on 1st August 2019, he went to the USA. Determine his residential status in terms of the Foreign Exchange Management Act, 1999. Pick the correct option out of the following;
   (a) Mr. Naveen shall be a person resident in India for the financial year 2019-20 only.
   (b) Mr. Naveen shall be a person resident in India for the financial year 2020-21 only.
   (c) Mr. Naveen shall be a person resident in India for both the financial years, 2019-20 and 2020-21.
   (d) Mr. Naveen neither a person resident in India for the financial year 2019-20 nor during 2020-21.

DESCRIPTIVE QUESTIONS

6. Enumerate the legal position of the given situations in the light of the Foreign Exchange Management Act, 1999;

   (i) The transaction done by Mr. Chopra using International Credit Card (ICC) for purchase of sweepstake. Also state the consequences of the same, if any.

(ii) Mr. Avinash had unspent USD 2,000 with him after he returned to India. He didn't submit the unspent money to the company.

7. Enumerate the legal position of the given situations in the light of the FEMA, 1999:

(i) Mr. Demello bought a 3BHK flat jointly with his wife. Determine the residential status of Mr. Demello for F.Y. 2020-21 and being a foreign national, whether he is eligible to buy a flat in India jointly with Mrs. Demello?

(ii) Mrs. Demello has inherited a property from her grandmother here in India. Justify how being a PROI, she can repatriate the sale proceeds of immovable property outside India?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Mr. Aditya Chopra will need RBI approval for remittance beyond USD 250,000.

Reason
Para 1(viii) of Sch III of FEM (Current Account Transactions) Rules, 2000 provides that individuals can avail of foreign exchange facility for the studies abroad within the limits of USD 250000. Any additional remittance in excess limit for the aforesaid purpose shall require prior approval of the RBI.

2. (c) Prior approval of RBI is required as the commission exceeds the limit of five percent .

Reason
Para 2 Schedule III of FEM (Current Account Transactions) Rules, 2000 provides that certain remittance by persons other than individuals shall require prior approval of the RBI. Its sub-para (ii) provides that the Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 250000 or 5% of the inward remittance, whichever is more, require prior approval of RBI.

3. (d) The cultural group will require prior permission from the Central Government.

Reason
Schedule II of FEM (Current Account Transactions) Rules, 2000 provides the list of transactions which require prior approval of the Central Government. S. No. 1 of this Schedule states that for Cultural Tours, the approval of the Ministry of Human Resources Development (Dept. of Education and Culture) is required.

4. (b) The rental income can be freely repatriated outside India subject to payment of applicable taxes.

Reason
Para 3(f) of Schedule I of Foreign Exchange Management (Deposit) Regulations, 2016 provides that Current income in India due to the account holder, subject to payment of applicable taxes in India.

5. (a) Mr. Naveen shall be a person resident in India for the financial year 2019-20 only

Reason
Section of 2(v) of FEMA reads as under:

"person resident in India" means-

(i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include-

(A) a person who has gone out of India or who stays outside India, in either case-
  (a) for or on taking up employment outside India, or
  (b) for carrying on outside India a business or vocation outside India, or
  (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than-
  (a) for or on taking up employment in India, or
  (b) for carrying on in India a business or vocation in India, or
  (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

Section 2 (w) "person resident outside India" means a person who is not resident in India;

In the given case, Mr. Naveen got shifted to the U.S.A. on 1st August 2019. So he remained in India for a period of 243 days in FY 2019-20.

For the FY 2020-21, Naveen remained out of India for the full FY.

So Naveen shall be resident in India for the FY 2019-20 only.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

(i) Para A.21- International Credit Cards of Master Circular on Miscellaneous Remittances from India - Facilities for Residents, RBI/2015-16/91 Master Circular No.6/2015-16 dated 01.07.2015 provides as:

21.1 The restrictions contained in Rule 5 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 will not be applicable for use of International Credit Cards (ICCs) by residents for making payment towards expenses, while on a visit outside India.

21.2 Residents can use ICCs on internet for any purpose for which exchange can be purchased from an Authorised Dealer in India, e.g. for import of books, purchase of downloadable software or import of any other item permissible under Foreign Trade Policy (FTP).

21.3 ICCs cannot be used on internet or otherwise for purchase of prohibited items, like lottery tickets, banned or proscribed magazines, participation in sweepstakes, payment for call-back services, etc., since no drawal of foreign exchange is permitted for such items/activities.

21.4 There is no aggregate monetary ceiling separately prescribed for use of ICCs through internet.

21.5 Resident individuals maintaining foreign currency accounts with an Authorised Dealer in India or a bank abroad, as permissible under extant Foreign Exchange Regulations, are free to obtain ICCs issued by overseas banks and other reputed agencies. The charges incurred against the card either in India or abroad, can be met out of funds held in such foreign currency account/s of the card holder or through remittances, if any, from India only through a bank where the card holder has a current or savings account. The remittance for this purpose should also be made directly to the card issuing agency abroad, and not to a third party.

21.6 The applicable limit will be the credit limit fixed by the card issuing banks. There is no monetary ceiling fixed by the Reserve Bank for remittances, if any, under this facility.

21.7 Use of ICC for payment in foreign exchange in Nepal and Bhutan is not permitted.

(ii) According to FEMA, 1999, Mr. Avinash must surrender the unused foreign exchange within 180 days of his return from abroad. However, if he so desires, he can keep foreign exchange up to USD 2,000 in his Resident Foreign Currency (Domestic) or RFC (Domestic) Accounts. He can also keep the said amount in form of foreign currency notes or traveler cheque for use in the future course of time. Residents are permitted to hold foreign currency up to USD 2,000 or its equivalent provided the foreign exchange was acquired by him from an authorised person for travel abroad and represents the unspent amount thereof. [Refer FAQ 7 Misc Forex Facilties, updated upto 21.10.2021]

Accordingly, Mr. Avinash has not contravened any provisions of the Foreign Exchange Management Act, 1999. The unspent money which is left with him belongs to the company and he needs to submit it back to the company within the stipulated time. Hence, according to the provisions of the Foreign Exchange Management Act, 1999, he is not liable for any punishment.

Answer 7

(i) Section of 2(v) of FEMA reads as under:

"Person resident in India" means-

(i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include-

(A) a person who has gone out of India or who stays outside India, in either case-
- (a) for or on taking up employment outside India, or
- (b) for carrying on outside India a business or vocation outside India, or
- (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than-
- (a) for or on taking up employment in India, or
- (b) for carrying on in India a business or vocation in India, or
- (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

As per facts stated in the case study, Mr. Demello resided in India for more than 182 days in the financial year 2019 -20. However, during 2020-21, he went back to carry on his employment with Alex Consultancy. Therefore, Mr. Demello will be considered as a person resident outside India for the financial year 2020-21.

Further, as per regulation 6 of the Foreign Exchange Management (Acquisition and transfer of Immovable Property in India) Regulation 2018, a person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, who is a spouse of a Non-Resident Indian or an Overseas Citizen of India may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse subject to the conditions laid down.

Hence, a foreign national who is a person resident outside India may acquire one immovable property, jointly with his NRI spouse.

Hence, Mr. Demello despite being a person resident outside India and a foreign national is eligible to acquire a flat in Bengaluru in joint ownership with Mrs. Demello.

Note - It is presumed other conditions provided under regulation 6 is fulfilled.

(ii) According to the provisions of the Foreign Exchange Management Act, 1999:

Section 6(5) of FEMA provides that a person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

Regulation 8 of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that-

(a) A person referred to in sub-section (5) of section 6 of the Act, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section.

(b) In the event of sale of immovable property other than agricultural land/farm house/plantation property in India by a person resident outside India who is a citizen of India or a person of Indian origin, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:

(i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;

(ii) the amount to be repatriated does not exceed (a) the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account, or (b) the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for the acquisition of the property; and

(iii)in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

So, in the above-mentioned case, Mrs. Demello can repatriate the sale of such property provided the above-mentioned conditions are duly satisfied.

CASE STUDY 29

Mr. Hardeep Suri is a renowned businessman from Indore. He worked as a senior manager in a company for 7 years. After that, he thought to establish his own company. He established Exotic Limited in the year 1995. Mr. Suri has two sons, Sanjay and Sagar. His wife, Mrs. Ashima Suri, is a socialite and philanthropist.

Mr. Hardeep Suri started manufacturing paper with a startup capital of ₹ 30 lakhs. He took INs 15 lakhs loan from the bank. Initially, like any other company, there were so many ups and downs. However, after 5 years of running the company, profits started pouring in. Around 2005, the company became a household name. The company had its head office in one of the best locations in Mumbai at Nariman Point. The shareholders of the company include Mr. Suri, his wife Mrs. Suri, both his sons, Sanjay and Sagar, and 3 other persons. Mr. Suri and his family held 90% of the total shares of the company.

Exotic Limited acquired a couple of companies to grow globally. Mr. Suri now owes an empire worth ₹ 500 crores. He wanted to earn more and more money and he also started an export-import business. The export-import business started flourishing in a year. Out of greed, Mr. Suri thought to take a loan from the banks to expand his business. His management contacted some of the nationalized banks for approval of the loan. After several rounds of meetings with Mr. Suri, five national banks agreed for lending him money, based on the letter of credit, export contract, and copy of the purchase order.

A number of front and fictitious companies were formed, to carry out illegal activities by the company, which submitted forged documents to obtain the money from the banks. The amount sanctioned for a particular export order was diverted to a different offshore company and later the money was remitted back into Mr. Suri's company without executing an export order.

Further, Mr. Suri and his son, Mr. Sanjay, started taking orders from other Asian countries for the supply of pulses and wheat. Some genuine transactions were also done to hide other fractious transactions. The credit sanctioned for export order received from Malaysia for the supply of pulses and wheat was diverted to a Malaysian based firm but the money was later remitted back to Exotic Limited So, most of the transactions of the company was done with a limited number of buyers, sister companies and sellers. As Mr. Suri frequently needed to travel to Malaysia, so, he bought a flat there. It was purchased with transmittals beyond the permissible limit under the Liberalized Remittance Scheme.

Further, Mr. Suri registered one more company in the name of his son, Sagar. It was an iron bar manufacturing company. It is a sister concern to Exotic Limited. In order to show that the company is genuine initially, it manufactured some goods and exported them to other Asian countries for around a year's duration. After 1 year, Sagar's company approached a consortium of banks to sanction 100 crore rupees as a loan. The bank credited the loan on basis of the performance evaluation of its sister concern, Exotic Limited. The money disbursed by the bank for procurement of goods and some other export materials was not utilized for the said purpose and no export order was executed by Sagar's company.

Mr. Hardeep, Suri's maternal uncle who resided in London since 2005, expired in the year 2018. While writing his will in the year 2017, he wrote his eastern London house worth USD 150,000 in name of Mr. Suri out of natural love and affection. Rejoice of inheriting a house in London was not sufficient to overcome the grief, because Mr. Suri was so connected to his uncle.

In between, Mr. Sagar went on a vacation to Macau. He took USD 7,000 along with him. On returning back, he had USD 3,300 unspent with him. Out of this amount, he gave USD 1,000 to his friend, who is going abroad next month.

Mr. Sagar during his visit to Macau came to know from one of his friends about a Macau-based company known as Ozone Sportswear which is a subsidiary of Ozone Group of Companies. The net worth of the company is USD 45,000. Ozone Sportswear wanted to start its business operations in India by incorporating a company, through a Joint Venture, with an Indian company. Sagar approached the company and held meetings with its management. The company agreed to the startup but before starting the joint venture, it wanted to study the market of India. The company wanted to study policies regarding exports and imports from/to India and other technical /financial collaborations between both companies. For that purpose, the company opened its office in India. All the expenses of the company would be met by inward remittance.

One day, Mr. Sagar met Mr. Rudra, his childhood friend who owns a big real estate company. Mr. Rudra suggested Mr. Sagar to invest in the real estate business as it gives good financial returns within a couple of years. Out of ₹ 100 crores amount received by Mr. Sagar, he invested ₹ 20 crores into his business and from the remaining amount, he bought 50 acres farmhouse worth ₹ 50 crore in a lush green vicinity near Noida. Mr. Sagar also bought two flats in the new project started by Mr. Rudra in Khar, Mumbai, for ₹ 10 crores, in

the name of his two company employees. He planned to transfer the same to his name later on. The leftover amount was transferred through a mediator to the shell companies abroad.

Mr. Suri was interested in building assets as he was having a huge amount of bank loans in his hand. One of his friends advised him to buy a zinc mine that was going to be auctioned by the Government of Rajasthan. Mr. Suri bought this mine by paying a sum of ₹ 30 crores, near Udaipur, Rajasthan to extract zinc. To earn more profit, Mr. Suri agreed to source zinc from other mines as well, from some associates like Shiv Kumar and Ramesh Shetty, whose job was to illegally mine zinc from mines. The job of these associates was to create layers to mask the actual source, for which, they were paid the money.

Zinc was sold to exporters, who deposited the money in one of the five bank accounts of Mr. Suri's company. Exotic Limited transferred money to Mr. Shiv Kumar and Mr. Ramesh. In one of the five bank accounts of Exotic Limited, there was a combined credit and debit of 64 crore rupees between the years 2015 to 2017. Mr. Shiv and Mr. Ramesh issued cheques to persons who may be either fictitious or under benami names or unregistered dealers of zinc. These individuals make withdrawals on the same date, in most cases in denominations of ₹ 6 lakh. The same happens on the credit side.

Exotic Limited exported 9520 tons of zinc at below market price to A.S Trading International, a Hong Kong registered company. Mr. Suri is the director of A.S Trading International which is owned by his wife, Mrs. Ashima, a company registered in the Isle of Man. A.S Trading International in return sold the zinc to an outside party at market price. So now it can move the profit to its companies in tax havens, which are owned by Mr. Suri's family members.

The CBI registered a case after receiving a complaint from one of the consortium banks against Exotic Limited, its director, Mr. Suri, his wife Ashima Suri, son Sanjay and Sagar, and unidentified other persons. It is alleged that the accused had cheated a consortium of five banks by siphoning off bank loans to the tune of ₹ 600 crores.

The enforcement directorate (ED), also registered a case against the promoters of Exotic Limited In their investigation, it has been found that the proceeds of the crime were subsequently used by the accused to create illegal assets and black money. In a further investigation by ED, they found there is the large increase in cash turnover and sales. No commercial reasons were mentioned for money inflows. Most of the transactions didn't have supporting documents, and don't fit the company's profile.

MULTIPLE CHOICE QUESTIONS

1. On returning from Macau, Sagar had unspent USD 3300. He gave USD 1000 to his friend who was leaving for abroad next month. Is he permitted to do so?
   (a) Sagar needs to give a declaration to the authorised agent that he gave USD 1000 of the amount remaining with him to his friend.
   (b) Sagar cannot do so, as he needs to deposit the amt exceeding USD 2000 to AD within specified days.
   (c) Sagar needs to surrender all the remaining USD 3300 to the AD within specified days.
   (d) Sagar can do so, as he bought this amount from AD.

2. Assuming that Exotic Limited procured consultancy services from abroad for his export and import of grains business and paid them USD 1,200,000 from its current account. Choose the correct answer.
   (a) Since it is a current account transaction, Exotic Limited needs no prior approval from the RBI.
   (b) Exotic Limited requires prior approval of the RBI before remittance of the said amount.
   (c) The service is covered under schedule II of the Foreign Exchange Management Act, 1999, so Ministry of Finance (Department of Economic Affairs) permission is required
   (d) Central Government prior permission is required before remittance of the said amount.

3. Ozone Sportswear, a company registered in Macau wanted to start its business operations in India; but wanted to study policies regarding exports and imports from/to India. For that purpose, the company opened its office in India. Presuming it took a building on lease for 10 years. Pick the correct statement out of the following;
   (a) Being a foreign company based in Macau, it can't acquire immovable property or any sort of right in any immovable property in India.
   (b) It can acquire a lease right of immovable property for any number of years, but can't acquire immovable property (freehold), even with prior permission from RBI.
   (c) It can acquire immovable property on lease for a period exceeding 5 years, with the prior permission of RBI.
   (d) Being a legal entity, Ozone Sportswear is not covered in the term 'Citizen' hence can acquire any immovable property, without prior permission from RBI.

4. Property seized under section 17 by the director or any other officer, not below the rank of deputy director authorised by the Director can be retained for
   (a) For a period not exceeding one hundred and eighty days from the day on which such property was seized and this period can't be extended
   (b) For a period not exceeding one hundred and eighty days from the day on which such property was seized and this period can be extended by Adjudicating Authority.
   (c) For a period not exceeding one hundred and eighty days from the day on which such property was seized and this period can be extended by the enforcement directorate.
   (d) For a period not exceeding one hundred and eighty days from the day on which such property was seized and this period can be extended in case offence committed comes under schedule I of PMLA.

5. The flat purchased by Sagar in the name of his company's employees, was transferred to a third party by entering a sale agreement. Such a transfer shall be;
   (a) Valid as sale agreement is entered.
   (b) Valid provided the company's employees were aware that the property was registered in their name.
   (c) Null and void.
   (d) Voidable at the option of the third party to whom property is sold

DESCRIPTIVE QUESTIONS

6. (i) Can Mr. Suri acquire and hold immovable property situated in London through inheritance from his uncle? Can Mr. Suri transfer that such property to some foreign resident or national according to the provisions of the Foreign Exchange Management Act, 1999? If not, state the penalty for contravention.

   (ii) Exotic Limited exported zinc to A.S Trading International. The profit earned by the company was never brought back to India. According to the provisions of the Prevention of Money Laundering Act, 2002 advice the company as to what nature of the crime it is and the legal consequences to be faced by him under the said Act?

7. Mr. Suri bought a flat in Malaysia beyond the permissible limit of transmission of amount under Liberalized Scheme. So, in context to the fact given in the case study, answer the following;

   (i) What legal consequences Mr Suri will have to face under the provisions of the Act?

   (ii) What remedy can Mr. Suri seek to safeguard himself from any legal action that can be taken against him for the aforesaid offence?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (b) Sagar cannot do so, as he needs to deposit the amount exceeding beyond USD 2000 to AD within specified days.

   Reason
   In terms of Para 3 of the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000, for the purposes of clause (a) and clause (e) of section 9 of FEMA, the RBI has specified limits for possession or retention of foreign currency or foreign coins. Its sub-para (iii) specifies that retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques not exceeding US$ 2000 or its equivalent in aggregate.

2. (b) Exotic Limited requires prior approval of the RBI before remittance of the said amount.

   Reason
   Para 2(iii) of the Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000, states the remittances exceeding USD 10,00,000 per project for any consultancy services in respect of infrastructure project and USD 10,00,000 per project, for other consultancy service procured from outside India, shall require prior approval of the RBI.

3. (c) It can acquire immovable property on lease for a period exceeding 5 years, with the prior permission of RBI.

   Reason
   Reg 4 of the FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 deals with the matter relating to the acquisition of Immovable Property for carrying on a permitted activity.

   The provision attached to Regulation 4(b) provides that no person of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea (DPRK) shall acquire immovable property, other than on lease not exceeding five years, without prior approval of the Reserve Bank.

4. (b) For a period not exceeding one hundred and eighty days from the day on which such property was seized and this period can be extended by Adjudicating Authority.

Reason
Section 20(1) of the PML Act provides that -

Where any property has been seized under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the officer authorised by the Director in this behalf has, on the basis of material in his possession, reason to believe (the reason for such belief to be recorded by him in writing) that such property is required to be retained for the purposes of adjudication under section 8, such property may, if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such property was seized or frozen, as the case may be.

5. (c) Null and void.

Reason
It is a benami transaction in terms of Section 2(9) of the PBTA ,1988. As per section 6(2) of the PBTA re-transfer of benami property shall be deemed to be null and void.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

(i) Regulation 5 (1) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015, provides that -

A person resident in India may acquire immovable property outside India by way of gift or inheritance from a person referred to in Section 6(4) of the Act or referred to in clause (b) of regulation 4.

Further section 6(4) of the Foreign Exchange Management Act 1999, a person resident in India may hold, own, transfer or invest in foreign currency, foreign security, or any immovable property situated outside India if such currency, security, or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

In the above-mentioned case, the property was inherited (acquired) by Mr. Suri from his uncle according to the provisions of the Foreign Exchange Management Act, 1999, hence Mr. Suri is legally entitled to hold the property.

Further, section 6(4) of said Act, allows Mr. Suri to transfer such property to any person including foreign resident or foreign national. Mr. Suri is required to realise and repatriate the sale proceeds from such transfer (if the transfer is in form of sale) as per provision of provisions of the Foreign Exchange Management Act, 1999 or applicable regulations thereunder.

(ii) The nature of crime committed by the company is an offence of cross border implications that has been defined u/s 2(1)(ra) of the Prevention of Money Laundering Act, 2002 (PML Act, 2002). It means-

(i) as any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person transfers in any manner the proceeds of such conduct or part thereof to India; or

(ii) any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India.

Part C of the Schedule to the PMLA, 2002 includes an offence which has cross-border implications. Para 4 of Part C of the schedule states that the offence of willful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 is termed as an offence of cross border implications.

Hence, Mr. Suri is guilty under Part C of the Schedule to the PMLA as making export through a sister concern in tax heaven amounts to offence of willful attempt to evade tax. He would be held guilty under section 3 of the PML Act, 2002, and will be liable to punishment under section 4 of the said Act.

Answer 7

(i) Section 4 of the Foreign Exchange Management Act, 1999, states that save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess, or transfer any foreign exchange, foreign security, or any immovable property situated outside India.

Under the Liberalised Remittance Scheme, Authorised Dealers may freely allow remittances by resident individuals up to USD 250,000 per Financial Year (April-March) for any permitted current or capital account transaction or a combination of both. As per para 6 of the LRS, an individual is permitted to purchase immovable property abroad.

However, if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall under section 13(1) of the Foreign Exchange Management Act, 1999, upon adjudication shall be liable to a penalty upto thrice the sum involved in such contravention where the amount is quantifiable. If the amount is not quantifiable, a penalty upto two lakhs rupees and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

The Adjudicating Authority adjudicating the contravention can also order confiscation of any currency, security or any other money, or property in respect of which the contravention has taken place. He can also direct that foreign exchange holdings of any person committing the contravention shall be brought back to India or retained outside as per directions.

The term 'property' in respect of which contravention has taken place shall include deposits in bank or Indian currency where the contravening property has been converted into bank deposits/Indian currency. It also includes any other property which has resulted out of the conversion of the contravening property. [Section 13(2) of the Foreign Exchange Management Act, 1999]

In other words, if the contravening property is converted into bank deposits, Indian currency or another property, such deposit/Indian currency/other property can also be confiscated.

Besides, Section 37A of the Foreign Exchange Management Act, 1999 specifies Special provisions relating to assets held outside India in contravention of section 4, states that upon receipt of any information or otherwise if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property.

The order of seizure along with relevant material shall be placed before the Competent Authority. The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of the seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.

The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure made above.

In this case, the purchase of a flat by Mr. Suri in Malaysia was beyond the permissible limit of transmission of amount under the liberalised remittance Scheme, so the said transaction is in contravention to the provision of the Act. Therefore, Mr. Suri will be liable for prosecution & penalty in the light of the aforesaid provisions of the Foreign Exchange Management Act, 1999.

(ii) Under section 15 of the Foreign Exchange Management Act, 1999, which deals the matter relating to the compound of contravention, Mr. Hardeep Suri can seek the following remedy in case of contravention under section 13 of the Foreign Exchange Management Act, 1999:

(1) he can make an application for the compound of such offence within one hundred and eighty days from the date of receipt of an application by the Director of Enforcement or any other officers of the Directorate of Enforcement and Officers of the Reserve Bank.

(2) Where a contravention has been compounded, then no further proceeding, shall be initiated or continued, against the person committing such contravention, in respect of the contravention so compounded.

CASE STUDY 30

Raj pursued his bachelor's degree from the Indian Institute of Technology, Delhi in computer science. After completing his bachelor's degree, he went to London for higher studies. Raj belonged to a middle-class family and knew that his father, Mr. Dev, had taken some loans by mortgaging his land, house, and jewellery to fund his five children's education. So, Raj decided to do some part-time jobs in London together with his studies. Raj was 3rd amongst his 5 siblings. His two elder brothers Brijesh and Bharat were practicing lawyers in Delhi and were in the early stage of their career and struggle. His younger brother and youngest sister wanted to become doctors. Before going to London, Raj opened an NRE account with a nationalized bank so that he can help his family financially by transferring some money to his parents through that account.

Raj reached London in July 2005. By doing a part-time job in London, Raj managed to send some money to his family in India apart from fund his own education and stay there. In due time, Raj finished his studies and got a good job in London. Meanwhile in India, both his brothers also started earning well and they too helped Dev financially. Within five years (by the end of 2010), Mr. Dev managed to repay his entire loan and got freed his mortgaged properties along with jewellery of his wife, Mrs. Kusum from the money lender.

In the year 2011, Raj got married to Nirmala. After their marriage, Nirmala also moved to London with Raj and she also got a good job there. Raj's younger brother, Shiv, and youngest sister, Radhika, both got admission in M.B.B.S. In the final year of Radhika's studies, she got married to Dr. Krishna on 16th May 2015. At the time of his sister's wedding, Raj gave his father an amount equal to USD 7,500 as a contribution towards her marriage expenses. Apart from this, he also gifted his sister and her husband all-inclusive tickets for their Europe tour as a wedding gift costing USD 22,500. Raj and his family's tickets to/from India to/from London in business class cost him around USD 20,000.

For their Europe trip, Krishna and Radhika purchased USD 10,000 from an authorized dealer. On 16th July 2015, they came back to India after a 15 days trip. At the time of their return, they were having unspent USD 2,500 with them. After Radhika's wedding, Mr. Dev left his job as a marketing officer with a real estate development company named Vinayak Developers. At the time of his retirement, he was having some savings in his kitty and he got 25 lakhs rupees as retirement benefits from his employer. With all these and a bank loan of INRs 7 lakhs, he purchased a flat for INRs 40 lakhs in October 2015.

Later in the month of November 2015, Dev and his wife decided to go to London. Raj again spent USD 10,000 for their trip. Raj's parents came back to India in December 2015.

In the month of February 2016, Raj's son went to America for his studies. For this Raj shell out USD 100,000 towards his fee, tickets, and other expenses.

In late August 2016, Dev's ex-employer Vinayak Developers ('promoters') approached him to appoint him as their real estate agent for their upcoming real estate project "Ganesha", consisting of a multistoried building having 12 floors with 3 flats on each floor. Dev agreed upon and in a detailed discussion regarding the strategy that should be adopted/followed to pre-sell their flats and to collect the maximum amount from prospective buyers without attracting any interest burden. It was decided to make a cartel with other builders that until they (Vinayak Developers) are done with 90-95% booking of their flats, they (other developers) will not launch any new project in that area so that maximum booking can be ensured. He also suggested that in turn the promoters, Vinayak Developers, will also do the same at the time of launch of other builder's projects. The motto behind forming such type of cartel was to ensure a limited supply of flats, so that buyers won't be left with more choices to choose from and will go for bookings in the upcoming project of Vinayak Developers, "Ganesha". Apart from this, it was also decided that every builder who has agreed to become part of such a cartel will be given a certain % share of the booking amount received.

Promoters past track record, location of the project added by Dev's idea helped the project in becoming a big success, and as soon as the promoters launched the scheme through advertisement in print and electronic media enquiries regarding flats poured in. The brochures containing the details of the upcoming project mentioned that the new project "Ganesha" spread in an area of 10,000 sq. ft., would accommodate a park, a gym, a swimming pool, lifts, parking slot, and a small shopping center. In Oct 2016, on the occasion of Navratri, booking of flats started and soon all the flats were booked. The price of each flat consisting of 2 BHK was fixed at INRs 1.2 crores and slab wise different discounts were offered to the customers.

The buyers' agreements were signed in November 2016. The project took off smoothly. Although the project was fully sold out, yet enquiries related to flats kept coming in, so the promoters decided to increase the height of the building by two more floors by fulfilling all the legal formalities related to it. Possession of the flats was handed over to all the allottees within the grace period with all the amenities as promised.

In this project, not only the promoters but also Dev made a handsome amount. In a couple of years, Mr. Dev accumulated more wealth and at beginning of 2019, he decided to invest such in an upcoming housing project being developed by one of his known developers. The price of the flat which Dev booked was INRs 2.5 crore rupees. Each flat was proposed to be delivered with a separate terrace, a small kitchen garden, and every possible modern household amenity. The builder of the housing project by a written contract signed by both the parties gave the order for the supply of all the required electronic items for this project to Arihant Electronics, who after receiving 15% amount of the contract value as advance payment, made supplies as per the contract without receiving any further payment.

On the other hand, the promoter/builder on the pretext of assured return of INRs 2,25,000 per month, convinced Dev and some other buyers, to pay the full amount at one go. This assured return was to be credited on monthly basis, after deducting tax at source, for the period starting from the date of receiving the payment till the date of handing over the flat. A written contract for the same was also signed by them (Dev and other buyers) and the promoter, when they (Dev and other buyers) made the full and final payment on 1st January 2019. They received only one monthly installment of assured return, net of tax. Then all the reminders for payment went unanswered and the promoter even expressed his inability to hand over the possession of the flats to the buyers/allottees. Later, he came to know that creditors of that promoter including Arihant Electronics have filed for insolvency proceedings against him as he had denied payments to them also. This was shocking for Dev and he could not bear it.

On 15th April 2019, Dev had a major heart attack which proved fatal for him. On 20th April, he died and within a period of 15 days from Dev's death, Kusum also passed away. Dev and Kusum had left a will which provided that all their properties i.e. flat, ancestral house, and one 5 acres agricultural land in their ancestral village were to be sold out and money received from such sale should be distributed amongst all the four brothers and jewellery of Kusum to be given to Radhika. After 15 days of their mother's death, Raj and Nirmala decided to leave for London and it was mutually agreed between all the brothers that their two elder brothers will sell the properties and will distribute the amount, amongst all of them.

MULTIPLE CHOICE QUESTIONS

1. Assuming in the given case, Raj is required to remit USD 110,000 to his son in the US for some major medical expenses on 30th March 2015 although no such estimate for the same is provided by the medical institute in the US. From the following, tick the correct option;
   (a) Raj can remit as much amount as he is required to, because he is not a person resident in India, so the provisions of liberalized remittance scheme do not apply to him.
   (b) Raj can remit the whole USD 110,000 to his son without any permission because the remittance is for his medical expenses.
   (c) Raj cannot transfer more than USD 90,000 to his son because he has already spent USD 160,000 for different purposes.
   (d) Raj should remit only partial amount before 31st March 2015 and balance amount after 31st March so that he won't attract any remittance limitation restrictions.

2. In respect to the unspent US dollars left with Radhika and her husband, from the following tick the correct option;
   (a) They can keep the whole unspent amount of USD 2,500 with them till the time they wish to do so, as they have been gifted the same and are not purchased by them.
   (b) They shell surrender the whole unspent USD 2,500 to the authorized dealer within a period of 90 days from the date of receipt of foreign currency.
   (c) They can keep upto USD 2,000 in the form of currency notes with them for their future use and the balance USD 500 shall be surrendered to the authorised dealer within 90 days from the date of receipt of foreign currency.
   (d) They can keep upto USD 2,000 in the form of currency notes and travelers cheque with them for their future use. However, the balance USD 500 shall be surrendered to the authorised dealer within a period of 180 days from the date of their return to India.

3. Assuming in the given case, for the sale of inherited agricultural land, Raj and his brothers got an offer from Mr. John, a citizen of Hong Kong, but the resident in India who was trying to get Indian citizenship, then with respect to such offer, from the following which option is correct:-
   (a) Mr. John can acquire the agricultural land in India, with the prior permission of RBI.
   (b) Mr. John being a foreign national can't acquire agricultural land in India.
   (c) Mr. John can acquire agricultural land in India on lease for a period not exceeding 5 years.
   (d) Mr. John being a citizen of Hong Kong can't acquire agricultural land in India.

4. In the given case, at least how much amount should be transferred to a separate account at the initial stage if INRs 25,92,00,000 booking amount was collected?
   (a) INRs 4,53,60,000
   (b) INRs 18,14,40,000
   (c) INRs 25,92,00,000
   (d) INRs 6,48,00,000
5. In the given case, if the formation of such cartel was being informed to the Competition Commission of India, then the Commission is empowered to impose a penalty of;
   (a) Upto three times of its profits for each year of the continuance of such agreement on each member of the cartel.
   (b) Ten percent of its turnover for each year of the continuance of such agreement on each member of the cartel
   (c) Higher of (a) & (b)
   (d) Lower of (a) & (b)

DESCRIPTIVE QUESTIONS

6. In the given case, Vinayak Developers has raised the floors in their residential project after fulfilling all the legal formalities. (i) You are required to narrate the formalities associated with such an increase. (ii) Narrate the consequences, if the promoters had not fulfilled the formalities before raising the height of the project?
7. If Mr. Dev was alive then can he file an application for initiation of the insolvency proceedings against the developer, who promised assured return to them?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (a) Raj can remit as much amount as he is required to, because he is not a person resident in India, so the provisions of liberalized remittance scheme do not apply to him.

   Reason
   LRS scheme is for the resident individuals, since Raj is not the resident individual hence the provisions of the LRS is not applicable on him.

2. (d) They can keep upto USD 2,000 in the form of currency notes and travelers' cheque with them for their future use. However, the balance USD 500 shall be surrendered to the authorized dealer within a period of 180 days from the date of their return to India.

   Reason
   Para 3 of the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000 provides that for the purpose of clause (a) and clause (e) of section 9 of FEMA, the RBI has specified the limit for possession or retention of foreign currency or foreign coins.

   Sub-para (iii) provides that retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques not exceeding US$ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers' cheques.

3. (a) Mr. John can acquire the agricultural land in India, with the prior permission of RBI.

   Reason
   A person who is a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong-Kong, or Macau or DPRK would require prior approval of the Reserve Bank of India for acquiring any immovable property (including agricultural land) in India and such requests are considered by Reserve Bank in consultation with the Government of India.

   Students are also advised to note that foreign nationals, even if residing in India, for acquiring immovable property have to obtain the approvals, & fulfill the requirements if any, prescribed by other authorities, such as the concerned State Government (because the land is a matter of state list), etc.

4. (b) INRs 18,14,40,000

   Reason
   Section 4(2)(l)(D) of RERA provides that 70% of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose.

   The 70% of Rs 25,92,00,000/- comes to Rs. 18,14,40,000/-

5. (c) higher of (a) & (b)

   Reason

The proviso to section 27(b) of the Competition Act, 2002 provides that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of:

- up to three times of its profit for each year of the continuance of such agreement; or
- ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

(i) Section 14 (1) of RERA, 2016 deals with the matter relating to the adherence to sanctioned plan and project specifications by the promoter. It provides that-

The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authority.

Sub-section (2)(ii) provides that Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make any other alteration or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take an apartment in such building.

(ii) Section 61 of the RERA 2016 provides that if any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to 5% of the estimated cost of the real estate project as determined by the Authority.

Answer 7:

Provisions of the Insolvency and Bankruptcy Code, 2016 provides that the corporate insolvency resolution process may be initiated against any defaulting corporate debtor by making an application adjudicating authority. The application can be made by a financial creditor, operational creditor, or the corporate debtor himself. On 6th June 2018, the Insolvency and Bankruptcy Code, 2016 was amended through the Insolvency and bankruptcy code (Amendment) Ordinance, 2018. Following the ordinance, home buyers and allottees under the Real Estate (Regulation and Development) Act, 2016 got the status of financial creditors under IBC 2016 (pursuant to the amendment to the definition of financial debt) which enabled the home buyers and other allottees to be able to invoke Section 7 of IBC, allowing financial creditors, either individually or jointly to file an application in NCLT, for initiating corporate insolvency resolution process against the defaulting promoters.

The Second proviso to section 7(1) of the IBC provides that provides that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less.

The amendments made by the Ordinance inter alia bring IBC in closer sync with Section 18 of the RERA which gives the allottees the right to demand a refund of the entire amount paid by them together with interest at prescribed rates. They can also demand interest to be claimed for any delayed possession.

In the case of Pioneer Urban Land and Infrastructure Ltd & Anr Vs. Union of India & Ors, the Supreme Court of India, dated 9th August, 2019 [Writ Petition (Civil) No. 43 of 2019], the Apex Court held that remedies given to allottees of flats are concurrent and they are in a position to avail remedies under the CPA, RERA as well trigger the IBC.

So, in the given case, if Mr. Dev was alive, he could have applied for initiation of insolvency proceedings against the promoter for not paying him assured returns.

CASE STUDY 31

Mr. Alpha is the promoter of a real estate project based in East Delhi, named Aashiyana. The project plan constituted building, in total, 50 apartments consisting of 20 3BHK apartments and 30 2BHK apartments. Mr. Aplha's son, Surendar is a Chartered Accountant as well as a RERA consultant. Mr. Alpha discussed with his son, the applicability of various provisions under the Real Estate (Regulation & Development) Act, 2016, and of the rules made thereunder on Aashiyana.

Mr. Alpha enquired about the process of registration (approval) and creation of his webpage, after getting login ID and password. Also, Mr. Alpha wanted to know the requisite contents as per law, of the advertisement to be published for the said project.

The draft advertisement specified a condition of making advance payment prior to entering into agreement for sale which shall not be less than 15% of the cost of the apartment and only after payment of such advance, the promoter will enter into an agreement for sale with the allottee.

Mr. Alpha refrained from disclosing any stage-wise time schedule of the completion of the project, including the provisions for civic infrastructure like water sanitation & electricity at the time of booking and issue of allotment letter to allottees. He forgot to include any terms for cancellation of allotment in the agreement of sale made with allottees. The construction started and afterward, the promoter made some major alterations in the sanctioned plans & layout plans as well as in the nature of fittings, without any previous approval from allottees. Mr. Alpha also made minor changes in an apartment allotted to Mr. Abhay which were duly recommended and verified by an authorised architect after proper declaration and intimation to the allottee, Mr. Abhay.

Mr. Alpha intended to transfer, project Aashiyana to Mr. Beta (third party) without obtaining any approval.

Queries raised by Mr. Alpha

- Is Mr. Alpha mandatorily required to maintain a webpage on the website of RERA Authority?
- What are the requirements for the registration of Project Aashiyana?
- Can an advertisement be published with or without mentioning the website address?

Queries raised by the allottees

- Can Mr. Alpha transfer the project to Mr. Beta on his own or there is any role of allottees or RERA authority? And if projects are transferred to a third party, can re-allotment.
- Is the promoter having any rights to not provide any details on the stage-wise time schedule of completion of the project, at the time of booking, to the allottees?
- Is the promoter correct while putting an upfront condition that 15% of the cost of the apartment shall be paid before entering into an agreement for sale?

Few apartments were purchased in the project by some NRIs' as follows

- Mr. X purchased a residential apartment for ₹ 50 lacs jointly in his and his sister's name. The source of such payment was not known and not routed through the banking channel. The sister of Mr. X is an Indian resident and national.
- Mr. Y purchased a residential apartment for ₹ 60 lacs in joint ownership with his wife, for which he paid from his NRE Account.
- Mr. P purchased a residential apartment for ₹ 50 lacs in the name of his wife, who is an Indian resident. Payment of ₹ 20 lacs was made from Mr. P's NRE account, ₹ 30 lacs were paid from unknown sources. The registry was done at a value of ₹ 45 lacs considering ₹ 20 lacs from known sources and ₹ 25 lacs from unknown sources.

MULTIPLE CHOICE QUESTIONS

1. Mr. Alpha shall not transfer or assign his majority rights & liabilities in respect of a real estate project to a third party without obtaining:
   (a) Prior written consent from two-thirds of the allottees;
   (b) Prior written consent from two-thirds of the allottees; except the promoter
   (c) Prior written consent from two-thirds of the allottees; except the promoter and prior written approval of the Authority.
   (d) Prior written consent from two-thirds of the allottees; except the promoter and prior written approval of the Authority. However, such transfer or assignment shall not affect the allotment or sale of the apartments.

2. The authority under RERA would have operationalised web-based online system for submitting applications for registration of the project within a period of _.
   (a) One year from the date of its establishment.
   (b) One year from the date of its commencement.
   (c) One year from the date of its initiation.
   (d) One year from the date of its starting.

3. Mr. Alpha at the time of the booking and issue of allotment letter to the allottees shall be responsible for making available, which of the following information to them?
   (a) Sanctioned Plans
   (b) Layout Plans
   (c) Stage-wise time schedule of completion of the project.
   (d) All of these.

4. Mr. Alpha shall be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project Aashiyana, by _____.
   (a) The allottees;
   (b) The third party;
   (c) The association of the allottees;
   (d) None of the above.

5. Identify the nature of the transaction undertaken by Mr. X as per the provisions of Prohibition of Benami Property Transactions Act, 1988?
   (a) It is a benami transaction.
   (b) Not a benami transaction
   (c) Can't say from the given information.
   (d) Partially a benami transaction

DESCRIPTIVE QUESTIONS

6. Mr. Alpha upon receiving login ID and password from RERA Authority created his webpage on the website of the authority and entered all details of the proposed project for public viewing. What information is required to be disclosed on the webpage as per statutory requirements?

7. Examine whether the transaction undertaken by Mr. P as aforementioned can be considered as a benami transaction or not (ignore the provisions of Foreign Exchange Management Act, 1999)?

8. (i) What shall be the responsibility of Mr. Alpha if the project Aashiyana developed on a leasehold land?

   (ii) Whether Mr. Alpha can cancel the allotment even if in the agreement of sale with the allottees, terms of cancellation of such allotment are not included?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Prior written consent from 2/3rd allottees; except the promoter and prior written approval of the Authority. However, such transfer or assignment shall not affect the allotment or sale of the apartments.

   Reason
   Section 15(1) of RERA provides that the promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority.

   Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

2. (a) One year from the date of its establishment.

   Reason
   Section 4(3) of the RERA provides that the Authority shall operationalise a web based online system for submitting applications for registration of projects within a period of one year from the date of its establishment.

3. (d) All of these

   Reason
   Section 11(3) of the RERA provides that (3) The promoter, at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:-

   (a) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;

   (b) the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

4. (c) The association of the allottees

Reason
Section 11(4)(d) of the RERA provides that the promoter shall be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees.

5. (a) It is a benami transaction

Reason
Section 2(9) of PBTA provides the definition of the benami transaction. In the given case Mr. X had purchased a residential apartment for ₹ 50 lacs jointly in his and his sister's name. The source of such payment was not known and not routed through the banking channel. The sister of Mr. X is an Indian resident and national. Since the purchase transaction is not covered under the exempted category benami transaction [i.e. under section 2(9)(A)(b)(iv) & (C)] and the consideration of purchase transaction is not from the known sources of income, hence it termed as benami transaction.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:
As per section 11(1) of RERA, 2016, the promoter shall, upon receiving his Login Id and password under clause (a) of sub-section (1) or under sub-section (2) of section 5, as the case may be, create his web page on the website of the Authority and enter all details of the proposed project as provided under sub-section (2) of section 4, in all the fields as provided, for public viewing, including-

(a) details of the registration granted by the Authority;

(b) quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;

(c) quarterly up-to-date the list of number of garages booked;

(d) quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;

(e) quarterly up-to-date status of the project; and

(f) such other information and documents as may be specified by the regulations made by the Authority.

Thus, Mr. Alpha is required to disclose the aforesaid information for public viewing on his webpage created on the website of the RERA Authority.

Answer 7:
As per Sec 2(9) of the Prohibition of Benami Property Transactions Act, 1988, "Benami transaction" means,

(A) a transaction or an arrangement-

(a) where a property is transferred to or is held by, a person and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by -
(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual.

In the case, Mr. P had purchased a residential apartment for ₹ 50 lacs in the name of his wife, who is an Indian resident. Payment of ₹ 20 lacs was made from Mr. P's NRE account and the remaining ₹ 30 lacs were paid from unknown sources. The registry was done at a value of ₹ 45 lacs considering ₹ 20 lacs from known sources and ₹ 25 lacs from unknown sources.

Had Mr. P paid the consideration from his known sources of income for purchase of property in the name of wife, it would have come under the exempted category of benami transaction under section 2(9)(A)(b)(iii). Since the part consideration of ₹ 30 is paid from undisclosed sources, hence it can be treated as benami transaction. Further the registry should have been done on the basis of the purchase consideration, and the purchase has done the registry for the lessor amount, he may also be liable under the provisions of Indian Stamp Act, 1899 and any rules framed thereunder of the concerned State.

Answer 8:

(i) As per section 11(4)(c) of the Real Estate (Regulation & Development) Act, 2016, the promoter shall be responsible to obtain the lease certificate, where the real estate project is developed on leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees.

Thus, Mr. Alpha's responsibility shall be as aforesaid if the project Aashiyana, is developed on leasehold land.

(ii) As per provisions of the section 11(5) of the Real Estate (Regulation & Development) Act, 2016, the promoter may cancel the allotment only in terms of the agreement for sale.

Provided that the allottee may approach the Authority for relief if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral, and without any sufficient cause.

Thus, Mr. Alpha cannot cancel any of the allotments made without first including the terms of cancellation in the executed agreement of sale.

CASE STUDY 32

Mr. Rajeev was born in 1988 in a small village in Gujarat. His father, Mr. Raju, is a farmer who used to cultivate paddy, jowar, and ragi crops in a plot of land which was owned by him. He had bought the agricultural plot of land at Verna, Goa, with his hard owned money. Since Mr. Rajeev was the only child of Mr. Raju, he would ensure to fulfil all his wishes. Mr. Raju's brother, Mr. Suresh, was a graduate in Science and his sister, Mrs. Alka, was a graduate in Economics, and both were settled in South Africa. Mr. Raju's brother and sister used to help Mr. Raju with his farming in India by sharing with him skills that were undertaken in South Africa. Mr. Raju was very keen to learn these techniques and ensuring their effective implementation in his field. Because of the support of his brother and sister, to acknowledge them, Mr. Raju thought to send gifts to their families. But the officers in the village used to haunt him by stating that the legal laws relating to foreign exchange are draconian. Mr. Rajeev was a bright student and through scholarships, he earned a graduate degree from a foreign university. Mr. Rajeev was very good at sports activities, extra-curricular activities in the school. He used to participate in interschool chess and football competition and win accolades for his school.

On 10th June 2012, Mr. Rajeev acquired a residential house in Maharashtra for a value of ₹ 2 crores from a widow who was in dire need of money and one commercial property in Kerala for ₹ 3 crores. He acquired both these properties through his funds earned in India. He had two saving bank accounts in India, one in Bank of Baroda and the other in Canara Bank. Both the bank accounts together had a balance of ₹ 10 lakhs. On 10th April 2018, he left for South Africa for a better career opportunity. He got married there to a foreign national named, Loreana D' costa. Loreana has obtained her Master's degree from Stanford University. She works in a Fortune 500 company in South Africa. Her designation is Head-Product Marketing. On 28th April 2018, Mr. Raju remitted USD 25,000 and on 29th April 2018, another USD 25,000 through Liberalised Remittance Scheme to Mr. Rajeev for his maintenance.

On 28th November 2018, Mr. Rajeev visited his village along with Mrs. Loreana. Loreana loved the Indian culture since her childhood age. She always had a dream of getting married in India as per the Hindu Rituals. Thus, Rajeev and Loreana again got married in India as per the Hindu Traditions. They undertook various wedding rituals in India which lasted for 10 days. Mr. Rajeev opened a Liaison Office in India by the name "Shiv Shakti Trading Inc". The Liaison Office in India transferred funds to Mr. Rajeev's company in Hong Kong as it was in immediate need of funds. Further, it received back the said funds after six months. The auditor of the Liaison Office pointed out to the Authorised Representative that the aforesaid transfer of funds is not in line with the RBI policies. The Authorised Representative of the Liaison office was totally shocked by seeing the auditor's remarks and was completely unaware of the RBI policies pertaining to Liaison Office. The said Liaison Office was planning to open more bank account to route all the salary payments through the new account.

Since Mr. Rajeev was a rich man and a foreign return, he was invited as the guest speaker in a small function organised by the Gram Panchayat, in his village.

He addressed the crowd with warm greetings and gave the following speech:
It was my father's dream to see the village progresses in all the directions - be it cleanliness, modern techniques of farming, education .....I will try my best to fulfil his wish. Thus, I have prepared a model plan for this year as under:

- To set up five schools in the village where education is compulsory to be taken by all the boys and girls.
- To ensure that there is a toilet in every 500 meters and all the villagers will compulsorily have to use the toilets only.
- To undertake agriculture through modern techniques-Intensive tillage, monoculture, application of inorganic fertilizer, irrigation, chemical pest control, and genetic manipulation of crop plants.

I shall call a famous agriculturist, Mr. Parekh, who will visit each and every farm in our village, examine the land in detail & guide the farm owners on how to maximise the cultivation and ensure effective use of land.

I have created a blog "My Village - My Dream", for which I request you all to give your views on the activities to be undertaken in our village."

After the function got over, he gave donations to various NGO'S for purposes as mentioned hereunder:

- Swatch Bharat Mission - ₹ 1 Lakh
- Development of schools in villages - ₹ 10 lakhs
- Organisation of cultural festivals - ₹ 5 lakhs

All these donations were made through the funds lying in his foreign bank accounts which he had earned in South Africa.

Since Mr. Rajeev generously contributed to various charitable activities; he, in turn, got a favour done from the head of the Panchayat of his village. On 30th November 2018, he paid ₹ 50 lakhs to buy a house in Gujarat which was bought in the name of the head of the Panchayat, Mr. Babubhai.

Mrs. Loreana wished to buy a residential house on the outskirts of Gujarat. There was news of devastating floods in Kerala which would trash the state. There was also news that the economy of Kerala would go down as the effects of floods would have a far-reaching impact on all the sectors. Thus, Mr. Rajeev immediately called a real estate agent in Kerala and asked him to sell the property in Kerala. He was ready to sell the property at less than the market price also. Mr. Rajeev sold the commercial property in Kerala for a value of ₹ 5 crores in the month of November 2018 to Mr. Ajay, a resident of India. Then, he got in touch with a relationship manager at HDFC Bank who assisted him in opening an NRO Account in HDFC Bank. He completed all the documental procedures and deposited the sale value of the property in the said NRO Account. Mr. Rajeev and Loreana left India on 3rd March 2019 for South Africa.

Mrs. Alka' son who stays in India visited South Africa on 6th March 2019 for 15 days trip to stay with his cousin Mr. Rajeev and his family. He had carried with him an International credit card to meet his expenses. Mrs. Alka's son shall inherit his mother's assets in South Africa after her death. She has the following assets in South Africa:

- Two bank accounts - one in Barclays Bank and another in Deutsche Bank
- $15000 to be received from Google Inc., where Mrs. Alka used to work in South Africa.

MULTIPLE CHOICE QUESTIONS

1. Being an NRI, Mr. Rajeev can validly transfer the inherited agricultural land situated in India to
   (a) A person resident in India
   (b) A person resident outside India
   (c) A non-resident who is a person of Indian Origin
   (d) Can't sell to anyone

2. Examine in the light of the given facts whether Mr. Raju can transfer funds under Liberalised remittance Scheme to his grandson, brother's wife, and sister's husband for their maintenance abroad?
   (a) Yes to all the three transferees
   (b) Can't transfer to any of the aforesaid persons
   (c) Transfer can be made to grandson only and not to brother's wife and sister's husband
   (d) Transfer can be made to grandson, brother's wife and not to sister's husband.

3. What are the conditions subject to which Loreana can acquire a residential property in India?
   I. Consideration for transfer should be made from inward remittance of funds received in India from any place outside India.
   II. The marriage should have been registered
   III. The marriage should have subsisted for a continuous period of not less than two years immediately preceding the acquisition of property.
   IV. The property should be bought jointly with Mr. Rajeev

   (a) I and II
   (b) I, II, and III
   (c) I, II, III, and IV
   (d) I and IV

4. Usage of International Credit Card by Mrs. Alka's son for meeting expenses while a visit to South Africa requires approval of;
   (a) Reserve Bank of India
   (b) Government of India
   (c) Doesn't require any approval
   (d) Both Reserve Bank of India and Government of India

5. Can Mrs. Alka's son utilize the assets to be inherited by him abroad?
   (a) Mrs. Alka's son can only utilise the funds lying in Mrs. Alka's Bank accounts.
   (b) Mrs. Alka's son can only utilise the funds to be received from Google Inc. abroad
   (c) Mrs. Alka's son shall require approval of RBI to inherit the funds from her mother and after that, he can utilise them abroad.
   (d) Mrs. Alka's son can inherit both the assets of her mother and can utilise the same abroad.

DESCRIPTIVE QUESTIONS

6. The Initiating Officer issued notice dated 01st April 2020 to Mr. Babubhai to show cause as to why the Gujarat house should not be considered a Benami property. However, a copy of the notice was not issued to Mr. Rajeev as his identity was not known to the officer. On 1st July 2020, the Initiating Officer passed an order provisionally attaching the property with the prior approval of the Approving Authority in writing. On receipt of a reference from the Initiating Officer on 14th July 2020, the Adjudicating Authority issued notice on 24th July 2020 to Mr. Babubhai to furnish the necessary papers of the agreement within 10 days from the date of this notice. After taking into account, all the materials furnished, Adjudicating Authority passed an order holding the property to be a Benami property. The Adjudicating Authority after giving Mr. Babubhai an opportunity of being heard made an order for confiscation of the Benami property.

   (i) Whether the steps followed by Initiating Officer are correct. If not, then provide the correct steps which were required to be undertaken by him.

   (ii) Mr. Babubhai's contention was that the Adjudicating Authority provided such a short span of time to furnish the necessary papers. Is the act of Adjudicating Authority valid for providing such a short span of time to furnish the information?

   (iii) Mr. Babubhai, after receiving the order for confiscating the property, sold the property to a villager for ₹ 10 lakhs who not having knowledge about the benami nature of the property. What rights such a villager possess regarding the property? Will it impact the rights/title of the government regarding confiscated property? Can villager claim compensation?

7. (i) What are the formalities Mr. Raju would have to follow for remitting the funds through Liberalised Remittance Scheme?

   (ii) Mr. Raju insisted the authorised dealer for making the remittance without furnishing the PAN as the amount of remittance was below USD 25,000. Advice Mr. Raju what provision Liberalised Remittance Scheme carries regarding furnishing of PAN?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (a) A person resident in India

Reason

The Regulation 3(e) of the FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that an NRI or an OCI may transfer any immovable property other than agricultural land / farm house/ plantation property to an NRI or an OCI.

It means the NRI can transfer the inherited agricultural property to any one except to an NRI or an OCI. Thus, he can transfer the inherited agricultural property to a person resident in India only and to no one else.

2. (b) Can't transfer to any of the aforesaid persons

Reason

FAQ No.5 on LRS (updated as on 21.10.2021) released by the RBI provides that Remittances under the facility can be consolidated in respect of close family members subject to the individual family members complying with the terms and conditions of the Scheme.

The definition of relative is defined under section 2(77) of the companies Act, 2013 which states that "relative", with reference to any person, means any one who is related to another, if-
(i) they are members of a Hindu Undivided Family;
(ii) they are husband and wife; or
(iii) one person is related to the other in such manner as may be prescribed.

Under the sub-clause (iii) of section 2(77) the grandson, brother's wife and sister's husband do not come under the purview of close relatives.

Therefore, if light of the above provisions, Rajeev cannot transfer funds under LRS to his grandson, brother's wife, and sister's husband for their maintenance abroad.

3. (c) I, II, III, and IV

Reason

The Regulation 6 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that a person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, who is a spouse of a Non-Resident Indian or an

Overseas Citizen of India may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse.

Provided that

(i) The consideration for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank;

(ii) No payment for any transfer of immovable property shall be made either by traveller's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause;

(iii) the marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property;

(iv) that the non-resident spouse is not otherwise prohibited from such acquisition.

4. (c) Doesn't require any approval

Reason

Regulation 6 of the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016 provides that a person resident in India may make payment for import of goods. In foreign exchange through an international card held by him/ in rupees from international credit card/ debit card through the credit/ debit card servicing bank in India against the charge slip signed by the importer/ as prescribed by Reserve Bank from time to time.

Further FAQ No. 11 (Miscellaneous forex facilities) (Updated as on October 21, 2021) release by the RBI states that Banks authorised to deal in foreign exchange are permitted to issue International Debit Cards (IDCs) which can be used by a resident individual for drawing cash or making payment to a merchant establishment overseas during his visit abroad. IDCs can be used only for permissible current account transactions and the usage of IDCs shall be within the LRS limit.

5. (d) Mrs. Alka's son can inherit both the assets of her mother and can utilise the same abroad.

Reason

Regulation 5(1)(a) of the Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015 provides that a person resident in India may acquire immovable property outside India by way of gift or inheritance from a person referred to in section 6(4) of the FEMA or referred to in Regulation 4(b).

Section 6(4) of the FEMA provides that a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

(i) As per section 24 (1) of the Prohibition of Benami Property Transactions Act 1988 (PBPT), where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.

Hence, Initiating Officer has rightly issued the notice to Mr. Babubhai to show cause.

Further, Section 24(2) of PBPT provides where a notice under sub-section (1) specifies any property as being held by a benamidar referred to in that sub-section, a copy of the notice shall also be issued to the beneficial owner if his identity is known.

Hence Initiating Officer is justified as the identity of Mr. Rajeev was not known to him.

Moreover, section 24(3) of PBPT, provides where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as may be prescribed, for a period not exceeding ninety days from the last day of the month in which the notice under sub-section (1) is issued.

So, in regard to provisional attachment, attachment can be done at any time but such provisional attachment shall be effective till ninety days from the last day of the month in which the notice under sub-section (1) is issued, so in a given case, such period ceases on 29th July 2020. In the given case, provisional attachment is also done with prior approval of the Approving Authority in writing; hence the course of action adopted by Initiating Officer is correct and within four corners of the law.

(ii) The first proviso to Section 26 of the PBPT, provides that the Adjudicating Authority shall issue notice within a period of 30 days from the date on which a reference has been received.

The second provision to Section 26 further provides that the notice shall provide a period of not less than 30 days to the person to whom the notice is issued to furnish the information sought.

Hence, in view of the provisions mentioned above the contention of Mr. Babubhai that the Adjudicating Authority has provided a short span of time to furnish the necessary papers is not tenable, since the 30 days' time is sufficient to revert.

(iii)Section 27 (1) of the PBPT deals with the matter relating to the confiscation and vesting of benami property. It reads as under-

(1) Where an order is passed in respect of any property under section 26(3) holding such property to be a benami property, the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating the property held to be a benami property.

Provided that where an appeal has been filed against the order of the Adjudicating Authority, the confiscation of property shall be made subject to the order passed by the Appellate Tribunal under section 46:

Provided further that the confiscation of the property shall be made in accordance with such procedure as may be prescribed.

(2) Nothing in sub-section (1) shall apply to a property held or acquired by a person from the benamidar for adequate consideration, prior to the issue of notice under section 24(1) without his having knowledge of the benami transaction.

(3) Where an order of confiscation has been made under sub-section (1), all the rights and title in such property shall vest absolutely in the Central Government free of all encumbrances and no compensation shall be payable in respect of such confiscation

(4) Any right of any third person created in such property with a view to defeat the purposes of this Act shall be null and void.

(5) Where no order of confiscations made upon the proceedings under this Act attaining finality, no claim shall lie against the Government.

Since in the given case property acquired by villager after the date of order of confiscation (which is obviously after the order under section 24 (1) and consideration were also inadequate hence villager despite the fact not having the knowledge about the benami nature of the property, will not get the title.

Villager can't claim any compensation from the Government, and said transaction between Babubhai and villager will not impact right/title of government in any manner because the said transaction is null and void on account of sub-section 4.

Answer 7

(i) Paras 14 to 16 of the Master Direction-Liberalised Remittance Scheme (LRS) dated 01.01.2016 (Updated as on 20.06.2018), deals with the documentation by the remitter, which reads as under:

Para 14: The individual will have to designate a branch of an AD through which all the remittances under the Scheme will be made. The resident individual seeking to make the remittance should furnish Form A2 as at Annex for purchase of foreign exchange under LRS.

Para 15: It is mandatory for the resident individual to provide his/her Permanent Account Number (PAN) to make remittance under the Scheme.9

Para 16: Investor, who has remitted funds under LRS can retain, reinvest the income earned on the investments. At present, the resident individual is not required to repatriate the funds or income generated out of investments made under the Scheme. However, a resident individual who has made overseas direct investment in the equity shares; compulsorily convertible preference shares of a JV/WoS outside India, within the LRS limit, shall have to comply with the terms and conditions prescribed by the overseas investment guidelines under Notification No. FEMA 263/RB-2013 dated

March 5, 2013.

Mr. Raju have to following the procedure mentioned in Paras 14 to 16 of the aforesaid Master direction. He will be required to designate a branch of an Authorised Dealer through which all the remittances under the Scheme will be made. Mr. Raju should furnish Form A2 for the purchase of foreign exchange under Liberalised Remittance Scheme. It is mandatory for Mr. Raju to provide his /her PAN to make remittance under the Scheme. Mr. Raju is required to sign a self-declaration provided by the Authorised Dealer which will satisfy the Authorise Dealer that the transaction will not involve and is not designed for the purpose of any contravention or evasion of the provisions of the FEMA or any rule, regulation, notification, direction or order issued there under.

Further, the Authorised Dealers shall obtain bank statement(s) for the previous year from the applicant to satisfy themselves regarding the source of funds. If such a bank statement is not available, copies of the latest Income Tax Assessment Order or Return filed by Mr. Raju shall be obtained.

(ii) Furnishing of Permanent Account Number (PAN), is mandatory in terms of Para 15 of the Master Direction-Liberalised Remittance Scheme (LRS), for making all remittances.

While allowing the facility to resident individuals, Authorised Dealers are required to ensure that Know Your Customer guidelines have been implemented in respect of bank accounts. They should also comply with the Anti-Money Laundering Rules in force while allowing the facility.

Thus, Mr. Raju will have to provide PAN for remittance under LRS.

CASE STUDY 33

Jayesh has 3 sons, Subhash, Girish, and Rajesh. The eldest son, Subhash, runs a Sugar Mill taken over from his father Jayesh, as a family business.

Rajesh, the third son of Jayesh, always feels ignored by his family, looking for some fast easy money, joins hands with Mohan, a real estate agent, who promises to pay Rajesh, a commission in cash, if he helps Mohan to buy 25 acres of land and hold the land in his name on behalf of one of his customers, Manu, in good trust and in good faith.

Rajesh agrees and a purchase agreement for 25 Acres of land was registered in the name of Rajesh and Madhav. Subsequently, Rajesh entered into several similar agreements in his name on behalf of others.

In due course of time, Rajesh also formed a company, Jeevan Jyothi Private Limited (JJPL), primarily in the hotel business, but the source of funding was secret drug dealings.

(a) JJPL accepted illegal monies in cash as legitimate business transactions with fake income and receipts.

(b) The monies were then deposited into the bank accounts of JJPL as clean money.

(c) Rajesh also kept fraudulent records, which did not demonstrate the current state of his business.

(d) Monies in the bank accounts of JJPL were also often transferred as legitimate business transactions, to the bank accounts of RD Private Limited (RDPL), which is also in a similar business like JJPL. Original source of money was, thus, disguised.

(e) JJPL also mobilized funds from various investors but were never utilized for the purpose for which they were collected.

(f) Rajesh also created a complex structure of group companies, subsidiaries, and associate companies, which were mainly paper /shell companies.

(g) JJPL also took loans from various banks and financial institutions. The funds were diverted and transferred to bank accounts of group companies, from where they were systematically siphoned off and were used for the purchase of various properties in India and abroad.

Rajesh led a lavish lifestyle. He also utilized the illegal cash for lavish stays in various hotels and in nightclubs in India and abroad. Rajesh also held some properties in the name of his wife, Suguna, bought from his known legal sources i.e. from his share of income from the Sugar Mill.

Mahesh, a friend of Girish, is the Company Secretary of a listed public limited company, BBC Limited.

(a) Mahesh gave ₹ 5 lakhs loan to Girish, who in turn gave the said amount to his other friend, Raghu, for investment in the shares of BBC Ltd. Mr. Raghu traded in shares of BBC Limited on behalf of Mahesh.

(b) Mahesh also ensured that some money is passed on to various legitimate companies to buy the shares of BBC Limited, in order to inflate the price of the shares. The intention is to show a higher valuation of shares before proposing to the investors or to discourage the shareholders from applying to the buyback scheme.

Raghav is the brother-in-law of Subhash, employed in UAE and a non-resident Indian.

(a) Raghav purchased some properties in Mumbai in the name of his wife for ₹ 75 lakhs. He paid ₹ 40 lakhs through his NRE Account, ₹ 10 lakhs through direct transfer from his salaries account in UAE to the seller's account as advance through normal banking channels, complying with all the procedural requirements, but balance ₹ 25 lakhs payment was made though some unknown sources.

(b) Raghav also invested in equity shares of various listed companies in India in the name of his wife Divya, who is a resident in India and himself, as joint holders, from an account that is not disclosed to tax authorities in India.

(c) Raghav also purchased a flat in Mumbai in the name of Divya and himself, as joint holders, from his NRE Account.

Subhash has a married daughter, Mangala, who is a UK resident. Subhash invested ₹ 1.50 crores in a bank fixed deposit in the name of Mangala, without her knowledge. Later, during the course of inquiries by tax officials, Mangala denied ownership of the said bank fixed deposit to be made in her name.

The Enforcement Directorate (ED) conducted raid operations against Rajesh and his associates after his office obtained some inputs on the purported dubious financial transactions. ED seized incriminating documents, emails, and WhatsApp chats during the raid.

MULTIPLE CHOICE QUESTIONS

1. The purchase of properties by Raghav in the name of his wife in Mumbai for ₹ 75 lakhs;
   (a) Can be considered as a valid transaction.
   (b) Can be considered valid transaction to the extent of ₹ 40 lakhs.
   (c) Can be considered as an invalid transaction under the relevant law.
   (d) Can be considered as an invalid transaction under the relevant law to the extent of ₹ 25 lakhs.

2. Which one of the following transactions undertaken by Rajesh can be considered valid and lawful?
   (a) Transaction in respect of a property, where the person providing the consideration to Rajesh is not traceable.
   (b) An arrangement by Rajesh in respect of a property made in a fictitious name.
   (c) Property held by Rajesh in the name of his spouse and consideration paid out of known legal sources.
   (d) A transaction by Rajesh in respect of a property where the owner is unaware of or denies knowledge of the ownership.

3. Share Trading by Raghu on behalf of Mahesh;
   (a) Is a valid transaction, since he is not at all connected with BBC Limited.
   (b) Can be considered as an unlawful transaction as trading is indirectly done in the stock market by Mahesh, the Company Secretary, who has insider price-sensitive information.
   (c) Can't be considered as an unlawful or invalid transaction.
   (d) Is a valid transaction, if Girish does share trading on behalf of Mahesh, out of the loan of ₹ 5 Lakhs given by Mahesh.

4. JJPL also took loans from various banks and financial institutions. The funds were diverted and transferred to bank accounts of group companies, from where they were systematically siphoned off and were used for the purchase of various properties in India and abroad. JJPL claimed such proceeds of crime to be untainted property. Which one among the following statements is correct?
   (a) Such offenses are non-cognizable
   (b) Such offenses are always bailable
   (c) Such offenses are cognizable and always non-bailable
   (d) Such offenses are cognizable and non-bailable but a person can be bailed subject to certain conditions.

5. Monies in the bank accounts of JJPL were also often transferred as legitimate business transactions, to the bank accounts of RDPL, which is also in a similar business like JJPL. In respect of the transactions done by JJPL, the crime money injected into the formal financial system is layered, moved, or spread over various transactions in different accounts. This step under the relevant law is referred to as:
   (a) Smurfing
   (b) Integration
   (c) Layering
   (d) Placement

DESCRIPTIVE QUESTIONS

6. Critically analyze the statement "the provisions of the Act need not necessarily apply only to persons, who try to hide their properties, but may also sometimes apply to genuine properties acquired out of disclosed funds". Also, cite the relevant incidence/s in the aforesaid case and the name of the relevant applicable Act.

7. Rajesh formed a company, JJPL, primarily in the hotel business, but the source of funding was secret drug dealings.

   (i) Is secret drug dealings and then disguising the original source of money for business, a predicate offence? Is there any difference between a Scheduled Offence and a Predicate Offence?

   (ii) Who investigates predicate offences?

   (iii) What are the possible actions that can be taken against Rajesh or JJPL or other concerned persons in the above case, for the alleged offences?

8. The Enforcement Directorate (ED) conducted raid operations against Rajesh and his associates after it obtained some inputs on the purported dubious financial transactions.

   (i) What are the rights of Rajesh and his associates, being searched during the raid operations?

   (ii) What are the rights of Rajesh during his arrest, in the case arrested?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Can be considered as an invalid transaction under the relevant law to the extent of ₹ 25 lakhs

Reason

Section 2(9)(A)(b)(iii) of the PBPT provides as under-

"benami transaction" means,-

(A) a transaction or an arrangement-

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by-

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual.

In the given case the purchase of property by Raghav in the name of his wife comes under the exempted category of benami transaction as per the provisions of section 2(9)(A)(b)(iii), provided the such property has been purchased out of the knows sources of the Raghav. However, Raghav has made payment of ₹ 25 lakh from the undisclosed source of income, hence to that extent it is benami transaction.

2. (c) Property held by Rajesh in the name of his spouse and consideration paid out of known legal sources

Reason

Section 2(9)(A)(b)(iii) of the PBPT provides as under-

"benami transaction" means,-

(A) a transaction or an arrangement-

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by-

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual.

The options mentioned in the case (a), (b) and (d) are not valid and lawful since it comes within the meaning of the benami transaction under section 2(9) of the PBPT Act. As regards the option (c) is concerned, the property purchased by Rajesh in the name of his wife comes under the exempted category of section 2(9)(A)(b)(iii) of the PBPT Act provided the consideration is paid out of the know sources of the income

3. (b) Can be considered as an unlawful transaction as trading is indirectly done in the stock market by Mahesh, the Company Secretary, who has insider price-sensitive information.

Reason

As given in the case, Mahesh is the Company Secretary of BBC Ltd. He might be having certain price sensitive information from time to time, which is not known in the public domain. Mahesh being the KMP and insider, cannot directly do trading in the shares of BBC Ltd so indirectly routed the transactions through the friend of friend i.e. Raghu.

4. (d) Such offenses are cognizable & non-bailable but a person can be bailed subject to certain conditions.

Reason

Section 45(1) of the PMLA provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence under this Act shall be released on bail or on his own

bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) 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.

5. (c) Layering

Reason

There are three stages to a transaction of money-laundering:

- **Placement**: It is the first stage is, where the criminals place the proceeds of the crime into normal financial system.
- **Layering**: It is the second stage, where money introduced into the normal financial system is layered or spread into various transactions within the financial system so that any link with the origin of the wealth is lost.
- **Integration**: It is the third stage, where the benefit or proceeds of crime are available with the criminals as untainted money.

In the given case, the transactions done by JJPL, are termed as layering, since the crime money is being injected into the formal financial system which is layered, moved, or spread over various transactions in different accounts.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

Prohibition of the Benami Property Transactions Act 1988 (PBPT Act) is the applicable Act here. The general belief is that the provisions of the PBPT Act apply only to persons, trying to hide their properties and not to genuine properties acquired out of disclosed funds. But that is not true. Even a property acquired using disclosed funds in a genuine transaction may sometimes be treated as Benami.

"Benami Property" under Section 2(8) means any property, which is the subject matter of a Benami transaction and also includes the proceeds from such property.

Benami Property means property without a name. Here the person, who pays for the property does not buy it under his own name. The person, who finances the deal, is the real owner of the property.

Section 2(10) defines the meaning of benamidar, which means a person or a fictitious person, as the case may be, in whose name the property is transferred or held and includes a person who lends his name.

As per the provisions of Section 2(9) of the Act “Benami transaction” means-

(A) A transaction or arrangement

(a) where a property is transferred to, or held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person, who has provided or paid the consideration,

except when the property is held by-

(i) a Karta, or a member of a HUF, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the HUF.

(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint- owners in any

document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) A transaction or an arrangement in respect of property where the owner of the property is not aware of, or, denies knowledge of such ownership;

(D) A transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious.

Explanation.- For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,-

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii)the contract has been registered.

Any transaction where possession of any immovable property is taken as a part performance of a contract is not a Benami transaction if the contract is registered and consideration, as well as stamp duty, has been paid.

The property would include assets of any kind, whether movable or immovable, tangible or intangible and includes rights or interest as well as proceeds from the property.

In the above case study, in one of the cases, Subhash invested ₹ 1.50 Crores in a bank fixed deposit in the name of his married daughter, Mangala, who is a UK Resident, without her knowledge. Later during the course of inquiries by Tax officials, Mangala denied ownership of the said bank fixed deposit. Here, the transaction is Benami, in terms of section 2(9)(C), though the FD is generated using disclosed funds in a genuine transaction.

Answer 7:

(i) Money Laundering is not an independent crime in itself. It depends upon another crime, which is known as the "Predicate Offence". Every Scheduled Offence is a Predicate Offence.

Offences under Narcotic Drugs and Psychotropic Substances is a Scheduled Offence and as such a Predicate Offence too. As such secret drug dealings and then disguising the original source of money by Rajesh and JJPL is a Predicate offence.

In terms of Section 2(1)(y) of the PML, The Scheduled Offence means -

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or

(iii)the offences specified under Part C of the Schedule.

The commission of any offence, as specified in Part A and Part C of the Schedule of the PMLA will attract the provisions of the PMLA. Some of the Acts and offences, which may attract the PMLA, are enumerated herein below;

Part A enlists offences under 29 Acts. These are:

The Indian Penal Code, The Narcotic Drugs and Psychotropic Substances Act, 1985, The Explosive Substances Act,1908, The Unlawful Activities (Prevention) Act, 1967, The Arms Act, 1959, The Wild Life (Protection) Act, 1972, The Immoral Traffic (Prevention) Act, 1956, The Prevention of Corruption Act, 1988, The Explosives Act, 1884, The Antiquities and Arts Treasures Act, 1972, The Securities and Exchange Board of India Act, 1992, The Customs Act, 1962, The Bonded Labour System (Abolition) Act, 1976, The Child Labour (Prohibition and Regulation) Act, 1986, The Transplantation of Human Organs Act, 1994, The Juvenile Justice (Care and Protection of Children) Act, 2000, The Emigration Act, 1983, The Passports Act, 1967, The Foreigners Act, 1946, The Copyright Act, 1957, The Trade Marks Act, 1999, The Information Technology Act, 2000, The Biological Diversity Act, 2002, The Protection of Plant Varieties and Farmers Rights Act, 2001, The Environment Protection Act, 1986, The Water (Prevention

and Control of Pollution) Act, 1974, The Air (Prevention and Control of Pollution) Act, 1981, The Suppression of Unlawful, Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 and The Companies Act, 2013.

Part B offences (offence under the Customs Act), provided the value of the property involved is more than one crore rupees or more;

Part C: An offence which is the offence of cross border implications and is specified in Part A; or the offences against property under XVII of the IPC. The offence of willful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

The Schedule Office is called Predicate Offence and the occurrence of the same is a pre-requisite for initiating an investigation into the offence of money laundering.

(ii) Predicate offences are investigated by the agencies such as Police, Customs, SEBI, NCB, CBI, etc. under their respective Acts.

(iii) Following actions can be taken against the persons involved in Money Laundering:-

(a) Attachment of property under Section 5, seizure/ freezing of property, and records under Section 17 or Section 18. The property also includes property of any kind used in the commission of an offence under the PMLA or any of the scheduled offences.

(b) Persons found guilty of an offence of Money Laundering are punishable with imprisonment for a term which shall not be less than three years but may extend up to seven years and shall also be liable to fine [Section 4].

(c) When the scheduled offence committed is under the Narcotics and Psychotropic substances Act, 1985 the punishment shall be imprisonment for a term which shall not be less than three years but which may extend up to ten years and shall also be liable to fine.

(d) As per Section 19(1), the Director may by passing an order, arrest such persons and shall inform them of the grounds for such arrest.

These are the possible actions that can be taken against Rajesh, JJPL, or other concerned persons in the above case for their offences.

Answer 8:

(i) The following are the rights of Rajesh and his associates under section 18 of the Prevention of Money Laundering Act, 2002, being searched during the raid operations;

(a) Where an authority is about to search any person, he shall, if such person so requires, take such person within twenty-four hours to the nearest Gazetted Officer, superior in rank to him, or a Magistrate. [Section 18(3)]

(b) If the requisition is made, the authority shall not detain the person for more than twenty-four hours prior to taking him before the Gazetted Officer, superior in rank to him, or the Magistrate referred to in that subsection. [Section 18(4)]

(c) The Gazetted Officer or the Magistrate before whom any such person is brought shall if he sees no reasonable ground for search, forthwith discharge such person but otherwise shall direct that search be made. [Section 18(5)]

(d) Search shall be made in the presence of two or more persons. [(Section 18(6)]

(e) No female shall be searched by anyone except a female [(Section 19(8)]

(ii) The following are the rights of Rajesh during his arrest under section 19 of the Prevention of Money Laundering Act, 2002, in the case arrested:

(a) The Authorized Officer making an arrest shall, as soon as may be, inform the arrestee of the grounds for such arrest. [Section 19(1)]

(b) Every person so arrested shall, within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction. Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the special court or magistrate's court. [Section 19(3)]

CASE STUDY 34

Delight Business Solutions (DBS) was established by Mr. Madan Shukla, around 20 years back. DBS was constituted initially in form of a proprietorship concern and was later converted into a private limited company in which Mr. Shukla & Mrs. Mamta Shukla, wife of Mr. Madan Shukla, became its members. The company is famous for its high-performance desktop-based personnel computers, but as the Information Technology (IT) industry developed new techniques over the period; resultantly prices started declining and the big fat profits, which earlier, DBS used to earn, started eroding.

DBS was primarily dealing in computers, spares, and accessories thereto but due to change in situations, DBS entered into trading and repairs of laptops and started offering maintenance services to small and medium entities with respect to IT equipment and infrastructure, in form of Annual Maintenance Contract (AMC) at just ₹ 999 per equipment and per year with a plan called 'AMC@999'. 'AMC@999' made DBS famous among corporate houses. Since the price charged (₹ 999) was pretty much lesser than what others were charging and was even below the cost incurred by DBS. In a short span, DBS started getting contracts from larger clients and it became famous for its AMC deals. After few months, when DBS acquired significant market share, the price of AMC was raised from ₹ 999 to ₹ 1499 which was taken as an unfair move by the existing customers of DBS as it appeared that after acquiring such a significant position in the market, when the other players were wiped out, such a move was made by DBS.

In order to diversify, DBS, entered into two other sectors, one being information technologies enabled services (ITeS) in which it offered customized software, ranging from accounting packages to human resources solutions and business process outsource (BPO) services in form of a private company, 'DBS Consultancy Services Private Limited (DBSCS)'; and other being the development of real estate in form of the private company, 'DBS Realtors and Developers (DBSRD)'.

Ministry of Urban Local Bodies in one of its press conferences gave hint about Government's intention to remove prohibitions on Foreign Direct Investment (FDI) in the real estate sector. Various trade groups through trade associations reached to the government with their concerns relating to the adverse effect of such policy on domestic industry and competition and requested not to launch FDI policy in the real estate. Since elections were due in major states in a year or two to come, hence, Central Government, sent the matter for reference to Competition Commission to assess the validity of concerns shown by different trade groups and in order to give assurance to such trade groups that anything which is detrimental to their interests will not be turned-up. Competition Commission gave its opinion to the government regarding the prospective effect on competition but Central Government did not consider such advice or opinion of Competition Commission and said such change in FDI policy was an essential part of government plan.

The BPO business of DBSCS was not doing well. Hence, Mr. Shukla decided to wind-up the BPO business, but was concerned about the realization of huge investment done in building and furniture. The building was structured in such a way that it could not be converted into residential property and was situated in an industrial area too. Mr. Shukla consulted his legal advisor for identifying DBSCSs' eligibility for moving an application for initiation of insolvency process of DBSCS, to the adjudicating authority.

The first real estate project of DBSRD was a big hit because the government had announced a list of 100 cities that were selected for mission 'smart city' and the city in which DBSRD started its first project was one amongst them. All the apartments were booked in the first week of opening of bookings, after the advertisement. The cost of each apartment was ₹ 70 lakhs. The advance of ₹ 10 lakhs was collected from each of the allottees and the allotment letters were issued in their names. Agreements for sale for few apartments were still pending to be entered, and in the case of some, were pending for registration.

Mr. & Mrs. Shukla went to New Zealand for the holidays. There they met, Mr. Binni, a cousin of Mrs. Shukla, who got settled in Christ church, since, 1990, although an Indian origin and is in the business of manufacturing and trading of food and beverages. Presently, the business of Mr. Binni is flourishing and he planned to open a branch office in India, for which he asked Mr. Shukla to help him in identifying suitable property. Mr. and Mrs. Shukla converted Indian rupees worth USD 500,000 through an authorise dealer for the foreign tour and they had spent an amount equal to USD 450,000.

Mr. Shukla told Mr. Binni about his building in the BPO business for which Mr. Binni agreed and the same building was sold to him, after making certain changes in the structure of the building, for ₹ 3 crores. ₹ 1 crore was repatriated into India and the sale proceeds were deposited into the personal account of Mrs. Shukla and her mother equally. The remaining ₹ 2 crores were not repatriated into India and the same was shown as loan/advance given in the books of accounts of DBS.

With, ₹ 1 crore, which was deposited into Mrs. Shukla's and her mothers' accounts, a plot was purchased

and was registered in the name of Ms. Rinki (daughter of Mr. and Mrs. Shukla). Ms. Rinki received a notice from the office of the Deputy Commissioner of Income Tax (DCIT), to be present in his office and he himself initiated the inquiry. Based upon the re-presentation made by Ms. Rinki and documents furnished, she was held Benamidar, and a penalty was imposed on her. She wished to file an appeal against the said order from the office of DCIT.

MULTIPLE CHOICE QUESTIONS

1. Is charging ₹ 999 for plan AMC@999, can be considered a predatory price?
   (a) No, charging ₹ 999 for AMC can't be considered a predatory price.
   (b) Yes, at the discretion of the competition commission.
   (c) Yes, because the price charged is lesser than the other players in the market.
   (d) Yes, because the price charged is less than its cost as well.

2. DBSRD is in contravention of the provisions of the Real Estate (Regulation and Development) Act, 2016, with respect to:-
   I Advance or booking fees collected was more the 10%.
   II Advance or booking fees was collected without entering into a written agreement for sale.
   III In the case of some, written agreements for sale (referred to in point 2 above) were pending for registration.
   (a) I and II
   (b) II and III
   (c) I and III
   (d) All the points

3. If DBSCS furnish an application for the initiation of insolvency resolution process, then adjudicating authority shall within a period of _____ days from the date of receipt of application; either accept the application or reject the same; but in case of rejection, a notice to rectify the defects in his application, within a period of _____days from receipt of such notice shall be given.
   (a) 7, 7
   (b) 14, 7
   (c) 7, 14
   (d) 14, 14

4. Which of the following statements is true regarding the validity of inquiry against Ms. Rinki regarding benami transaction by the DCIT office?
   (a) DCIT can conduct an inquiry himself, without any approval.
   (b) DCIT can conduct an inquiry after intimation to the Approving Authority.
   (c) DCIT can conduct an inquiry with prior approval of the Approving Authority only.
   (d) No, DCIT has no authority to conduct any an inquiry, despite permission.

5. Mr. and Mrs. Shukla shall surrender unused/unspent foreign exchange within a period of days from the date of their return to India.
   (a) 60
   (b) 90
   (c) 120
   (d) 180

DESCRIPTIVE QUESTIONS

6. The legal advisor, while explaining the process and eligibility of DBSCS for making an application to the adjudicating authority for the initiation of the insolvency process, also explained to the directors, certain cases, where the insolvency process can't be initiated. In that context, please explain:-

   (i) Person who can't move the application of insolvency

   (ii) What shall be the information to be furnished along with the application by the corporate applicant?

7. (i) Can a person of Indian origin who is a resident outside India, buy immovable property in India?

   (ii) Proceeds from the sale of BPO business's building were not fully recovered and repatriated by Mr. Shukla, on behalf of DBSCS. Explain the legal duties of DBSCS under the Foreign Exchange Management Act, 1999.

8. (i) Whether the increase of price by DBS for AMC contract from ₹ 999 to ₹ 1499, can be constituted as abuse of dominance; Explain with reasons.

   (ii) Role of the Competition Commission is vital in order to ensure healthy competition in the market. In the present case, determine the legal validity of government action in terms of 'making reference to' & 'refusal to consider the opinion' furnished by the Competition Commission.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Yes, because the price charged is less than its cost as well.

Reason

According to explanation (b) attached to section 4(e) of the Competition Act, 2002, "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

In the given case, it is mentioned that the price charged ₹ 999 by the DBS was much lesser than others were charging and was even below the cost incurred by DBS. Therefore, it is treated as predatory price.

2. (d) All the points

Reason

Section 13(1) of the RERA provides that a promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

In the given case the DBSRD collected advance of ₹ 10 lakhs, while the cost of the flat was only ₹ 70 lakh, which is higher than 10%. Further it also accepted advance without written agreement for sale. Moreover, the agreements for sale for few apartments were still pending to be entered, and in the case of some, were pending for registration. Therefore, DBSRD has violated all points mentioned in the MCQ.

3. (b) 14, 7

Reason

Acceptance of application: Section 7(4) of the IBC provides that the Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

Rectification of defect in the application: The proviso to section 7(5) further states that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

4. (c) DCIT can conduct an inquiry with prior approval of the Approving Authority only.

Reason

Section 23(1) of the PBPT Act, the Initiating Officer, after obtaining prior approval of the Approving Authority, shall have power to conduct or cause to be conducted any inquiry or investigation in respect of any person, place, property, assets, documents, books of account or other documents, in respect of any other relevant matters under this Act.

5. (d) 180

Reason

Regulation 7 of the the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015 provides that a person being an individual resident in India shall surrender the received/realised/unspent/unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/ acquisition or date of his return to India, as the case may be.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

(i) As per section 11 of the Insolvency and Bankruptcy Code, 2016, the following persons shall not be entitled to make an application to initiate the corporate insolvency resolution process, namely:

(a) A corporate debtor undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process, or

(aa) A financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process, or

(b) A corporate debtor having completed corporate insolvency process twelve months preceding the date of making of the application, or

(ba) A corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application, or

(c) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making an application, or

(d) A corporate debtor in respect of whom a liquidation order has been made.

Explanation I: For purpose of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.
Explanation II: For the purposes of this section, it is clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

(ii) As per section 10(3) of the IBC, 2016, the corporate applicant shall, along with the application, furnish-

(a) The information relating to its books of account and such other documents for such period as may be specified;

(b) The information relating to the resolution proposed to be appointed as an interim resolution professional; and

(c) The special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving the filing of the application.

Answer 7:

(i) As per regulation 3 of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018,
An NRI or and OCI may -

(a) acquire immovable property in India other than agricultural land/ farm house/ plantation property:

Provided that the consideration, if any, for transfer, shall be made out of -
(i) funds received in India through banking channels by way of inward remittance from any place outside India or
(ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

Provided further that -
- no payment for any transfer of immovable property shall be made either by traveler's cheque or by foreign currency notes; or
- by any other mode other than those specifically permitted under this clause.

(b) acquire any immovable property in India other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013;

(c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;

(d) transfer any immovable property in India to a person resident in India;

(e) transfer any immovable property other than agricultural land/ farm house/ plantation property to an NRI or an OCI.

(ii) Section 8 of the Foreign Exchange Management Act, 1999, deals with realisation and repatriation of foreign exchange. It provides that, save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

RBI has specified the Foreign Exchange Management (Realisation, Repatriation, and Surrender of Foreign Exchange) Regulations, 2015, in this regard;

Regulation 3: Duty of persons to realise foreign exchange due
A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank, take all reasonable steps to realise and

repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -
(a) that the receipt by him of the whole or part of that foreign exchange is delayed; or
(b) that the foreign exchange ceases in whole or in part to be receivable by him.

Regulation 4. Manner of Repatriation:-
(1) On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and -

(a) sell it to an authorised person in India in exchange for rupees; or
(b) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
(c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

(2) A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

Regulation 5. Period for surrender of realised foreign exchange:-
A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person under clause (a) of sub-regulation (1) of regulation 4, within the period specified below:-

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

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

Hence, the DBSCS needs to realise, then repatriate, and then convert the foreign exchange, by making sale to authorise dealer within 90 days from the date of receipt.

Answer 8:

(i) As per explanation (a) to section 4(e) of the Competition Act 2002, "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.

Further, section 4(2)(a)(ii) says that there shall be an abuse of dominant position, if an enterprise or a group, directly or indirectly, imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or service.

Here, it is given in the case, that DBS acquired significant market share which appears that it was able to achieve a dominant position as aforesaid and the rise in price by DBS of AMC contracts from ₹ 999 to ₹ 1499 can be constituted as abuse of dominance as from the facts given in the case, it appears that DBS raised its prices after acquiring a dominant position in the relevant market, when the other players were wiped out from the market and where the customers were left with no choice but to opt for or continue taking the services of DBS.

(ii) Chapter VII of the Competition Act, 2002, deals with provisions on Competition Advocacy. It comprises only one section, which section 49. It reads as under-

The Central Government may, in formulating a policy on competition (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Govt, or the State Govt, as the case may be, which may thereafter take further action as it deems fit.

(2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government or the State Government, as the case may be in formulating such policy.

(3) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government or the State Government, as the case may, in formulating such policy.

Hence, the Central Government is legally correct in both of the aforesaid aspects i.e. 'making reference to' & 'refusal to consider the opinion' as furnished by the Competition Commission.

CASE STUDY 35

Mr. Naushad Ali is a managing director at Naushad Enterprises Private Limited (NEPL), registered under the Companies Act, 1956. NEPL was established around 60 years back in 1960, by the grandfather of Mr. Naushad Ali. Since then, 'Precision', is the most popular brand of NEPL. NEPL deals in different types of bearing balls exclusively. Precision is famous for conformance to specification and finishing. NEPL has made SOPs in all its domains, including procurement and supply of material; to ensure timely delivery of material and timely collection and payments of sale proceeds. NEPL has captured the maximum possible domestic market.

Apart from NEPL, there is another major player in the manufacturing of bearing balls, i.e. Aarti Steels Private Limited (ASPL). Since NEPL has been working profitably for many years; it has huge free realized reserves. NEPL with the use of such available reserves made a hostile takeover of ASPL, and resultantly became the largest manufacturer and supplier of bearing balls and gained a market share of approximately 80%. Gross assets situated in India of the combined entity, after such merger is ₹ 1800 crores and domestic turnover is ₹ 6500 crores.

Post-merger, the listed prices of bearing balls were increased by 40%. There is no major increase in prices of raw-material and labour charges. Sales dipped by 2-3%, but there are clear instructions from NEPL to all of its suppliers/stockists and even retailers that, they are not allowed to sell below such list price. If anyone in the distribution network is identified doing so, selling products at a price, below the list price, will be blacklisted.

In recent times, NEPL is on the drive to diversify its business. NEPL entered into the business of production & trading of designer wood items and also entered into the business of the real estate.

NEPL purchased two pieces of land, out of funds with the company and one of the plots was registered in the name of Mrs. Wahida, mother of Mr. Naushad Ali. On the plot which was registered in the name of NEPL, it developed a real estate project on it by constructing 40 flats of 120 square meters each. The sale price of each flat was fixed at 40 lakhs, whereas the estimated cost of each flat is 32 lakhs; which will result in a total project value of ₹ 16 crores and an estimated total project cost of ₹ 12.80 crores. Real Estate Regulatory Authority also estimated the same. NEPL failed to register the project with authority under the Real Estate (Regulation & Development) Act 2016 because it was discovered that the information provided/furnished was largely false. NEPL approached Satya Real Estate Advisors, a registered real estate agent, to deal in the NEPL housing project, but Satya Real Estate Advisors denied the offer stating that the project was not registered with the authority. The project remained in a low profile because NEPL failed to deliver the flats on the committed date. Due to such experience, NEPL decided not to engage in the real estate business in the future.

Another piece of land, which was registered in the name of Mrs. Wahida was sold to Mr. Danish Akhtar for ₹ 2.25 crores (2 crores through cheque and balance in cash) and the proceeds of the same were deposited into the personnel account of Mrs. Wahida. Mrs. Wahida converted the entire proceeds (except for keeping ₹ 5 lakhs cash with her) into US$ 300,000 without any intimation/approval and remitted the same to his grandson, Mr. Amin, as a gift on his 25th birthday, who is staying in the USA with his wife, Ms. Shazia, and 2 years older son, Azhar.

In the meantime, when demonetization was announced by the government, she deposited the said five lakhs equally into the personal savings accounts of her domestic helper, gardener, gate-keeper, and driver respectively, as their salary in advance for the upcoming 12 months, to which all the aforesaid persons happily agreed.

NEPL is dealing in a wide range of designer wood items for home decoration and personal use with brand-name 'Décor' and 'Wellness Mantra'. In order to ensure quality, NEPL used to import, teak wood logs, from Indonesia and Nigeria. Recently on 10th October 2019, 27,618 CBM of teak wood logs were imported against the letter of credit from Indonesia at a price of ₹ 68.75 per CBM, totaling to ₹ 24,23,448, on which following levies were charged and the same was duly paid.

Particulars	Amount (in ₹)
Assessable Value	24,23,448.00
Add: Basic Custom Duty @ 5% (HSN code 44034910)	1,21,172.40
Add: Social Welfare Surcharge @10% of BCD	12,117.24
	25,56,737.64
Add: IGST @ 18%	4,60,212.78
	30,16,950.42

NEPL became the country-wide largest manufacturer of wooden muscle rollers (massager) and wooden wall clocks. NEPL captured a reasonable size of the domestic market in the business of wooden articles. NEPL is now looking to explore the global market. Recently, NEPL, shipped its first export order on 5th May 2020, of 9,800 muscle roller massagers (export duty was exempt on it) at ₹ 416.63 each, totaling to ₹ 40,82,974 to Australia.

MULTIPLE CHOICE QUESTIONS

1. Whether a hostile takeover of ASPL by NEPL, will result in a combination as per the provisions of the Competition Act, 2002?
   (a) For determining combination, there is no criteria of assets and turnover
   (b) For determining combination, the assets should be more than ₹ 2000 crores
   (c) For determining combination, the turnover should be more than ₹ 8000 crores
   (d) For determining combination, the assets should be more than 1000 crores rupees and turnover should be more than ₹ 3000 crores

2. What shall be the maximum penalty that could be levied upon NEPL, for furnishing false information in an application to Real Estate Regulatory Authority?
   (a) ₹ 80 Lakhs
   (b) ₹ 64 Lakhs
   (c) ₹ 160 Lakhs
   (d) ₹ 128 Lakhs

3. Who will be considered as the beneficial owner under the Prevention of Money Laundering Act 2002 with respect to advance salary paid by Mrs. Wahida to her employees/caretakers?
   (a) Mr. Naushad Ali
   (b) Mrs. Wahida
   (c) Domestic help, Gardener, Gate-keeper, and Driver
   (d) Both (a) and (b) above

4. Who shall be considered as the benamidar in respect of property bought by NEPL out of the company's funds, but registered in name of Mrs. Wahida?
   (a) Mr. Naushad Ali
   (b) Mrs. Wahida
   (c) Mr. Danish Akhtar
   (d) NEPL

5. NEPL shall realize and repatriate, the full value of export within a period of:-
   (a) 15 months from the date of export
   (b) 6 months from the date of receipt of material by an overseas importer
   (c) 9 months from the date of export
   (d) 9 months from the date of receipt of material by an overseas importer

DESCRIPTIVE QUESTIONS

6. (i) Identify the incidence of contravention of provisions of the Foreign Exchange Management Act, 1999 and regulations issued thereunder, from the given case study.

   (ii) State the amount of penalty that could be levied in case of the contravention identified.

   (iii) Whether the aforesaid contravention is compoundable in nature, if yes, state relevant provisions?

7. Whether any act conducted by NEPL, is prohibited under the provisions of the Competition Act, 2002? Please state the circumstances.

8. What shall be the quantum of monetary penalty that can be imposed on NEPL, for not getting its project registered with the Real Estate Regulatory Authority?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) For determining combination, the assets should be more than 1000 crores rupees and turnover should be more than ₹ 3000 crores

   Reason

   Section 5 (c) of the Competition Act, 2002 provides that the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if

   any merger or amalgamation in which-

   (i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,-

   (A) either in India, the assets of the value of more than rupees 1000 crores or turnover more than rupees 3000 crores.

In the given case, the gross assets situated in India of the combined entity, after such merger is ₹ 1800 crores and domestic turnover is ₹ 6500 crores.

2. (b) ₹ 64 Lakhs

Reason

Section 60 of the RERA provides that if any promoter provides false information or contravenes the provisions of section 4, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project, as determined by the Authority.

In the given case, the estimated total project cost is ₹ 12.80 crores, so 5% of it comes to ₹ 64 lakhs.

3. (c) Domestic help, Gardener, Gate-keeper, and Driver

Reason

Section 2(1)(fa) of the PML provides that "beneficial owner" means an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person.

In the given case, when demonetization was announced by the Government, Wahida, deposited 5 lakh rupees in the personal savings account of her domestic helpers. These helpers ultimately owns the money, transactions by Wahida has been done on behalf of these person, these persons shall be termed as beneficial owner.

4. (b) Mrs. Wahida

Reason

Section 2(10) of the PBPT Act, "benamidar" means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

In the given case, NEPL purchased two pieces of land, out of funds with the company and one of the plots was registered in the name of Mrs. Wahida, mother of Mr. Naushad Ali. Therefore, the name of Wahida is termed as benamidar since the property is transferred in her name or say she has lent her name for purchase of property in her name,

5. (a) 15 months from the date of export

Reason

As per para 9(1) of Foreign Exchange Management (export of goods and services) Regulation, 2015; the amount representing the full export value of goods exported shall be realized and repatriated to India within 9 (Nine) months from the date of export normally.

But vide RBI/2019-20/206 - A. P. (DIR Series) Circular No. 27 dated 1st April 2020, it has been decided, (in consultation with Government of India - in response to representations from Exporters Trade bodies to extend the period of realisation of export proceeds in view of the outbreak of pandemic COVID-19), to increase the present period of realization and repatriation to India of the amount representing the full export value of goods or software or services exported, from nine months to fifteen months from the date of export, for the exports made up to or on July 31, 2020.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

(i) As per rule 5 of Foreign Exchange Management (Current Account Transactions) Rules, 2000 read with liberalized remittance scheme; for purpose of transactions mentioned in Schedule III, resident individuals are permitted to remit overseas up to USD 250,000 per financial year. Such remittances are permitted to be used for conducting permissible current or capital account transactions and subsumes gift in foreign currency made to any NRI or Persons of Indian Origin ("PIO"). Any additional amount in excess of the said limit requires prior approval of RBI.

Hence, Mrs. Wahida could remit a maximum of USD 250,000 as a gift to his grandson abroad. But Mrs. Wahida remitted USD 300,000 without any intimation/approval, which is in contravention to FEMA provisions.

(ii) As per section 13 of Foreign Exchange Management Act 1999, if any person contravenes any provision of this act, or contravenes any rule, regulation, notification, direction, or order issued in exercise of the powers under this act, or contravenes any condition subject to which an authorization is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not

quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

With reference to schedule III of the Foreign Exchange Management (Current Account Transactions) Regulations 2000, in the present case, the amount involved in the contravention is USD 50,000 because the amount permissible by Schedule III read with LRS is USD 250,000. Hence, amount of penalty that could be levied will be an amount equal to USD 150,000 (i.e. 3 times of USD 50,000).

(iii)Yes, contravention committed is compoundable in nature.

Section 15(1) of the Foreign Exchange Management Act 1999 provides that any contravention under section 13 may on an application, made by the person committing such contravention, compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

Sub-section (2) of section 15 states that where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded. [Section 15(2)].

Answer 7:

There are three major acts conducted by NEPL, in relation to the Competition Act, 2002, lets' study them one by one, as follows:-

Entering into combination with ASPL - As per section 6 of the Competition Act, 2002, no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

In the given case, NEPL after acquiring ASPL got a significant market share and increased the prices also, likely to cause an appreciable adverse effect on the competition in India within the relevant market, hence, such a combination can even be considered as void under the act.

Increase in price without much/significant increase in raw material prices and labour charges - Post hostile take-over of ASPL, since, NEPL got dominance over the market, hence, it increased the prices by 40%.

Section 4(1) of the Competition Act, 2002 provides that no enterprise or group shall abuse its dominant position. Its sub-section (2)(a) states that there shall be an abuse of dominant position under sub-section (1), if an enterprise or a group, directly or indirectly, imposes unfair or discriminatory (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service.

Such increase in price by NEPL will be considered as abuse of dominance under sub-clause (ii) to clause (a) to sub-section 2 of section 4 of the Competition Act, 2002.

Note - Dominance is not prohibited, prohibition is on abuse of dominance.

Resale Price Maintenance - As per explanation(e) to section 3(4) - "resale price maintenance" includes any agreement to sell goods on the condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Further, as per section 3(4) read with section 3(1) of the Competition Act 2002, such resale price maintenance agreement is prohibited.

Hence, the act of NEPL of issuing clear instructions to all of its suppliers/ stockists and even retailers that, they are not allowed to sell below such list price is prohibited under the Competition Act, 2002.

Note - The clause, 'who is selling product at price below the list price, will be black listed' is of no importance.

Answer 8:

Section 59 of The Real Estate (Regulation and Development) Act, 2016 deals with punishment for non-registration under section 3. It reads as under:

(1) If any promoter contravenes the provisions of section 3, he shall be liable to a penalty which may extend up to ten percent of the estimated cost of the real estate project as determined by the Authority.

(2) If any promoter does not comply with the orders, decisions, or directions issued under sub-section (1) or

continues to violate the provisions of section 3, he shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten percent of the estimated cost of the real estate project, or with both.

So, in the present case, in terms of section 59(1), the promoter shall be liable to a penalty which may extend upto 10% of the estimated cost i.e. ₹ 12.80 crores can be imposed on NEPL, which amounts to ₹ 1.28 crores.

Morevoer, in terms of section 59(2), if the NEPL do not comply the provisions of section 3(1) it shall be punishable with imprisonment for a term which may extend up to 3 years OR with fine which may extend upto a further 10% of the estimated cost of the real estate project i.e. ₹ 1.28 crores, or with both.

CASE STUDY 36

Mr. Amitabh Dutta was a professor who took voluntary retirement in the year 2008, from the College of Engineering, Nagpur. In his family, he has his wife, Rukmani, and three sons. His elder son's name is Dhruv who is a banker and an NRI residing in the Canada for last five years and his wife's name is Shreya. Mr. Amitabh's second son name is Arav who is an engineer by profession and well settled in Australia with his wife, Manju. Mr. Amitabh's youngest son's name is Asmith who recently got married and his wife's name is Saniya and he is living in India with Mr. Amitabh Dutta.

After voluntary retirement, Mr. Amitabh Dutta established a company called Krishna Industries Limited, in the year 2009. His son, Asmith, daughter in law, Saniya, and wife, Rukmani, became the directors of the company. The company had raised its capital by issuing shares in 2015. It had issued 10 million shares at the rate of ₹ 100 per share. An investor, Mr. John Tailor, who is an NRI, invested in the company's shares by purchasing 1,000 shares of the company.

Mr. Dhruv Dutta visited India, in the year 2018. He had heard about many upcoming real estate projects in Mumbai and wanted to invest in a newly launched township in Thane, Mumbai. After a few searches for properties in that area, he and his wife thought to invest in a project called, "Riveria Condename", which is proposed to be built in an area of around 2000 square metres. After seeing the model flat, they finally decided to buy a 3BHK flat at ₹ 3 crores. The builder demanded ₹ 50 Lakh as advance payment. But after negotiation, Mr. Dhruv paid ₹ 40 lakhs to the promoters, from his FCNR account, as advance prior to the agreement of sale. The date of completion of the project was June 2021. The remaining payment was to be made according to the completion of the slabs. After six months, the promoters were in shortage of funds. They decided to transfer their majority rights in the project to another company called, Z-One Construction Company. They held a meeting of 1/4th of the allottees and obtained written permission from the allottees present in the meeting for the said transfer.

Mr. Amitabh Dutta had a 3000 sq. feet plot in the posh area of Malabar Hills, Mumbai. The adjoining bungalow belonged to the U.A.E Embassy. Mr. Amitabh Dutta's plot was sea-facing, so the ambassador of U.A.E wanted to purchase that plot. After a few talks with Mr. Dutta, the deal was finalised at whooping ₹ 25 crores.

Krishna Industries Limited has generated huge profits since 2014. The company's shares are also performing well in the share market and generating huge profits for the company. So, in the general meeting held on 2nd September 2018, Mr. Amitabh Dutta declared a great amount of dividend on the shares. Mr. Amitabh Dutta also decided to gift two of his self-acquired farm houses, to his sons, Mr. Dhruv and Mr. Arav. Both the sons were so happy to receive such a gift from their father. After sometime, Mr. Dhruv came to know that his cousin is selling a European style villa in Canada. Mr. Dhruv wanted to purchase that villa. Mr. Dhruv came to know from his cousin that after selling this villa, he will purchase some property in India. So, Mr. Dhruv told his cousin that he will gift him his farm house in India, and in return, he will pay the differential amount of the property to his cousin in Canada. Mr. Dhruv's cousin liked the offer and finally agreed to it.

Mr. Amitabh and his wife Mrs. Rukmani decided to go on a trip to a foreign destination. They consulted their travel agent. Their travel agent suggested many plans. After going through all the plans and trip details, Mr. Amitabh and Mrs. Rukmani decided to go on a European tour. They took USD 5,000 in cash along with them for their expenditure. They spent around USD 3,500, on their shopping, hotels bills, and dining. Out of the total cash carried by them, USD 1,500 was left unspent with them. They deposited this USD 1,500, in their FCNR account.

Arav Dutta who is an Engineer by profession wanted to start an industry of his own in India. He has a plan to build an industry for manufacturing switchgears near Gorakhpur. So, he visited India, on 21st March 2019 along with his wife and children and with one of his friends, Mr. Alex Johnson, who had heard a lot about India, from Mr. Arav and his wife. When they all visited India, Mr. Alex wanted to see the Taj Mahal and he got so much impressed by the beauty of the Taj Mahal and Mughal Architecture that he decided to extend his stay in India for 3-4 months in order to explore more about Indian culture and heritage. To support his stay in India, he required money, so he decided to open an NRO savings bank account with the Nationalised bank. He went back to his country on 27th September 2019. Mr. Arav, with his brother, Mr. Asmith, went to see some properties around Gorakhpur. After a few days, they finalised one property. The cost of the plot was ₹ 50 Lacs. Mr. Arav paid ₹ 5 lacs as earnest money through a cheque from his NRO account. After a few days, an agreement to sell was signed between both parties. The remaining amount, Mr. Arav paid through two cheques. On 12th May 2020, the property was finally registered in Mr. Arav's name. Now the next phase was of construction and buying and install plant and machinery. For this, Mr.

Arav required a capital of ₹ 4 crores. So he decided to take the amount from his father, Mr. Amitabh, as he was short of ₹ 1 crore. He had a discussion with his father and took a loan of ₹ 1 crore from him. He decided to pay the entire loan amount to his father in the next two years. As planned, the construction of the industry started on time and finally, it got inaugurated on 19th September 2020.

MULTIPLE CHOICE QUESTIONS

1. As per the provisions of the Foreign Exchange Management Act, 1999, Mr. Alex Johnson is a
   (a) Person resident in India for both the financial years 2019-20 and 2020-21.
   (b) Person resident in India for the financial year 2019-20 only.
   (c) Person resident outside India for the financial year 2020-21.
   (d) Person resident in India for the financial year 2020-21 only.

2. What shall be the maximum amount of advance as per provision of applicable laws that can be charged/paid in case of 3BHK flat booked Mr. Dhruv?
   (a) Twenty lakhs rupees
   (b) Thirty lakhs rupees
   (c) Forty lakhs rupees
   (d) Fifty lakhs rupees

3. The promoters of Riveria Condename transferred their majority rights to Z-one Construction Company. Has the company complied with the provisions of the relevant Act, before transferring its rights to another company? Choose the correct statement.
   (a) The company has complied with the provisions, as written consent was taken from the allottees as required.
   (b) The company is required to take prior written consent of two-third of allottees and approval from the authority also.
   (c) Since the project is in the construction stage, the promoters can sell their rights to any other company as required.
   (d) It depends totally on the sole discretion of the appropriate Government to grant permission to the promoters for transferring their rights to another company.

4. The U.A.E. Embassy bought the plot from Mr. Dutta at ₹ 25 crores. Whether a Foreign Embassy eligible under the provisions of FEMA to buy a property in India?
   (a) After acquiring permission from the Reserve Bank of India, the Foreign Embassy can buy the property in India.
   (b) After acquiring permission from the concerned State Government, the Foreign Embassy can buy the property in India.
   (c) After getting permission from the Ministry of External Affairs, the Foreign Embassy can buy the property in India.
   (d) After getting permission from the Reserve Bank of India, the Foreign Embassy can only acquire the property on lease for a maximum of 10 years.

5. The loan is taken by Mr. Arav from his father, Mr. Amitabh, is credited to his NRO account. Is there any duration prescribed, within which the said loan is to be paid, and mode of its payment?
   (a) The loan should be paid within three years and it can be paid through inward remittance through normal banking channels or by debit through his NRO account.
   (b) The loan should be paid within three years and it can be paid through inward remittance via normal banking channel or by debit through his NRE or NRO account.
   (c) The loan should be paid within one year and can be paid through inward remittance via normal banking channel or by debit from NRE, NRO, or FCNR account.
   (d) As it is not taken from any financial institutions, there is no time limit for payment of the loan and it can be paid through inward remittance via normal banking channel or by debit from NRE, NRO, or FCNR account.

DESCRIPTIVE QUESTIONS

6. (i) Mr. Amitabh Dutta gifted his self-acquired farm houses, to both his sons Mr. Dhruv and Mr. Arav, living abroad.

   (ii) Mr. Dhruv gifted the farm house which he received from his father to his cousin living in Canada and paid him the differential amount of the property situated in Canada.

   Examine the legal status of both the above transactions as per the provisions of FEMA?

7. Mr. Amitabh Dutta's sons, Mr. Arav and Mr. Dhruv are living abroad. Can Mr. Amitabh Dutta make a remittance of ₹ 50 lacs each to both his NRI sons by way of crossed cheque/ electronic transfer for their maintenance abroad? Explain. (Presume 1 USD = ₹ 70)

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) Person resident outside India for the financial year 2020-21.

Reason

Section 2(v) of the FEMA provides the definition of 'Person resident in India', which reads as under:

"person resident in India" means-

(i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include-

(A) a person who has gone out of India or who stays outside India, in either case-

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than-

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

Section 2(w) "person resident outside India" means a person who is not resident in India.

For 2019-20: In the given Alex came in India on 21.3.2019. So, in the preceding financial year i.e. for the FY 2018-19 he stayed in India for 11 days. So, for the FY 2019-20, he is Person resident outside India

For 2020-21: Alex he left India on 27.9.2019 which means he remained in India in the preceding FY 2019-20 for 179 days only (form 01.04.2019 to 26.09.2019) for 179 days, which is less than 182 days. Therefore for 2020-21, Alex is "Person resident outside India"

2. (b) Thirty lakhs rupees

Reason

Section 13(1) of RERA provides that a promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

In the given case, since the cost of flat is 3 crores rupees, so the 10% advance comes to 30 lakh rupees only.

3. (b) The company is required to take prior written consent of two-third of allottees and approval from the authority also.

Reason

Section 15(1) of RERA provides that the promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority.

4. (c) After getting permission from the Ministry of External Affairs, the Foreign Embassy can buy the property in India.

Reason

Regulation 5 of the FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018. provides that a Foreign Embassy/ Diplomat/ Consulate General may purchase/ sell immovable property in India other than agricultural land/ plantation property/ farm house provided (i) clearance from Government of India, Ministry of External Affairs is obtained for such purchase/ sale, and (ii) the consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through banking channels.

5. (c) The loan should be paid within one year and can be paid through inward remittance via normal banking channel or by debit from NRE, NRO, or FCNR account.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

(i) As per regulation 3 (b) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 an NRI or an OCI may acquire any immovable property in India, other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or an OCI who in any case is a relative as defined in section 2(77) of the Companies Act, 2013.

Further regulation 3 (c) specifies the cases wherein through inheritance an NRI or an OCI can acquire the immovable property in India.

Mr. Dhruv and Mr. Arav are both NRIs. Hence, Mr. Amitabh Dutta cannot gift farm house to them, as it is prohibited under the provisions of FEMA.

(ii) As per regulation 3 (b) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018

An NRI or an OCI may transfer any immovable property in India to a person resident in India;

An NRI or an OCI may transfer any immovable property other than agricultural land or plantation property or farm house to an NRI or an OCI. In case the transfer is by way of gift the transferee should be a relative as defined in section 2(77) of the Companies Act, 2013.

Firstly, as mentioned above, an NRI cannot transfer any agricultural land, farm house, or plantation property to another NRI or OCI. Secondly, an NRI, can by way of gift, transfer immovable property to his relative mentioned under section 2(77) of the Companies Act, 2013. According to the Companies Act, 2013, cousin is not covered under the definition of relative. Hence, the transfer of farm house by Mr. Dhruv to his cousin is invalid and prohibited under the provisions of FEMA, 1999.

Answer 7:

A resident individual can remit to an NRI/PIO who is a close relative of the resident individual [relative' as defined in Section 2(77) of the Companies Act, 2013] by way of crossed cheque/electronic transfer. The amount should be credited to the Non-Resident (Ordinary) Rupee Account (NRO) a/c of the NRI / PIO and credit of such amount may be treated as an eligible credit to NRO a/c. The amount should be within the overall limit of USD 250,000 per financial year as permitted under the LRS for a resident individual. It would be the responsibility of the resident individual to ensure that the amount being remitted is under the LRS and all the remittances made by the said individual during the financial year including the amount remitted for maintenance have not exceeded the limit prescribed under the LRS.

Hence, remittance of ₹ 50 lacs each to both his NRI sons will be considered valid according to the provisions of FEMA if Mr. Amitabh Dutta has not remitted any amount under LRS, in that particular financial year, then it is under the prescribed limit. If in any case, he has transferred any amount, then that amount will also be considered including this amount remitted. So, in the above-mentioned case, the amount to be remitted to both his sons is within the limit prescribed under LRS.

CASE STUDY 37

Mr. Rajath and his two sons, Mr. Lokesh and Mr. Ramesh are the promoters of Rajath Beverages Limited (RBL). Rajath is the Chief Managing Director (CMD) of RBL. Lokesh looks after finance and marketing; while Ramesh takes care of production and human resources.

The production unit is located in Patna, Bihar. The business of RBL is manufacturing and selling mineral water. The company was formed with a small investment of Rs. 25 Lacs initially as a private limited company, however, later converted into an unlisted limited liability company. The promoters, through their hard work and business competence, ensured that RBL is profitable.

Lokesh is ambitious as well as a shrewd businessman. He always tried to beat the competition through flexibility in the pricing of his products. Sometimes he even sold some of the products at prices below the costs. He always looked for new avenues for business development, diversification, and expansion, for which Ramesh ably assisted him by providing him with the required feasibility reports, analysis, and technical information.

Years passed. The board of directors of RBL decided to go for public issue and listing of its equity shares, largely for expansion, initially with setting up a new large-scale mango juice preparation plant. The public offer was a great success and the required shares were duly allotted.

A new large-scale mango juice manufacturing plant was established in Patna, located next to the existing mineral water unit. The very initial year of operation was just breakeven. However unfortunately the second year of operation turned out to be negative for the Mango Juice unit due to bad monsoons and bad weather. There was a scarcity in the supply of mangoes, mango pulp, and some other basic raw materials required for the production of mango juice during the year 2017 in Bihar. Consequently, all the mango juice manufacturing units in Bihar, through their trade association, entered into an understanding for price-fixing with the sole purpose of defeating competition during the time of scarcity. However, the said understanding was not in writing and also not intended to be enforced by legal proceedings.

In due course of time, RBL entered into a joint venture agreement with Raman Pulp Private Limited (RPPL) of Punjab to ensure a continuous supply of mango pulp and some other raw materials to its mango juice manufacturing unit. With this JV and some other continuous supplies arrangements, RBL could gradually reach an advantageous position in Bihar for local sales of Mango Juice within the State. Production and sales of RBL increased by more than 10 times within a short period of time.

RBL also entered into various distribution agreements with different retail distributors within the state of Bihar to sell its products only in the area exclusively identified or allocated to each of them. Different agreements relating to prices, quantities, bids, and market sharing with the competitors and other non-competing entities were also entered into by RBL.

RBL enhanced its production efficiency, introduced various cost-saving measures, and could substantially increase its market share in the sale of its products over a period of time. Many of the bankers, financial institutions, and potential investors approached and offer further financial assistance/investment. With all the productive measures, RBL could achieve strength position in the Bihar market to operate independently of competitive forces. RBL soon also diversified into other segments of businesses in beverages.

However, the continuing business competition also resulted in the Commission receiving formal information from one of the Trade Associations in Bihar that there is an abuse of dominance by RBL by contravening various provisions of the relevant law. The Commission initiated an inquiry and was of the opinion that there exists a prima facie case and directed the Director General (DG) to cause an investigation to be made into the matter and report the findings to the Commission.

After due investigation, the DG submitted his report to the Commission within the specified period. However, the allegations against RBL of the contravention of the law could not be substantiated during an investigation and found to be mainly because of business competition. The report of the DG recommended that, since there is no appreciable adverse effect on competition; hence there is no contravention.

The Commission forwarded copies of the report to both parties. After due consideration of the objections and suggestions, the Commission agreed with the recommendations of the DG, closed the matter, and passed the appropriate orders.

MULTIPLE CHOICE QUESTIONS

1. Board of Directors of RBL decided to go for public issue and listing of its equity shares, largely for business expansion, initially with setting up a new large-scale mango juice preparation plant. In the context of shares, which one of the following statements is correct under the Competition Act, 2002?

(a) Shares can't be considered as "goods" because nothing has to do with manufacturing, processing, or mining.
(b) Shares shall be considered as "goods" only if fully paid up.
(c) Shares shall be considered as "goods" after the application made for shares since application monies are paid for the acquisition of shares.
(d) Shares shall be considered as "goods" after allotment.

2. RBL also entered into a joint venture agreement with Raman Pulp Private Limited (RPPL) of Punjab to ensure the continuous supply of mango pulp and some other raw materials to its mango juice manufacturing unit. A Joint Venture agreement between RBL and RPPL is
(a) Anti-competitive, since resulted in an increased turnover for one company, as against others
(b) Not to be considered anti-competitive, since it enhanced the production efficiency of RBL
(c) Anti-competitive, since RBL could reach an advantageous position in Bihar because of this Agreement
(d) Void-ab-initio, since resulted in more sales to RBL as compared to other companies in Bihar.

3. The continuing business competition also resulted in the Commission receiving formal information from one of the Trade Associations in Bihar that there is an abuse of dominance by RBL by contravening various provisions of the relevant law. The composition of the said Commission (which received the formal information hereinabove), as per the relevant law shall be:
(a) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the State Government.
(b) The Commission shall consist of a Commissioner and not less than two and not more than six other Members to be appointed by the Central Government.
(c) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.
(d) The Commission shall consist of a Chairperson and not less than two and not more than eight Members to be appointed by the Central Government.

4. All the mango juice manufacturing units in Bihar, through their trade association, entered into an understanding for price-fixing with the sole purpose of defeating competition during the time of scarcity. However, the said understanding was not in writing and also not intended to be enforced by legal proceedings. The oral understanding entered into by the trade association of Bihar in the aforesaid case is;
(a) Not an agreement, because not intended to be enforced by legal proceedings.
(b) An arrangement but not an agreement
(c) A valid Agreement and shall be presumed to have an appreciable adverse effect on competition.
(d) A valid Agreement, but only if all the parties involved therein confirm it in writing.

5. Lokesh tried to beat the competition sometimes even by selling some of the products at prices lesser than costs. The sale of goods or provision of services, at a price below the cost, as may be determined by the regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors termed as:
(a) Monopolistic price
(b) Minimum Retail Price (MRP)
(c) Eliminatory Price
(d) Predatory Price

DESCRIPTIVE QUESTIONS

6. "An enterprise has the legal right to grow its business and achieve the position of strength to the maximum extent possible unless such position has been intentionally exploited to gain undue advantages".

Analyze the above statement in the context of the given case (with all the productive measures, RBL could achieve the position of strength in the Bihar market to operate independently of competitive forces) with reference to the provisions of the relevant law in India, including the factors which the Commission shall consider in order to determine 'is there any dominance or abuse thereof'.

7. The Commission initiated an inquiry and was of the opinion that there exists a prima facie case and directed the Director-General to cause an investigation to be made into the matter and report the findings to the Commission.

(i) Instead of any directions by the Commission, is there any possibility that Director-General Suo-moto initiates an investigation in the above case under any of the provisions of the relevant Indian law?

(ii) Imagine in the aforesaid case, the Commission passes an order directing the division of the enterprise, RBL. "The Order of the Commission may provide for any or all the matters on a division of the enterprise enjoying the position of strength as stated under the law". Explain the provisions of the relevant Law on what are the matters that may be provided for in the Order?

(iii) The Articles of Association of RBL provides that the Managing Director and the Directors are entitled to claim compensation (to the extent mentioned therein) in case they cease to hold their office(s) in consequence of the division of enterprise for any reasons. Is Ramesh, one of the directors of RBL, on cessation of his office entitled to claim compensation, because of the position stated in question (ii) above i.e. Commission passing an order for division of enterprise?

8. In the given case, RBL has entered into various types of agreements with various entities. "Any agreement at different stages or levels of the production chain in different markets for trade in goods or provision of services shall be void if it causes or is likely to cause an appreciable adverse effect on competition in India". State and explain five such agreements.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Shares shall be considered as "goods" after allotment.

Reason

As per Section 2(i)(B) of the Competition Act, 2002, "goods" means goods as defined in the Sale of Goods Act, 1930 and includes debentures, stocks and shares after allotment.

2. (b) Not to be considered anti-competitive, since it enhanced the production efficiency of RBL

Reason

The proviso to section 3(3) of the Competition Act, 2002 provides that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

3. (c) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.

Reason

Section 8(1) of the Competition Act, 2002 provides that the Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.

4. (c) A valid Agreement

Reason

Section 3(3) of the Competition Act, 2002 provides that any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding

shall be presumed to have an appreciable adverse effect on competition.

In the given case, some of the manufacturing units have entered into oral understanding with trade association for price fixing, which in terms of section 3(3)(a), shall be presumed to have an appreciable adverse effect on competition. It is immaterial, that it was an oral understanding. As per the contract laws, the contract can be in oral or written and both are valid, although the oral agreements are difficult to prove. Further the word 'understanding' shall be treated as oral agreements. So, it shall be treated as a valid agreement and such agreement shall be presumed to have an appreciable adverse effect on competition.

5. (d) Predatory Price

Reason

According to Explanation (b) to section 4(2)(e) of the Competition Act, 2002, "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

The statement "An enterprise has the legal right to grow its business and achieve the position of strength to the maximum extent possible unless such position has been exploited to gain undue advantages", simply signifies that 'Dominance is not prohibited, what prohibited is its' abuse'.

Sub-section (1) to section 4 of the Competition Act, 2002 (which is considered to be back-bone and principle component of competition law in India; (here-in-after referred to as the act) expressly says 'No enterprise or group shall abuse its dominant position'.

As per explanation (a) to section 4(2)(e) of the Act "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.

Further as per sub-section 2 to section 4 of the Act, there shall be "abuse of dominant position" if an enterprise or group;

(a) directly or indirectly, imposes unfair or discriminatory (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or services

(b) limits or restricts (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access in any manner or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market/s.

In the present case, mere achieving of the position of strength in the Bihar market by RBL to operate independently of competitive forces is not prohibited under the Act.

Abuse of a dominant position is prohibited because it impedes fair competition between firms, exploits consumers, and makes it difficult for the other players to compete with the dominant undertaking on merit. Hence the Commission, who is duty-bound under section 18 of the Act to eliminate practices having an adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India, can conduct the inquiry under section 19 of the act into any alleged contravention of the provisions contained in sub-section (1) of section 4 (regarding the prohibition on abuse of dominance) of the act.

For the purpose of determining whether an enterprise enjoys a dominant position or not under section 4, the Commission shall have due regard to all or any of the following factors enumerated by section 19 (4) of the act;

(a) Market Share of the enterprise;

(b) Size and Resource of the enterprise;

(c) Size and importance of the competitors;

(d) Economic power of the enterprise including commercial advantages over competitors;

(e) Vertical integration of the enterprises or sale or service network of such enterprises;

(f) Dependence of consumers on the enterprise;

(g) Monopoly or dominant position whether acquired as a result of any statute or by the virtue of being a Government or a public sector undertaking or otherwise;

(h) Entry barriers including barriers such as regulatory barriers, financial risk, high capital cost entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or services for consumers;

(i) Countervailing buying power;

(j) Market structure and size of the market;

(k) Social obligations and social costs;

(l) Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m)Any other factor, which the Commission may consider relevant for the inquiry.

Further, as sub-section 5 to section 19 of the Act, for determining as to what constitutes a "relevant market", the Commission shall have due regard to the "relevant geographic market" and "relevant product market". Factors shall be considered by the Commission for determination of "relevant geographic market" and "relevant product market" enumerated under sub-section 6 and 7 respectively of section 19 of the act.

Answer 7

(i) No, Director-General is not authorised to initiate investigation Suo-moto. As per sub-section 1 to section 41 of the Competition Act, 2002 (here-in-after referred as the Act), the Director General shall when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

The role of the Director-General is actually to assist the Competition Commission in the effective discharge of its duties. Section 16 (1) of the Act provides that the Central Government may, by notification, appoint a Director General for the purposes of assisting the Commission in conducting an inquiry into contravention of any of the provisions of this act and for performing such other functions as are, or may be, provided by or under the Act.

(ii) Yes, as per sub-section 1 to section 28 of the Competition Act, 2002 (here-in-after referred to as the Act), the Commission may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise or group does not abuse its dominant position.

Further sub-section 2 to section 28 provides that in particular, and without prejudice to the generality of the foregoing powers, the order referred to in sub-section (1) may provide for all or any of the following matters;

(a) The transfer or vesting of property, rights, liabilities, or obligations;

(b) The adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;

(c) The creation, allotment, surrender, or cancellation of any shares, stocks, or securities;

(d) [Omitted]

(e) The formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;

(f) The extent to which, and the circumstances in which, provisions of the Order affecting an enterprise may be altered by the enterprise and the registration thereof

(g) Any other matter, which may be necessary to give effect to the division of the enterprise or group.

(iii)No, Ramesh is not entitled to claim any compensation. Sub-section 3 to section 28 of the Competition Act, 2002, states that notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company, who ceases to hold office as such in consequence of the division of an enterprise, shall not be entitled to claim any compensation for such cesser.

Answer 8

As per sub-section 4 to section 3 of the Competition Act, 2002; any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade-in goods or provision of services, including -

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1), if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Further explanation (a) to (e) of sub-section 4 to section 3 of the Act explains the meaning of following phrases:

(a) **Tie in arrangement:** includes any agreement, requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) **Exclusive supply agreement:** includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.

(c) **Exclusive Distribution agreement:** includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.

(d) **Refusal to deal:** includes any agreement, which restricts or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.

(e) **Resale price maintenance:** includes any agreement to sell goods on the condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

CASE STUDY 38

Navjeevan Technology Private Limited (NTPL) is an electrical component manufacturing company. It was established in the year 1998. NTPL supplies some critical electronic components to Maharaja Elevators Private Limited (MEPL). MEPL is a manufacturer of Elevators and Escalators.

The two companies are successfully dealing with each other for the last fifteen years. Unfortunately, due to negative cash flow, MEPL failed to pay NTPL's total outstanding amount of ₹ 1.75 Crore. The amount remained unpaid for more than a year.

MEPL had been incurring losses for the last 6 years and it is expected that within the next 3 months, there might be a major financial crisis. The Company might not be able to pay its outstanding debts to many of its creditors. There is also a possibility that its financial position deteriorates further.

The Board of Directors of MEPL is confident and is of opinion that with certain financial decisions and concrete actions like the restructuring of some of the term loans MEPL had borrowed from banks, reduction in debtors' credit period for the faster realization to sort out liquidity issues, controlled inventory levels, certain other cost savings measurement, removal of some of the non-profitable items from the product mix, etc. might bring the Company into profitable position within next 6 to 8 months.

However, the operational creditors with long over dues were not convinced with the Board of Directors' suggestive measures. Demand Notice along with the photocopies of relevant invoices and outstanding statements as per the ledger officially sent to MEPL. MEPL in its turn tried to convince NTPL and other operational creditors about the future plans of the business. MEPL neither was able to clear their dues, nor were they able to make any future commitments.

After having meetings with the operational and financial creditors of MEPL, the Board of Directors of NTPL finally took a firm decision to file an application along with the required documents for initiation of the Corporate Insolvency Resolution Process (CIRP) against MEPL before the National Company Law Tribunal (NCLT) under Insolvency and Bankruptcy Code, 2016 (Here-in-after referred as IBC). NTPL proposed the name of Mr. Varadraj, as an Interim Resolution Professional (IRP). He is a Chartered Accountant and a leading Insolvency Professional.

NCLT admitted the application filed by financial creditors, operational creditors, and NTPL. The Corporate Insolvency Resolution Process commenced on the scheduled date, following the process under the provisions of the IBC. NCLT by an order issued a moratorium.

As an IRP, Mr. Varadraj started managing all the company affairs. The powers of the Board of Directors of MEPL got suspended. The officers and managers of MEPL started reporting to Mr. Varadraj. The banks and financial institutions of MEPL started acting on the instructions issued by Mr. Varadraj and provided him with all the necessary information and documents.

After receiving all the claims against MEPL and determining its financial position, Mr. Varadraj constituted a Committee of Creditors. In the first meeting of the Committee of Creditors, the committee approved the appointment of Mr. Varadraj as the Resolution Professional. Board approved the appointment of Mr. Varadraj. He took prior approval of the Committee of Creditors, whenever required.

Mr. Varadraj prepared the required Memorandum for the Resolution Plan. He invited prospective lenders, investors, and other persons to prepare Resolution Plans.

In consultation with various stakeholders, Mr. Varadraj prepared a Resolution Plan. MEPL and all the stakeholders agreed with the resolution plan submitted during the Meetings of the Committee of Creditors. Mr. Varadraj had a firm belief that liquidation of MEPL is not at all necessary. Finally, all the stakeholders agreed with MEPL revival possibilities.

Mr. Varadraj then submitted the Resolution Plan to the Committee of Creditors for approval. The Committee discuss it in detail and approved the Resolution Plan to revive MEPL with the required majority. The Revival Plan also approved the payments of debts due to NTPL and other Creditors. Mr. Varadraj submitted a Resolution Plan, approved by the Committee of Creditors to NCLT. NCLT made an Order by approving the Resolution Plan.

MEPL was back on track after the next 10 months and now it could repay, its overdue debts to all of its Creditors and NTPL Company and gradually could achieve a position to pay all the creditors on time.

MULTIPLE CHOICE QUESTIONS

1. Assuming that Mr. Varadraj suggested the merger of MEPL with some XZY Company under the Resolution Plan. What will be your advice to Mr. Varadraj according to the provisions of this Code?

(a) Resolution plan may include restructuring, but only related to the sale of non-profitable assets or discontinuation of unprofitable product from existing product mix.
(b) Resolution plan may include restructuring of the corporate debtor, but not by way of merger and amalgamation.
(c) Resolution plan may include restructuring of the corporate debtor, including by way of merger, amalgamation, and demerger.
(d) Resolution plan shall include restructuring of the corporate debtor.

2. If in any case the resolution plan is approved by the Adjudicating Authority, but is breached by MEPL, then what remedy can be availed by the person whose interests are prejudicially affected?
(a) May file a complaint against MEPL to the Adjudicating Authority for some preventive measures to avoid such contravention in the future.
(b) May make an application to the Adjudicating Authority for a liquidation order
(c) The CoC will take some preventive measures to avoid such contravention in the future.
(d) May file a complaint against MEPL to the Adjudicating Authority for imposing a fine on MEPL.

3. Assuming that instead of Mr. Varadraj, Mr. Ranjit is appointed as Resolution Professional, then till what period Mr. Varadraj can continue as Interim Resolution Professional?
(a) Shall not exceed 30 days from the date of his appointment
(b) Shall not exceed 60 days from the date of his appointment
(c) Shall not exceed 90 days from the date of his appointment
(d) Shall continue till the date of appointment of the resolution professional

4. Assuming Mr. Varadraj accepts a short-term loan of ₹ 20 Lakh (which is twice the limit fixed for such loan) as interim finance to meet the requirement and keep MEPL running as a going concern during CIRP. Choose the correct option out of the following:
(a) Mr. Varadraj as RP has all the power
(b) Mr. Varadraj needs prior approval from the Committee of Creditors.
(c) Mr. Varadraj can raise such a loan if it is incorporated under the Resolution Plan.
(d) Mr. Varadraj is empowered to take such a decision as the power of board of MEPL now vests in him.

5. NCLT by an order issued a moratorium in the case of MEPL. Which of the following statements is true regarding the length of the moratorium under IBC?
(a) Moratorium shall cease to have effect from the cession date written in order, thorough which it is imposed by NCLT
(b) Moratorium shall automatically cease to have an effect on the 91st day from the day of its commencement
(c) Moratorium shall have effect till the completion of the CIRP in all cases
(d) In case the Adjudicating Authority approves the resolution plan, the moratorium shall cease to have effect from the date of such approval order.

DESCRIPTIVE QUESTIONS

6. While itself undergoing CIRP, can MEPL file an application to NCLT to initiate CIRP against their debtors in the capacity of "Financial Creditor" or "Operational Creditor" to realise its overdue amount under IBC?

7. Read the three situations (course of action) given below:
I MEPL signed a lease deed with Mr. X, for the warehouse a year back. MEPL is in possession of such warehouse property since then. But now Mr. X terminated the lease and recovered his property.
II MEPL sold its property worth ₹ 10 crores to XYZ company so that it can repay its creditors.
III Licence of MEPL with some sector regulator suspended, regarding which license fee is already paid by MEPL in advance.

Analyse the legal validity of the actions under IBC, presuming MEPL is under moratorium?

8. NCLT admitted the application filed by financial creditors, operational creditors, and NTPL resultantly Corporate Insolvency Resolution Process commenced under the provisions of the IBC. NCLT by order declares a moratorium. Are there any agreements or arrangements which are in exception to the applicability of the moratorium?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c)Resolution plan may include restructuring of the corporate debtor, including by way of merger, amalgamation, and demerger.

Reason
Explanation to section 5(26) of the IBC states that for the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger.

2. (b) May make an application to the Adjudicating Authority for a liquidation order

Reason
Section 33(3) of the IBC provides that where the resolution plan approved by the Adjudicating Authority under section 31 or under sub-section (1) of section 54L, is contravened by the concerned corporate debtor, any person other than the corporate debtor, may make an application to the Adjudicating Authority for a liquidation order as whose interests are prejudicially affected by such contravention referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

3. (d) Shall continue till the date of appointment of the resolution professional

Reason
Section 16(5) of the IBC provides that the term of the interim resolution professional shall continue till the date of appointment of the resolution professional under section 22.

4. (b) Mr. Varadraj needs prior approval from the Committee of Creditors.

Reason
Section 25 of the IBC lists out the duties of resolution professional. Its sub-section (2c) states that the resolution professional shall raise interim finances subject to the approval of the committee of creditors under section28.

5. (d) In case the Adjudicating Authority approves the resolution plan, the moratorium shall cease to have effect from the date of such approval order.

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

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

Although as per Section 11 of IBC, the following persons shall not be entitled to make an application to initiate a corporate insolvency resolution process under Chapter II of IBC:

(a) A corporate debtor undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process; or

(aa) A financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or

(b) A corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(ba) A corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or

(c) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) A corporate debtor in respect of whom a liquidation order has been made.

Despite the intention of code was clear that restriction under section 11 is only in reference to an application made under section 10, still there was some ambiguity hovering around; which has also been removed through the insertion of explanation II to section 11 vide Act number 1 of 2020, with effect from 28.12.2019.

Explanation II reads as 'for the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor'.

Hence while itself undergoing CIRP, MEPL can file an application to NCLT to initiate CIRP against their debtors in the capacity of "Financial Creditor" or "Operational Creditor" to realise its overdue amount under IBC.

It is important here to note that under section 25 (1) of IBC, it shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

Further under clause (b) of sub-section (2) of section 25 itself, for the purposes of sub-section (1), the resolution professional shall represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings. Hence proceeding can be initiated through a resolution professional.

Answer 7

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

(a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree, or order in any court of law, tribunal, arbitration panel, or other authority:

(b) Transferring, encumbering, alienating, or disposing-off by the corporate debtor any of its assets or any legal right or beneficial interest therein:

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002):

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Further, explanation reads as for the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during the moratorium period.

(i) Action of Mr. X to terminate the lease and recover his property is prohibited under clause (d) of sub-section (1) to section 14 stated above.

(ii) Action of MEPL to sell its property worth ₹ 10 crores to XYZ company so that it can repay its creditors is prohibited under clause (b) of sub-section (1) to section 14 stated above.

(iii)Action of the sectoral regulator to suspend the licence of MEPL despite the fact that license fee is already paid by MEPL is not legally valid due to explanation to sub-section (1) to section 14 stated above.

Answer 8

The sub-section (1) to section 14 of IBC explains the prohibitions due to the imposition of the moratorium. But further sub-section 3 specify exceptions to the application of the moratorium, which also includes notified agreements and arrangements too.

Clause (a) to sub-section (3) to section 14 of IBC reads as, the provisions of sub-section (1) of section 14 shall not apply to such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority.

It is important here to note that before the amendment made by Act No. 1 of 2020 (with effect from 28.12.2019), clause (a) stood as "such transaction as may be notified by the Central Government in consultation with any financial regulator".

It is also pertinent to mention here that the provisions of section 14(1) shall not apply to a surety in a contract of guarantee to a corporate debtor, as stated in Section 14(3)(b).

CASE STUDY 39

Mr. Gautam is the Karta of a Hindu Undivided Family (HUF), consisting of his wife Mrs. Laxmi Devi and 3 sons, Mr. Subhash, Mr. Girish, and Mr. Rajesh. The eldest son Subhash runs a sugar mill, taken over from his father Gautam.

Rajesh, the youngest son of Gautam, looking for some fast and easy money; he joins hands with Mr. Mohanlal, who is a real estate agent. Mohanlal promises to pay a commission in cash to Rajesh, against the help in buying 25 acres of land and hold the land in his (Rajesh) name on behalf of Mr. Manoranjan (one of the clients of Mohanlal) in good trust and in good faith. Rajesh agrees and a purchase agreement for 25 acres of land was registered in the name of Rajesh and one Madhav Rao. Subsequently, Rajesh entered into several similar agreements in his name on behalf of others.

In due course of time, Rajesh also formed a Company XYZ Private Limited, primarily for a Hotel business, but the source of funding was secret drug dealings. The Company accepted illegal monies in cash as legitimate business transactions with fake income and receipts. The monies were then deposited into the Company's Bank accounts as clean money. XYZ Private Limited kept fraudulent records, which did not demonstrate the current state of its businesses. Monies in the Bank Accounts of XYZ Private Limited were also often transferred as legitimate business transactions, to the Bank Accounts of RDX Private Limited, which is also in similar businesses like XYZ Private Limited. Original source of money is thus disguised.

The Company XYZ Private Limited also mobilized funds from various investors but were never utilized for which they were collected. The Funds were transferred to bank accounts of some group companies, which were mainly paper companies, from where they were systematically siphoned off and were used for the purchase of various properties in India.

Rajesh has also held some properties purchased in the name of his wife Sugandha from his known income from legal sources.

Mr. Mahesh who is a Company Secretary of a listed Public Limited Company ABC Ltd. is also a friend of Girish. Mahesh gives a ₹ 5 lacs loan to Girish, who in his turn gives a loan of ₹ 5 Lacs to his friend Mr. Raghu for investment in the shares of ABC Ltd. Raghu trades in shares of ABC Ltd. on behalf of Mahesh.

Mahesh also ensures that some money is passed on to various legitimate Companies to buy the shares of ABC Ltd so that it results in an increase in the price of shares. The intention is to show a higher valuation of shares before proposing to the investors or to discourage the shareholders from applying to the buyback scheme.

Mr. Raghav is the brother-in-law of Subhash, employed in UAE, and a non-resident Indian. Raghav purchased the property in the Mumbai for ₹ 75 Lacs. He paid ₹ 40 Lacs through his NRE Account, ₹ 10 Lacs through direct transfer from his salaries account in UAE to the sellers' account as advance through normal banking channels, complying with all the procedural requirements, but balance ₹ 25 Lacs payment was made through some unknown sources.

Raghav also invested in equity shares of various listed companies in India, in the joint name along with his wife Mrs. Divya (who is a resident in India); out of an account not disclosed to tax authorities in India. Raghav also purchased another flat in Pune in the joint name of Divya and himself from his NRE Account.

Subhash has a married daughter Mangala, a resident of the UK. Subhash invested ₹ 1.50 Crores in a Bank Fixed deposit in the name of Mangala without her knowledge. Later during the course of inquiries by officials, Mangala denies ownership of Bank Fixed Deposit.

Since all of his children are well settled, due to the old age and deteriorating health conditions of Gautam and Laxmi Devi, the family decided to sell off the loss-making sugar mill. Later after much negotiations, the sugar mill was sold to a person well known to the real estate agent Mohanlal, but unknown to the Gautam's Family, at a very reasonable price.

MULTIPLE CHOICE QUESTIONS

1. The transaction of the purchase of properties in Mumbai by Raghav for ₹ 75 Lacs is;
   (a) A valid transaction in full
   (b) A valid transaction but only to the extent of ₹ 40 Lacs
   (c) A benami transaction in full
   (d) May be a benami transaction to the extent of ₹ 25 lacs
2. Which one of the following transactions is not Benami done by Rajesh?
   (a) Transaction in respect of a property, where the person providing the consideration to Rajesh is not traceable.

(b) An arrangement by Rajesh in respect of a property made in a fictitious name
(c) Property held by Rajesh in the name of his spouse and consideration paid out of known legal sources
(d) A transaction by Rajesh in respect of a property where the owner is unaware of or denies knowledge of the ownership

3. Subhash has a married daughter Mangala, a resident of the UK. Subhash invested ₹1.50 Crores in a bank FD in the name of Mangala without her knowledge. Later during the course of inquiries by officials, Mangala denies ownership of the bank FD. Pick the correct statement out of the following
(a) Transaction is not benami because Mangala is a child of Subhash.
(b) Transaction is benami transaction because Mangala is a Non-Resident Indian.
(c) Transaction is benami transaction because Mangala denies the ownership.
(d) Transaction is benami transaction because Mangala is his married daughter.

4. XYZ Private Limited company in the stated case, indulged in moving or spreading the injected proceed of crime over various transactions in different accounts to disguise the origin. This step in money laundering is referred to as
(a) Smuggling
(b) Integration
(c) Layering
(d) Placement

5. What will be the quantum of the punishment under the PML Act, 2002 for Rajesh to form a company XYZ Private Limited, primarily for a Hotel business, but the source of funding was secret drug dealings?
(a) Fine upto five lakhs rupees and rigorous imprisonment upto 3 years
(b) Fine or rigorous imprisonment not lesser than 3 years and may extend up to 7 years
(c) Fine and rigorous imprisonment not lesser than 3 years and may extend up to 7 years
(d) Fine and rigorous imprisonment of not lesser than 3 years and may extend upto 10 years

DESCRIPTIVE QUESTIONS

6. In the context of various property dealings and transactions stated in the case study, critically analyse the statement "the provisions of the Prohibition of Benami Property Transactions Act, 1988 need not necessarily apply only to transaction where the source of fund is unknown or undisclosed and carries in a fictitious name, but may also sometimes apply to transaction wherein disclosed funds and real persons are involved" state at-least one transaction to support your analysis.

7. For the properties held by Rajesh as benamidar, if a penalty is to be imposed, then what will be the quantum, and how the amount of fine will be determined under the provisions of the PBPT Act, 1988?

8. Can a property involved in money laundering be attached, if yes then state the provisions relating to the attachment of such property under the Prevention of Money Laundering Act, 2002?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) May be a benami transaction to the extent of ₹ 25 lacs

Reason
In the given case, Mr. Raghav while purchasing flat in Mumbai, paid ₹ 25 Lacs sources of which is unknows. Therefore, to this extent the transaction shall be held as benami transaction.

2. (c) Property held by Rajesh in the name of his spouse & consideration paid out of known legal sources

Reason
The option (c) comes under the exempted category of benami transaction under section 2(9)(A)(b)(iii) of the PBPT Act.

3. (c) Transaction is benami transaction because Mangala denies the ownership

Reason
Section 2(9) (C) of the PBPT Act provides that benami transaction means a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership.

In this case, Mangla has denied of having purchased any property, so it shall be a benami transaction.

4. (c) Layering

Reason
The layering is the second stage of money laundering in which the money launderer indulges in moving or spreading the injected proceeds of crime over various transactions in different accounts to disguise the origin.

5. (d) Fine and rigorous imprisonment of not lesser than 3 years and may extend upto 10 years

Reason

Proviso to section 4 of the PMLA provides that provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted.

Paragraph 2 of Part A of the Schedule deals with the offences under the Narcotic Drugs and Psychotropic Substances Act, 1985.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

The general belief is that the provisions of the Prohibition of Benami Property Transactions Act, 1988 (here-in-after referred to as the act) apply only to transactions and persons dealing with property out of unknown/undisclosed sources and through fictitious identity, where the primary intent is to hide the ownership of the property; but this is not true in all respects, even where the property is created out of known source can be the subject matter of benami transaction.

As per section 2(8) of the act, Benami Property means any property, which is the subject matter of a Benami transaction and also includes the proceeds from such property.

Further, as per section 2 (9), a Benami transaction means:

(A) A transaction or arrangement
   (a) where a property is transferred to, or held by, a person and the consideration for such property has been provided, or paid by, another person; and
   (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

   except when the property is held by -
   (i) A Karta, or member of a HUF, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the HUF;

   (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;

   (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

   (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint- owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) A transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) A transaction or an arrangement, in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) A transaction or an arrangement in respect of a property where the person, providing the consideration is not traceable or is fictitious.

Further as per section 2 (26) of the Act "property" means assets of any kind, whether movable/immovable, tangible/intangible, corporeal/incorporeal and includes any right/interest/legal documents/instruments evidencing title to/interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property.

The exceptions have been provided in the Act which are narrated in clause (i) to (iv) of section 2(9)(A)(b). So if the transaction can be categorized under cluses (i) to (iv) it shall not be treated as benami transaction, provided the other conditions are fulfilled.

In the stated case study a transaction wherein, Subhash invested ₹ 1.50 Crores in a bank fixed deposit in the name of Mangala (his married daughter), who is a UK resident, without her knowledge. Later during the

course of enquiries by officials, Mangala denies ownership of bank fixed deposit. Here, the transaction is Benami (due to section 2 (9) (C), despite the bank fixed deposit is generated using disclosed funds in a genuine name, which is not a fictitious transaction.

Answer 7

As per sub-section (2) of section 53 of the Prohibition of Benami Property Transactions Act 1988 (here-in-after referred to as the act), whoever is found guilty of the offence of benami transaction shall be punishable with rigorous imprisonment for a term ranging from one year to seven years and shall also be liable to fine which may extend to twenty-five percent of the fair market value of the property.

Fair market value in relation to the property as per section 2(16) of the Act means the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and where such price is not ascertainable, then the price (fair market value) as may be determined in accordance with such manner as prescribed in Rule 3 of Prohibition of Benami Transactions Rules, 2016.

Answer 8

Section 5 of the Prevention of Money laundering Act 2002 (here-in-after referred to as the Act) deals with the attachment of property involved in money laundering. It reads as under-

(1) Where the director or any other officer not below the rank of deputy director (authorized by the director for the purposes of this section) has reason to following believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that -

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

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

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

Provided also that for the purposes of computing the period of 180 days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding 30 days from the date of order of vacation of such stay order shall be counted;

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

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

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.-For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

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

CASE STUDY 40

In coordinated raids, more than 100 income tax sleuths (apart from police personnel) swooped down on the total of 25 premises linked to the Yashraj family. The family runs the Vidyanand Group of Institutions (VGI), established by Late Shri Ramraj 4 decades ago. Ramraj is the grandfather of Yashraj, the present CMD of the group. Besides raiding the office, residence, and institutions belonging to Yashraj, the IT officials also searched the residences of his two brothers and some of their close aides.

The VGI is mainly into running educational and also coaching Institutes for different competitive examinations in various states. The VGI comprised three (3) private limited companies, four (4) partnership firms, and a trust, controlled by a close-knit group of individuals. The annual revenue of VGI was ₹ 105 Crores as per the latest available audited financial statements.

The raids at the premises belonging to Yashraj and others were in connection with a multi-crore tax evasion case. The search was undertaken on the basis of intelligence outputs that VGI was indulged in substantial tax evasion through the following mentioned three ways:

(a) By the suppression of fee receipts received from students.

(b) There was also an allegation of forgery/impersonation in a competitive examination and

(c) Illegal payments- "cash for seat"- to secure seats in the educational institutions.

The modus operandi was as below:

(a) To receive a part of the fees (40%) through bank transfers and balance (60%) in cash;

(b) Such cash receipts were invariably not entered into a regular accounting system. Instead, the receipts were maintained in a separate set of manual accounts handled by a lone close associate of the Yashraj family;

(c) Cash received from some of the students, education Institutions permitting illegal impersonation during competitive examinations;

(d) Cash received from students to secure seats, though the Institution managed a network of brokers.

Incriminating evidence of such suppression of receipts was found during the search in the form of separate manual accounts, electronic storage devices, huge sums of unaccounted cash, and some other properties. It was found that:

(a) Cash was kept in bank lockers in the names of some of the long-serving employees on behalf of the Yashraj family.

(b) A significant amount of cash was also found in a secret safe inside an auditorium on the main premises of the educational institution.

(c) Huge amount of cash was also found in the residences of the family members of Yashraj, their close aids.

The unaccounted cash receipts were deployed for

(a) acquiring immovable properties as personal investments in different places in India and abroad,

(b) The immovable properties were then leased for long terms to the Trust for expansion of business in other towns. The documents evidencing the acquisition of immovable properties were showing lesser values, but actual market prices were much higher.

(c) Well qualified and highly-priced faculty were hired and employed in the educational and coaching institutes. They were paid outside the books.

(d) Luxury vehicles, highly-priced jewellery, etc. were purchased for the promoters.

(e) Shares, Debentures, Properties, Fixed Deposits, and Bank Accounts of the family members of Yashraj were held in the names of some of the long-serving employees and close aids.

Investigating Authorities found that there are highly sophisticated acts to cover up or camouflage the identity or origin of illegally obtained earnings so that they appear to have derived from lawful sources.

Based on the preliminary findings, the undisclosed income of the VGI was estimated at over ₹ 175 crores. Unaccounted cash of ₹ 30 crores, jewellery worth ₹ 12 Crores, and 2 new luxury cars value at ₹ 2 crores each were seized. During the search, even some of the students, who impersonated could be traced, who

accepted their crimes, along with some of institution managed brokers. Two of the 3 private limited companies were found to have existed only on papers.

Some of the close aides, who held some of the shares and debentures of the Yashraj family tried to re-transfer them to the Yashraj family fearing actions by the investigating officials. Some of the employee's en-cashed fixed deposits held in their names and immediately tried to transfer the proceeds to the bank accounts of the Yashraj family.

MULTIPLE CHOICE QUESTIONS

1. The unaccounted cash receipts were deployed for acquiring immovable properties as personal investments in different places in India and abroad. The immovable properties were then leased for long terms to the Trust for expansion of business in other towns. The documents evidencing the acquisition of immovable properties were showing lesser values, but actual market prices were much higher. In the context of an investigation of concealment of the proceeds of crime relating to the value of any property, value means:
   (a) The Actual cost price at which the immovable properties were acquired by Yashraj Family as on the date of acquisition or possession;
   (b) The Actual Value as per the Title Deeds, based on which the immovable properties were acquired by Yashraj Family;
   (c) The Fair market value of the immovable properties acquired by Yashraj Family as on the date of acquisition or if the date cannot be determined, as on the date of possession;
   (d) The Value as in the Title Deeds relating to the immovable properties acquired by Yashraj Family, suitably adjusting the Cost Inflation Index as on the date of acquisition or possession.

2. Shares, Debentures, Properties, Fixed Deposits and Bank Accounts of Yashraj Family were held in the names of some of the long-serving employees and their close aides. In this context, which of the following statements is not correct?
   (a) A transaction in respect of a property, where the person providing the consideration is unknown at the time of sale but can be traced is not valid.
   (b) A transaction in respect of a property carried out or made in a fictitious name is not valid.
   (c) A transaction in respect of a property, where the person providing the consideration is fictitious is not valid.
   (d) A transaction or arrangement in respect of a property, where the owner of the property is not aware of such ownership is not valid.

3. Some of the close aides, who held some of the shares and debentures of the Yashraj family, tried to re-transfer them to Yashraj family fearing actions.
   (a) Such retransfer is a valid transaction
   (b) Such transactions are voidable at the option of the Adjudicating Authority
   (c) Such transaction and retransfer shall be deemed to be null and void.
   (d) Such transaction and re-transfer shall be valid in case transferred to any other person, acting on behalf of Yashraj Family.

4. Some of the employees encashed FDs held in their names on behalf of Yashraj family and immediately after raids tried to transfer the proceeds to the bank accounts of the Yashraj family. In this context;
   (a) Once transferred, such property becomes the property of the real owner Yashraj family and the said employees are relieved from liability.
   (b) The proceeds from the properties are also illegal and consequently, such employees of the Yashraj family are also liable
   (c) Fixed deposits of the Yashraj family, if not transferred, becomes the property of such employees and they are not liable.
   (d) Transactions in fixed deposits in the above case held in other names are valid transactions.

5. Cash receipts were invariably not entered into the regular accounting system. Instead, the receipts were maintained in a separate set of manual accounts by a lone close associate of the Yashraj family. Pick the correct statement regarding records, out of the following statements;
   (a) Only accounts made through a regular accounting system shall be considered as a record.
   (b) Separate manual accounts may be considered as a record for the purpose of investigation at the will of investigating officers.
   (c) Separate manual accounts shall also include apart from accounts made through regular accounting system considered as a record for the purpose of investigation.
   (d) Separate manual accounts may be considered as records only if maintained directly by one of the family members of Yashraj for the purpose of investigation.

DESCRIPTIVE QUESTIONS

6. Prima facie various offences have been committed by the Yashraj family and VGI. There are highly sophisticated acts to cover up or camouflage the identity or origin of illegally obtained earnings so that they appear to have derived from lawful sources. Answer the following:

   (A) What should be established by the Government to bring a successful prosecution of the Yashraj family and their close aides?

   (B) Illegal payments such as cash for the seat to secure seats in the educational institutions; education institutions permitting illegal impersonation during competitive examinations; the unaccounted cash receipts were deployed for acquiring immovable properties. What is the punishment for such types of offences under the Indian Laws when the crime involves disguising financial assets so that they can be used without detection of the illegal activity that produced them?

7. It was found that Cash was kept in bank lockers in the names of some of the long-serving employees. "All cases of transactions or arrangements may not be illegal or unlawful, where the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration". Elucidate.

8. The unaccounted receipts were deployed for acquiring immovable properties as personal investments in different states. Based on the preliminary findings, the undisclosed income of the group was estimated at over ₹ 175 Crores, while unaccounted cash of ₹ 30 Crores, Jewellery valued ₹ 12 Crores, 2 Luxury Cars value ₹ 2 Crores each was seized.

   What are the wide powers to the concerned authorities to attach such properties suspected to be involved in covering up the origin of illegally obtained earnings?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) The Fair market value of the immovable properties acquired by Yashraj family as on the date of acquisition or if the date cannot be determined, as on the date of possession.

   Reason
   In terms of section 2(1)(zb) of the PMLA "value" means the fair market value of any property on the date of its acquisition by any person, or if such date cannot be determined, the date on which such property is possessed by such person.

2. (a) A transaction in respect of a property, where the person providing the consideration is unknown at the time of sale but can be traced is not valid.

   Reason
   Examining each of the options given in the MCQ-
   Option (b): It is correct in light of the provisions contained in section 2(9)(B) of the PBPT Act. Section 2(9)(B): benami transaction means, a transaction or an arrangement in respect of a property carried out or made in a fictitious name.

   Option (c): It is correct in light of the provisions contained in section 2(9)(D) of the PBPT Act. Section 2(9)(D): benami transaction means, a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious.

   Option (d): It is correct in light of the provisions contained in section 2(9)(C) of the PBPT Act. Section 2(9)(C): benami transaction means, a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership.

   Therefore, only option (a) is not correct.

3. (c) Such transaction and retransfer shall be deemed to be null and void.

   Reason
   Section 6 of the PBPT Act provides that -

   No person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf.

   Where any property is re-transferred in contravention of the provisions of sub-section (1), the transaction of such property shall be deemed to be null and void.

4. (b) The proceeds from the properties are also illegal and consequently, such employees of the Yashraj family are also liable.

Reason
In light of the provision contained in section 6 of the PBPT Act it is null and void.

5. (c) Separate manual accounts shall also include apart from accounts made through regular accounting system considered as a record for the purpose of investigation.

Reason
Yes, the separate accounts maintained manually shall also be the part of the investigation, since all the cash receipts are entered in it.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

(A) Government has to establish that there is an offence of money laundering as per section 3 of the Prevention of Money-Laundering Act, 2002 (here-in-after referred to as the Act) to bring a successful prosecution of the concerned in Yashraj family and their close aids under the PMLA.

As per section 2 (p) of the Act, money-laundering has the meaning assigned to it in section 3. Further section 3 provides that whoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeding of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of the offence of money laundering.

Explanation.-For the removal of doubts, it is hereby clarified that,-

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:-
(a) concealment; or
(b) possession; or
(c) acquisition; or
(d) use; or
(e) projecting as untainted property; or
(f) claiming as untainted property,

in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

(B) Prima facie, various offences of Money Laundering appear to have been committed in the given case.

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.

Further provided that where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 (Offences under The Narcotic Drugs and Psychotropic Substances Act, 1985) of Part A of the Schedule, then the maximum imprisonment may extend to ten years.

Answer 7:

In the given case, it was found that cash was kept in bank lockers in the names of some of the long-serving employees as benami.

A transaction or arrangement where the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration is a benami transaction under Section 2(9)(A)(b) of the Prohibition of Benami Property Transactions Act, 1988.

However, there are certain exceptions to this when the transaction or arrangement shall not be considered benami. The exceptions are when the property is held by;

(i) a Karta or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family.

(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a

participant as an agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose.

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual.

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendent and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual.

Answer 8:

The unaccounted receipts were deployed for acquiring immovable properties as personal investments in different states. Based on the preliminary findings, the undisclosed income of the VGI was estimated at over ₹ 175 crores. Unaccounted cash of ₹ 30 crores, jewellery worth ₹ 12 Crores, and 2 new luxury cars value ₹ 2 crores each were seized.

As per section 2 (d) of the Prevention of Money laundering Act 2002 (here-in-after referred to as the Act), the attachment means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III of the Act.

Section 5 of the Act gives extremely wide powers to the authorities to attach properties suspected to be involved in Money Laundering, which reads as under-

(1) Where the director or any other officer not below the rank of deputy director authorized by the Director for the purposes of this section has reason to believe (the reason for such belief to be recorded in writing),on the basis of material in his possession, that-

(a) Any person is in possession of any proceeds of crime; and

(b) Such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to consfiscation of such proceeds of crime under this Chapter.

he may by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

'That any person is in possession of any proceeds of crime and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to the confiscation of such proceeds of crime'.

Provided that no such order of attachment shall be made unless (with exception of cases where the absence of immediate attachment leads to frustrate any proceeding under this Act), in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or a complaint has been filed by a person 9 uthorized to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country.

Provided further that, notwithstanding anything contained in 1[first proviso], any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

Provided also that for the purposes of computing the period of 180 days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.

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

Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under section 8 (3) (Adjudication),

whichever is earlier.

Nothing in this section shall prevent the person interested (includes all persons claiming or entitled to claim any interest in the property) in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.-For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

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

CASE STUDY 41

Little Star Private Limited (LSPL) is a fully integrated setup from taking a 3D model as input to the design and manufacturing of tools to the manufacturing of finished products. The Company is also into Engineering Services with headquarters in Mumbai, India managed and run mainly by the promoters Mr. Sharad (MD), Mr. Sanjeev (Director), and Mr. Javed (Director). All three are Indian residents.

LSPL has a marketing office with warehouse facility Little Star Trading Spolka Z.O.O (LTS) in Poland, fully owned and controlled by it, to cater to the demands of European customers. LTS has been established with the permission of the Reserve Bank of India, duly complying with the required statutory formalities.

On 1st January 2017, LSPL shipped some engineering products with a CIF value of EUR 265,000 to LTS, the cost of the products is EUR 250,000, Insurance EUR 3,000, and Freight EUR 12,000. Also, some of the products worth CIF GBP 126,000 were shipped to one of the customers in the UK on the same date. The total value of Exports of LSPL during the calendar year 2017 from various customers from different countries was USD 12 Million.

LSPL during the normal course of business also entered into a Supply (Export) Agreement with one of its customers Drakes Group (DG) in the UK for the supply of two machines, a total export value estimated to be CIF (Cyrpto Improvement Fund) GBP 4 Million. As per the terms of supply:

(a) Two Machines, as specified, worth about CIF GBP 2 Million each are to be exported by LSPL to DG.

(b) Exact value of each of the Machinery can be ascertained only after the export to the UK since some more processes are involved during installation and commissioning.

(c) An advance of GBP 1 Million is to be remitted to India by DG to LSPL for the purchase or import of critical components required for the manufacture of the said machines.

(d) Interest shall be payable on Advance payment by LSPL to DG up to the date of bill of lading of the first shipment.

(e) The first Machinery is to be supplied within 15 months from the date of receipt of advance payment in India, and the second one within a period not exceeding 27 months.

Accordingly, as per the terms of supply, a sum of GBP 1 Million was received by LSPL from DG on 1st July 2018 as an advance towards exports through the State Bank of India. The First machinery was supplied on time and the relevant export declaration was furnished to the specified authority in a specified manner. Other export formalities were duly complied with.

LSPL also established a marketing office in Dubai, UAE - Little Star Emirates LLC (LSEL) for conducting normal business activities of the Indian entity, to cater to the requirements of customers from the Middle East. For promoting business in the Middle East Region, LSPL sponsored a T20 Cricket match in Dubai International Cricket stadium & approached SBI for remittance of USD 250,000 towards sponsorship Fees.

LSPL is holding certain properties in the form of some residential flats in UAE ready for sale. Prestige Real Estate LLC (PREL) is a well-reputed real estate agent in UAE and has experience in marketing, advertising, and selling real estate property. While on travel to Dubai, Sharad and Sanjeev, on behalf of LSPL entered into an Agency Agreement PREL for the sale of properties in UAE. As per the Agreement

(a) LSPL grants PREL the exclusive rights to sell all the residential flats in UAE.

(b) Any and all offers and negotiations in regards to the said properties shall be conducted by PREL

(c) PREL shall do everything possible to entertain and vet offers made. It is the Agent's sole purpose to sell the properties and as so shall be permitted to employ additional Brokers to assist in the selling and advertising process.

(d) Any offers considered valid should be reported to the Seller within 2 days and it shall be at the discretion of LSPL to accept or decline.

(e) LSPL agreed to remit PREL a flat commission of a certain % of the final sale price, on case-to-case basis.

PREL also authorized to sell one of the commercial plots owned by LSPL in India on similar terms as stated above. For one of the plots owned by LSPL in Pune, PREL finds a buyer from UAE. Because of the efforts of PREL, such a plot could be sold at USD 400,000. PREL transferred USD 400,000 to India, as sale proceeds. As per the Agreement, USD 22,000 is to be transferred as Commission to PREL.

Javed wants to remit USD 250,000 under the Liberalized Remittance Scheme (LRS) to buy lottery tickets abroad making use of his business connections.

MULTIPLE CHOICE QUESTIONS

1. For one of the plots owned by LSPL in Pune, PREL find a buyer from UAE. Because of the efforts of PREL, such a plot could be sold at USD 400,000. PREL transferred USD 400,000 to India, as sale proceeds. As per the Agreement, USD 22,000 is to be transferred as Commission to PREL. In the context of commission which of the following statements is correct:
   (a) Without any pre-approval from the Reserve Bank of India upto USD 100,000 or 5% of the amount remitted, whichever is higher, can be transferred as a commission by LSPL to PREL
   (b) Without any pre-approval from the Reserve Bank of India any amount upto USD 25,000 or 5% of the amount remitted, whichever is higher can be transferred as a commission by LSPL to PREL
   (c) Without any pre-approval from the Reserve Bank of India only USD 20,000 can be transferred as a commission by LSPL to PREL in the given case.
   (d) Without any pre-approval from the Reserve Bank of India upto USD 50,000 or 5% of the amount remitted, whichever is lesser, can be transferred as a commission by LSPL to PREL.

2. The First machinery was supplied on time and the relevant Export Declaration was furnished to the specified authority in a specified manner. In the context of the Export Declaration, which one of the following statements is not correct?
   (a) Export of goods can be made without furnishing the specified Declaration when goods are imported free of cost on a re-export basis;
   (b) Export of goods can be made without furnishing the specified Declaration when goods are sent outside India for testing subject to re-import into India.
   (c) Export of goods can be made without furnishing the specified Declaration when defective goods are sent outside India for repairs at an agreed price with the supplier outside, subject to re-import into India.
   (d) Export of goods can be made without furnishing the specified Declaration in case of unaccompanied personal effects of travelers.

3. LTS (Little Star Trading Spolka Z.O.O) in Poland in the stated case shall be treated as:
   (a) Person resident outside India
   (b) Person resident in India
   (c) Person not ordinary resident in India
   (d) No relevance to LTS of residential status with reference to Indian laws

4. For promoting business in the Middle East Region, LSPL sponsored a T20 cricket match in Dubai International Cricket stadium and approached the SBI for remittance of USD 250,000 towards sponsorship Fees.
   (a) SBI can remit USD 250,000 towards cricket sponsorship without any limits and any pre-approval.
   (b) SBI can remit USD 250,000 with the approval from Reserve Bank of India.
   (c) SBI can remit USD 250,000 with prior approval from the appropriate ministry of the GOI.
   (d) Remittance by SBI of USD 250,000 towards T20 cricket sponsorship in Dubai is a transaction for which remittance of foreign exchange is prohibited.

5. Javed wants to remit USD 250,000 under the Liberalized Remittance Scheme (LRS) to buy lottery tickets abroad making use of his business connections.
   (a) Remittance to buy lottery tickets abroad is a prohibited item under LRS
   (b) Remittance of more than USD 100,000 for buy lottery tickets abroad is prohibited under LRS
   (c) Remittance upto USD 250,000 per FY is permitted to buy lottery tickets abroad under LRS
   (d) Remittance only upto USD 150,000 per FY is permitted to buy lottery tickets abroad under LRS

DESCRIPTIVE QUESTIONS

6. On 1st January 2017, LSPL shipped some engineering products with a CIF value of EUR 265,000 to LTS, the cost of the products is EUR 250,000, Insurance is EUR 3,000, and Freight is EUR 12000. In this regard answer the following;
   (A) What is the period within which the export value of goods shipped to LTS to be realized and repatriated to India, and does it make any difference, if only the cost price is realized but not Insurance and Freight within the period specified?
   (B) Will your answer change to part A above, in the case of the transaction wherein goods worth GBP 126,000 shipped/exported to one of the customers in the UK and not to LTS?
   (C) Will your answer change to part A above, in case LSPL has an Export Oriented Unit in Mumbai and goods/software/services are shipped therefrom? Explain.

7. As per the terms of supply, a sum of GBP 1 Million was received by LSPL from DG on 1st July 2018 as an advance towards exports. In this context, as per the legal system prevailing in India answer following:

(A) What are the obligations of LSPL with references to the rate of interest payable to DG and the submission of documents?
(B) Within how much period the shipment shall be made by LSPL, is there any exception to this?
(C) Is it possible for LSPL to refund the advance received in case of its inability to make the shipment as per the supply terms?

8. LSPL is holding certain properties in the form of some residential flats in the UAE. What are the possible ways by which these properties might have been legally acquired by LSPL in the UAE?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (b) Without any pre-approval from the Reserve Bank of India any amount upto USD 25,000 or 5% of the amount remitted, whichever is higher can be transferred as a commission by LSPL to PREL.

   Reason: Regulation 2(ii) of Schedule III of the the Foreign Exchange Management (Current Account Transactions) Rules, 2000 provides the commission, per transaction, to agents aborad for sale of residential flats or commercial plots in India exceeding USD 25000 or 5% of the inward remittance, whichever is more, requires prior approval of the RBI. Therefore, the payment of commission which is below the above ceiling, do not require prior approval of RBI.

2. (c) Export of goods can be made without furnishing the specified Declaration when defective goods are sent outside India for repairs at an agreed price with the supplier outside, subject to re-import into India.

   Reason: Regulation 4 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, states that notwithstanding anything contained in Regulation 3, export of goods/ software may be made without furnishing the declaration in case of -

   (i) Goods sent outside India for testing subject to re-import into India.

   (j) Defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.

3. (b) Person resident in India

   Reason: Section 2(v) of the FEMA provides that "person resident in India" means-

   (i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include-

   (A) a person who has gone out of India or who stays outside India, in either case-

   (a) for or on taking up employment outside India, or

   (b) for carrying on outside India a business or vocation outside India, or

   (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

   (B) a person who has come to or stays in India, in either case, otherwise than-

   (a) for or on taking up employment in India, or

   (b) for carrying on in India a business or vocation in India, or

   (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

   (ii) any person or body corporate registered or incorporated in India,

   (iii) an office, branch or agency in India owned or controlled by a person resident outside India,

   (iv) an office, branch or agency outside India owned or controlled by a person resident in India.

   In the given case, the LSPL has a marketing office with warehouse facility Little Star Trading Spolka Z.O.O (LTS) in Poland, fully owned and controlled by it, to cater to the demands of European customers. LTS has been established with the permission of the Reserve Bank of India, duly complying with the required statutory formalities. Thus, LTS shall be treated as 'Person Resident in India' in terms of section 2(v)(iv) of the FEMA.

4. (c) State Bank of India can remit USD 250,000 with prior approval from the appropriate ministry of Government of India.

Reason: Rule 4 read with Schedule II of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 narrates the transactions which requires prior approval of the Central Government. The para 9 of the schedule II states that remittance of prize money /sponsorship of sports activity abroad by a person other than International/ National / State Level sports bodies, if the amount involved exceeds USD 1,00,000, requires the approval of Ministry of HRD (Dept of Youth Affairs and Sports). In the given case, since the amount of remittance required is USD 2,50,000 hence it requires the prior approval of Ministry of HRD (Dept. of Youth Affairs and Sports).

5. (a) Remittance to buy lottery tickets abroad is a prohibited item under LRS

Reason: Rule 3 read with Schedule I of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 narrates the transactions which are prohibited. Among the list of various transactions, at S. No. 3 "Remittance for purchase of lottery tickets, banned / proscribed magazines, football pools, sweepstakes etc.",which is also a prohibited transaction.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

(A) Regulation 9 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 deals with the period within which the export value of goods is to be realized. It reads as under-

(1) The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months from the date of export, provided -

(a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorized dealer as soon as it is realized and in any case within fifteen months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of shipment of goods.

(b) further provided that RBI, or subject to the directions issued by that bank on this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be.

Since in the given case, LTS is a warehouse facility of LSPL established with the permission of RBI in Poland and the goods were shipped and/or exported on 1st January 2017, EUR 265,000 is expected to be realized within the next 15 months i.e. by March 31st, 2018, unless the period is further extended as above. It is the full value of export i.e. CIF value (EUR 265,000) is to be realized within the period stipulated in Regulation 9.

(B) Regulation 9 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 deals with the period within which export value of goods to be realized. As per sub-regulation 9(1), the amount representing the full export value of goods / software/ services exported shall be realized and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of export,

It is further provided that the Reserve Bank, or subject to the directions issued by that Bank on this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the said period.

Since in the given case, the goods were shipped and/or exported on 1st January 2017, GBP 126,000 is expected to be realized within the next 9 months i.e. by September 30th, 2017, unless the period is further extended as above. It is the full value of export i.e. GBP 126,000 is to be realized within the period stipulated.

(C) Regulation 9 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 deals with the period within which export value of goods to be realized. As per Regulation 9(2)(a),where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realized and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of export.

It is further provided that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the said period.

Since in the given case, the goods were shipped and/or exported on 1st January 2017, EUR 265,000 is expected to be realized within the next 9 months i.e. by September 30th, 2017, unless the period is further extended as above. It is the full value of export i.e. CIF value (EUR 265,000 is to be realized within the period stipulated.

Note - "or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time" and, "said period" Inserted vide Notification No. FEMA 23(R)/(3)/2020-RB dated March 31, 2020 published in the Official Gazette of India, Extra Ordinary, Part III, Section 4 dated March 31, 2020.

It is pertinent to mention here that on 1st April 2020, through RBI/201920/206 A. P. (DIR Series) Circular No. 27, It has been decided, in consultation with the Government of India (after considering the representations from Exporters Trade bodies to extend the period of realisation of export proceeds in view of the outbreak of pandemic COVID- 19), to increase the present period of realization and repatriation to India of the amount representing the full export value of goods or software or services exported, from nine months to fifteen months from the date of export, for the exports made up to or on 31st July 2020.

Answer 7

(A) As per regulation 15 (1) of the Foreign Exchange Management (Export of Goods and Services) Regulation 2015 where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that;

(i) The shipment of goods is made within one year from the date of receipt of advance payment;

(ii) The rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and

(iii)The documents covering the shipment are routed through the authorised dealer through whom the advance payment is received.

Hence the rate of interest shall not be more than LIBOR+1% and the documents covering the shipment are also routed through the State Bank of India.

(B) As per regulation 15 (1) of the Foreign Exchange Management (Export of Goods and Services) Regulation, 2015 where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that the shipment of goods is made within one year from the date of receipt of advance payment;

As such, since advance payment is received by LSPL on 1st July 2018, under the normal circumstances, LSPL should have ensured shipment within one year i.e. within 1st July 2019.

But further regulation 15 (2) Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment. Since the Export Agreement between LSPL and DG provides that the first Machinery is to be supplied within 15 months from the date of receipt of advance payment in India and the second one within a period not exceeding 27 months. LSPL shall be bound by this Export Agreement and may accordingly ship the machines.

(C) As per proviso to regulation 15 (1) of the Foreign Exchange Management (Export of Goods and Services) Regulation 2015 read as "Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of an unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank".

In view of the proviso, LSPL is in a position to refund the advance received in case of its inability to make the shipment as per the supply terms only after the prior approval of the Reserve Bank of India. A period of one year may be substituted with the period stated under the Export Agreement considering the sub-clause (2) of Regulation 15.

Answer 8

According to section 6 (4) of the Foreign Exchange Management Act, 1999 (here-in-after referred to as the Act) read with regulation 5 of Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015,

(1) A person resident in India may acquire immovable property outside India;

(a) By way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the Act, or referred to in clause (b) of regulation 4;

(b) By way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (foreign currency accounts by a person resident in India) Regulations, 2015;

(c) Jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India;

(2) A person resident in India may acquire immovable property outside India, by way of inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.

(3) A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

These are the possible ways by which these properties might have been legally acquired by LSPL in UAE.

CASE STUDY 42

In the year 2001, Keshav and Tanishk formed Ketan Builders and Constructions Private Limited (KBCPL) having a registered office in Karol Bagh, New Delhi. The company provided spacious and luxurious homes with well-designed landscapes, gymnasiums along with multi-tiered security, and recreational spaces involving more than one lac square feet in Faridabad and Gurugram.

Their construction business was flourishing day-by-day. KBCPL was now a brand that could attract persons from all walks of life i.e. professors, advocates, engineers, professionals, businessmen, government employees holding responsible positions, etc. Expanding business required Keshav and Tanishk to appoint Radhika and her husband Ratnesh, both architects by profession, as directors in the company. Radhika was the younger sister of Tanishk.

Time was passing on. It was in the month of July 2015, that the KBCPL launched yet another project in Greater Noida whose completion date was given as June 2018. This project involved the construction of residential units, office spaces, and a mall. The modus operandi was to invest around ₹ 1200 Crores for developing the township at Greater Noida under the 'committed returns plan'.

The 'committed returns plan' required the home-buyers to pay 80% percent of the total sale consideration up-front at the time of execution of the MOU and the promoters of KBCPL would undertake to pay 12% of the 'advance money' so received each month to the investors as 'committed returns' from the date of execution of the MOU till the time actual physical possession of residential units/office space, etc., was to be handed over to the buyer. The home-buyers also had the option to choose the construction-linked payment plan and possession-linked payment plan.

In comparison to the construction and possession linked payment plan, the 'committed returns plan' proved to be an attractive one for the home-buyers belonging to different strata of society. Like many others, Aayush, by profession a computer engineer and working for a reputed MNC engaged in developing customized software, was also interested in this plan and applied for a residential unit as well as an office space. Aayush, who always wanted to be a self-employed person, in the long run, kept some future plans in mind while applying for the office space.

Under the 'committed returns plan', Aayush was required to make a payment of ₹ 80 lacs (i.e. 80% of the cost ₹ 1 cr for a 4BHK apartment and an office space in the mall). He discussed the matter with his father Rama Shankar who arranged ₹ 65 lacs by raising a loan against his fixed deposits. The remaining ₹ 15 lacs were arranged by Aayush as a gold loan by pledging the jewellery of his wife Meera. According to the MOU entered by Aayush with the company, he would be paid ₹ 80,000/month through NEFT from October 2015 onwards till the handing over of the fully constructed property. The difference of ₹ 20 lakh (i.e. ₹ 1 cr minus ₹ 80 lakh) would be paid by Aayush when he will be having possession of the apartment and office space.

Everything seemed to be fine in the first year of launching the project as the KBCPL paid the 'committed returns' to the home-buyers without any default but stopped the same thereafter without assigning any reason. Similar to the others, Aayush also noticed the default but comforted himself by assuming that the 'committed returns' would start soon after some time.

There was, however, no ray of hope and the default continued unhindered. Further, Aayush learned from certain other home-buyers that no construction activities were in sight at the earmarked plot. He made up his mind to visit the site personally and found the unthinkable revelations true. Aayush got extremely worried at the changed scenario. He contacted the officials of the company but received no reply. At a later date, when Aayush confronted the company officials, he was informed that the possession would be given within the next two years; but the time passed without anything concrete to happen.

Sensing dark clouds looming large over his head, he discussed the worrying matter with his uncle's lawyer Vansh Agarwal. Vansh informed him that due to some significant amendments in the Insolvency and Bankruptcy Code, 2016, home-buyers were also the financial creditors of the builders and developers. The premise of this amendment was based on an important fact that the home-buyers were also a reckoning force as other financial creditors, but they were being left high and dry when it came to playing a role in the decision-making process relating to the initiation of the insolvency resolution process against the defaulting builder/developer. Accordingly, he could also be referred to as a financial creditor and could initiate insolvency proceedings against the company as it had failed to pay back monthly 'committed returns' to him including non-delivery of apartment and office space at the stipulated time. The other investors could also sail in the same boat as they had a similar fate.

Vansh further clarified that 'debt' in this case was disbursed against the consideration for 'time value of money' which is the main ingredient that is required to be satisfied in order for an arrangement to qualify as

financial debt and for the lender to qualify as a financial creditor under the scheme of the Insolvency and Bankruptcy Code, 2016. This acted as a silver lining for Aayush.

In the meantime, Aayush came across a public announcement through which claims from 'Financial Creditors' as well as other creditors of KBCPL were invited. On further inquiry, he gathered that the company had defaulted in repayment of a term loan of ₹ 100 crore which were obtained from the National Bank of India. Accordingly, the Hon'ble National Company Law Tribunal (NCLT), Delhi, on the application of the National Bank of India, had ordered the commencement of the Corporate Insolvency Resolution Process (CIRP) against KBCPL. As mentioned in the public announcement, Aayush submitted his claim along with proof thereof in 'Form C' through the specified e-mail.

MULTIPLE CHOICE QUESTIONS

1. In the given case study National Bank of India filed an application for corporate insolvency resolution process (CIRP) with the National Company Law Tribunal, Delhi against KBCPL for default in repayment of term loan. If everything was in perfect order, from which date the corporate insolvency resolution process would have commenced?
   (a) From the date of admission of the application.
   (b) From the date of submission of the application.
   (c) From the date of ascertaining the existence of default by the NCLT.
   (d) From the date of appointment of Insolvency Resolution Professional (IRP).

2. Suppose Radhika had given a loan of ₹ 15 lakh to KBCPL which remained outstanding when Corporate Insolvency Resolution Process was ordered. As a financial creditor whether she could be a part of the Committee of Creditors (CoC) after she submitted her claim in 'Form C'.
   (a) Yes, she could be a part of the Committee of Creditors (CoC) as she had given a loan to KBCC which was more than ₹ 5 lakh.
   (b) No, she is a director of KBCC, could not be a part of the Committee of Creditors (CoC).
   (c) Yes, she could be a part of the Committee of Creditors (CoC), if Interim Resolution Professional (IRP) permitted her despite the fact that she was a director of KBCC.
   (d) Yes, she could be a part of the Committee of Creditors (CoC), if Interim Resolution Professional (IRP) sought permission of a minimum of 66% of the shareholders of the company carrying voting rights.

3. In the case study, Ketan Builders and Constructions Private Limited had demanded advance payment of 80% of the project cost from the intending home-buyers. After coming into force of Real Estate (Regulation and Development), Act, 2016 (RERA), maximum how much advance money can be demanded by a builder.
   (a) Not more than 25%
   (b) Not more than 20%
   (c) Not more than 10%
   (d) Not more than 5%

4. Suppose the application for Corporate Insolvency Resolution Process against KBCPL filed by National Bank of India with the National Company Law Tribunal, Delhi is adjudged as incomplete in respect of certain matters. Within how much time the defects must be rectified from the receipt of notice by the National Bank of India from the National Company Law Tribunal, Delhi.
   (a) 7 days
   (b) 10 days
   (c) 14 days
   (d) 15 days

5. In the given case study, Aayush, as a 'financial creditor', could also move an application for corporate insolvency resolution process because non-payment of debt by KBCPL was much more than the minimum amount stipulated for triggering a default against the company. Indicate that minimum amount by choosing the correct option (Assuming the current calendar date is 31st July 2021)
   (a) ₹ 50,000
   (b) ₹ 1,00,000
   (c) ₹ 10,00,000
   (d) ₹ 1,00,00,000

DESCRIPTIVE QUESTIONS

6. In this case study Aayush, who is a home-buyer, has been categorized as a 'financial creditor'. You are required to answer why the advance payment against allotment by allottees can be regarded as 'financial lending'? How advance given by homebuyers against the allotment is distinct from the debt of the operation creditor?

7. Can a person (say Mr. Aayush) also be an operational creditor apart from being a financial creditor?

8. In the given case study, suppose Aayush having developed a customized software for KBCPL. Despite repeated reminders, KBCPL did not settle his invoice of ₹ 5,00,000 raised in this respect. Ultimately,

Aayush proceeded to file an application for initiating the Corporate Insolvency Resolution Process (CIRP) against KBCPL with the NCLT, Delhi. What could have been the documents which Aayush might have furnished along with the application filed for initiating the CIRP?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (a) From the date of admission of the application.

   Reason: Section 7(6) of the IBC states that the corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) by the Adjudicating Authority.

2. (b) No, she is a director of KBCC, could not be a part of Committee of Creditors (CoC).

   Reason:
   Section 21 of the IBC provides as under:
   (1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a CoC.
   (2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

   Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

   Further, section 5(24)(a) states that 'related party' in relation to a corporate debtor means, a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor. Since in the given case, Radhika being a director in the company will be termed as related party, hence cannot be the part of the CoC.

3. (c) Not more than 10%

   Reason: Section 13(1) of the RERA provides that a promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

4. (a) 7 days

   Reason: The proviso to section 7(5) of the IBC provides that Provided that the Adjudicating Authority (AA) shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within 7 days of receipt of such notice from the AA.

5. (d) ₹ 1,00,00,000

   Reason: Section 4(1) of the IBC provides that Part II shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one crore rupees.

   1 Subs. by Notification No. S.O. 1205(E), for "one lakh rupees" (w.e.f. 24-3-2020).

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

According to section 5 (8) (f) of the Insolvency and Bankruptcy Code, 2016 states that financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.

Further, as per the explanation inserted to this sub-clause,
(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
(ii) the expressions, "allottee" & "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of sec 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016).

Hence advance payment against allotment by allottees shall be regarded as 'financial lending'. Further, the payment made by Aayush to KBCPL for purchasing an apartment and office space is, therefore, a 'financial debt', and accordingly, Aayush is a 'financial creditor'.

Further, Hon'ble Supreme Court, while disposing civil writ petition no. 43 of 2019, in the matter of Pioneer Urban Land and Infrastructure Ltd and Anr vs. Union of India, highlight the following three major difference between operational debts

Point of difference	Operational Creditor	Advance by the allottee
Role of supplier	In operational debts, a person who supplies the goods and services becomes a creditor.	In the case of real estate developers, who is the supplier of the flat/apartment is the debtor.
Time value of money	Payments made in advance for goods and services are not made to fund the manufacturer of such goods or provision of such services.	Advance by allottees against allotment is to fund the developer to construct the apartment and flats.
The stake of interest of fund provider in the business of the other party	The operational creditor has no interest in or stake in the corporate debtor's business	Allottee of a real estate project is vitally concerned with the financial health of the corporate debtor

Hence, the advance given by homebuyers against the allotment is distinct from the debt of the operation creditor.

Answer 7:

Yes, a person may also be an operational creditor apart from being a financial creditor.

According to Section 5 (20) of the Insolvency and Bankruptcy Code, 2016, the term 'operational creditor' means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Further, according to Section 5 (21), the term 'operational debt' means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

In order to categorise Aayush as an 'operational creditor' also, in addition to a 'financial creditor', he should have made provision of goods, for example, the supply of construction material to KBCPL and the payment for which remains unpaid. Or else, he should have made provision of certain services but the company, till date, has not honoured the invoice raised by him. Another limb of operational debt is 'employment dues' i.e. Aayush was/is in the employment of the company but his employment dues are still pending.

Section 21(4) of the IBC states that where any person is a financial creditor as well as an operational creditor,-

(a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

Answer 8:

As per sub-section (3) to section 9 (application for initiation of corporate insolvency resolution process by an operational creditor) of the Insolvency and Bankruptcy Code, 2016, Mr. Aayush as an 'operational creditor' shall furnish the following documents, along with the application for corporate insolvency resolution process of KBCPL:

(a) A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor.

(b) An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt.

(c) 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.

(d) A copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) Any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

CASE STUDY 43

Way back in November 2011, Mr. Hariharan Reddy, a senior professor of Biology at the University of Hyderabad, booked a 3BHK apartment in Royal Golf Burg - an impressive and integrated housing project proposed to be developed by a reputed builder popularly known as Raj Group. The project was large enough to accommodate 1200 fully-furnished apartments of different sizes spread out in 15 towers; each tower having 80 apartments. In addition, a golf course and a mall were also to be developed. This project was to come up near Shankarpally Road, Hyderabad, a non-polluting and posh area having all the facilities in close vicinity including ultra-modern cinema halls, markets, schools, colleges, hospitals, etc.

As mentioned above, the Raj Group which undertook to develop Royal-Golf-Burg consisted of Dhanraj and his younger brother Yuvraj, a well-known figure of Hyderabad. Both the brothers were the directors of Eklavya Estates Private Limited (EEPL) which had a registered office at Gachibowli, Hyderabad. EEPL owned the plot of land where the proposed housing project including the mall was to be developed.

The gated residency with a nice and peaceful environment as provided by Royal Golf Burg was meant for golf lovers who wanted to live a sleek and sporty lifestyle by making golf playing a routine. The glamour which attracted Mr. Reddy the most was that every apartment owner after occupation would feel the ownership of the golf course due to its strategic location vis-à-vis each apartment.

The management team of EEPL comprised seasoned architects and professionals who had, in the past, made luxurious homes possible for every home-buyer and the team was considered to be a dedicated one having will and honesty as its strong pillars that could build integrated properties with excellent infrastructure and services. The builders had completed several giant opulent projects in Guwahati, Mumbai, and Bhopal earlier. In the case of Royal Golf Burg, the company was to give delivery of fully furnished apartments by December 2017. Construction cost including the cost of the land was valued at around ₹ 800 crores.

The current project, however, missed the deadline of December 2017 and on the date of delivery, it was noticed that only six towers were completed; but the apartments in those towers were yet to be furnished. The other three towers had been constructed with a skeletal structure. In the other six towers, only the foundation and negligible wall work had been completed. In other words, the construction work was just at the initial stage and nothing more than that. However, the construction of the mall was almost complete. This angered the home-buyers including Mr. Reddy a lot but their repeated visits to the office of promoters did not evoke any positive response. Six months passed without any significant happening. Nothing was done to furnish the already constructed apartments or to develop the other nine towers. Disappointed, Mr. Reddy and others approached Telangana State RERA authorities for redressal of their grievances including the filing of complaints regarding non-delivery of apartments.

Telangana State RERA, after a detailed inquiry, found that there were several financial irregularities together with diversion and siphoning of funds. More than two hundred shell companies were floated in the names of peons and drivers to divert money. Further, unaccounted money worth crores of rupees was invested in various other housing projects floated by the Raj Group which sold these flats at throw-away prices on paper but received black money in cash which was laundered through various shell companies operated by the Raj Group. This attracted the provisions of the Prevention of Money Laundering Act, 2002.

In the case of 250 apartments built in the six towers, the double allotment was also detected where the apartments were allotted to the persons more than their entitlement at a very nominal amount. It included the person himself, the spouse or dependent children, and almost in all cases, such persons were found to be connected with the promoters. The double allotment deprived the genuine home-buyers who had parted with their hard-earned money from getting even the deserving allotment of apartments despite paying around 80% of the cost. The double allotment was considered to be a form of unfair practice in which the promoters were involved. Inquiry by the RERA Authority also revealed that ten gardeners and drivers of Raj Group who had no means of paying the price of ten apartments were allotted the flats though consideration came from the Raj Group itself.

A show-cause notice was issued by Telangana State RERA authorities to the developers asking them to provide a satisfactory response within a period of 30 days from the date of the notice as to why the project should not be de-registered. The response was given by the directors, however, was dismal, lacked substance, and was not at all satisfactory.

However, de-registration of a building project is not an ideal choice for the authorities keeping in view the larger interests of the stakeholders as well as the nation as a whole and it is resorted to only when all the possible avenues of reaching a comfortable and plausible solution are shut. Therefore, as a last attempt

before going for de-registration, RERA authorities in the interest of the allottees, permitted the developer EEPL to continue with the project and complete it in the next one year at the most subject, however, to the payment of a fine equivalent to 10% of ₹ 800 crores within next thirty days.

However, the developers seemed to be not serious at all so far as the completion of the housing project was concerned. They did not make use of this golden opportunity; thus, letting the project slip out of their hands. Citing insufficiency of the funds, they did not cough out the required fine of ₹ 80 crores within the next thirty days and therefore, the Telangana State RERA authorities were forced to de-register the project, and an order to this effect was passed. Thereafter, finally, the project was taken over by RERA Authorities.

After take-over, RERA authorities with the concurrence of the State Government imposed various restrictions and controls on the project and the developer. These included:

- Freezing of various bank accounts due to which the developer was not allowed to make any payment or withdraw from these accounts without the authority's approval.
- Debarring the developer EEPL from accessing the website of RERA in relation to the project.
- RERA offices in other States and Union Territories were given information about such a revocation.
- As a part of name and shame, the name of the EEPL was mentioned in the list of the defaulters along with the photographs of Dhanraj and Yuvraj, and also relevant information about the case was displayed.

The officials of Telangana State RERA opined that after de-registration, there were several options before them to solve the issue in favour of home-buyers. The authority could give the first right of completion of the project to the home-buyers. In case the buyers were not in a position to do so by pooling their resources together and required RERA to supervise the development work which could be undertaken by another trust-worthy developer, then the RERA Authority could take steps to develop a mechanism to supervise the project.

In case there was not enough money left in the project fund, the Authority could also start proceedings to recover the diverted funds from the EEPL and it could also explore other possibilities to complete the project if the home-buyers so wished.

The response from the Home-buyers' Association of Royal Golf Burg was positive and therefore, a conciliatory committee was formed. President and Secretary of the Home-buyers' Association were nominated to the committee and RERA then appointed Mr. Yudhister Pal, a retired IAS Officer as a conciliator to supervise the operations of the committee. Another developer Uttam Constructions Private Limited was given the charge to complete the project within one year under the supervision of the RERA Authority represented by Mr. Yudhister Pal.

RERA ordered that all money realised from the sale of Mall as well as remaining dues to be given by the home-buyers would flow into an 'Escrow Account' opened solely for the construction of the project and Mr. Yudhister would release the funds only with the consent of the President and Secretary of Home-buyers' Association. Proceedings to recover the diverted funds from the EEPL were also started. It was hoped that the project would be completed as per the new schedule.

MULTIPLE CHOICE QUESTIONS

1. Before revocation of registration, the RERA authorities are required to give written notice to the promoter stating the grounds on which it is proposed to revoke the registration. Such notice should be of how many days within which the promoter needs to reply?
   (a) Not less than 30 days
   (b) Not less than 45 days
   (c) Not less than 60 days
   (d) Not less than 120 days

2. RERA Authority passed the order of de-registration of Royal Golf Burg Project against its promoter EEPL. Within how many days of receipt of the order of de-registration, EEPL, as an aggrieved party, can file an appeal with the concerned Real Estate Appellate Tribunal?
   (a) 30 days
   (b) 45 days
   (c) 60 days
   (d) 120 days

3. The promoter EEPL did not complete the Royal Golf Burg Project within the projected time-frame as shared through declaration with RERA Authorities while seeking registration under Section 4. For such contravention, how much penalty the EEPL is liable to pay?
   (a) Penalty may extend up to 2% of the estimated project cost
   (b) Penalty may extend up to 5% of the estimated project cost

(c) Penalty may extend up to 10% of the estimated project cost
(d) None of the above

4. In the case of the Royal Golf Burg project, it is seen that it was de-registered by the RERA Authorities due to various irregularities. Choose from the given options as to who shall have the first right of refusal for carrying out the remaining development works in case of such revocation of registration.
(a) Home-buyers' Association of Royal Burg Golf
(b) EEPL
(c) Mr. Yudhister Pal, Head of Conciliatory Committee
(d) RERA Authority

5. In case the Real Estate Appellate Tribunal admits the appeal of EEPL against de-registration of the Project, then maximum within how much time such appeal must be disposed of?
(a) Within 30 days from the receipt of the appeal
(b) Within 45 days from the receipt of the appeal
(c) Within 60 days from the receipt of the appeal
(d) Within 120 days from the receipt of the appeal

DESCRIPTIVE QUESTIONS

6. According to the above case study, the Royal Golf Burg promoted by the Raj Group was de-registered by the Telangana State RERA authorities because the promoters were found to be involved in certain unfair and fraudulent practices. You are required to state the various reasons due to which registration granted to a project under RERA can be revoked and the project stands de-registered.

7. In the given case study, the Telangana State RERA authorities resorted to de-registration of the Royal Golf Burg Project due to unfair and fraudulent practices and irregularities followed by its promoters while developing the project, and the development was carried out at such a slow pace that ultimately the home-buyers could not get the possession of fully furnished apartments well within the promised time. What are the obligations of the RERA Authority and other matters associated with it if it recourses to de-registration of a project?

8. The circumstances stated in the above case study require the RERA Authority to revoke the registration of the Royal Golf Burg Project instead of its extension. State the provisions under which the RERA Authority may be required to extend the registration instead of revoking it.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (a) Not less than 30 days

Reason: Section 7(2) of the RERA provides that the registration granted to the promoter under section 5 shall not be revoked unless the Authority has given to the promoter not less than thirty days notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation.

2. (c) 60 days

Reason: Section 44(2) of the RERA provides that every appeal made under sub-section (1) shall be preferred within a period of 60 days from the date on which copy of the direction/order/decision made by the Authority or the adjudicating officer is received by the appropriate Govt/the competent authority /the aggrieved person and it shall be in such form and accompanied by such fee, as may be prescribed.

3. (b) Penalty may extend up to 5% of the estimated project cost

Reason: Section 61 of the RERA provides that if any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project as determined by the Authority.

4. (a) Home-buyers' Association of Royal Burg Golf

Reason: The proviso to section 8 of the RERA states that in case of revocation of registration of a project under this Act, the association of allottees shall have the first right of refusal for carrying out of the remaining development works.

5. (c) Within 60 days from the receipt of the appeal

Reason: Section 44(5) of the RERA provides that the appeal preferred under sub-section (1), shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within a period of sixty days from the date of receipt of appeal.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

Section 7 of the Real Estate (Regulation and Development) Act, 2016 , lists out various grounds of revocation of registration granted to a real estate project under section 5, after being satisfied that -

a. Making of default - The promoter makes default in doing anything, which is required by or under the Act or the rules or the regulations made thereunder.

b. Violation of terms or conditions of approval - The promoter violates any of the terms or conditions of the approval given by the competent authority. From the case study it shall be noticed that broadly the following terms or conditions of the approval were violated by the promoters of the Royal Golf Burg;

i. Non-construction of all the apartments in fifteen towers till the due date.

ii. Non-furnishing of apartments though the deadline to handover the furnished apartments passed.

c. Involvement in unfair practice or irregularities - If the promoter is involved in any kind of unfair practice or irregularities. The term "unfair practice" here means a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely-

(A) The practice of making any statement, whether in writing or by visible representation which,

(i) Falsely represents that the services are of a particular standard or grade;

(ii) represents that the promoter has approval or affiliation which such promoter does not have;

(iii)makes a false or misleading representation concerning the services;

(B) The promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;

d. Fraudulent practices - The promoter indulges in any fraudulent practices.

From the case study it shall be noticed that the fraudulent practices were undertaken by the promoters of the Royal Golf Burg included;

i. Resorting to double allotment due to which the genuine home-buyers were not allotted the apartments which they very much deserved.

ii. Diversion of funds meant for constructing the apartments to shell companies.

iii. Allotment of apartments in the name of the peons and drivers though such allotments were actually meant for the use of the promoters since the consideration flowed from them.

Note - De-registration of a building project is not an ideal choice for the authorities keeping in view the larger interests of the stakeholders as well as the nation as a whole and it is resorted to only when all the possible avenues of reaching a comfortable and plausible solution are shut.

Answer 7:

Section 8 of the Real Estate (Regulation and Development) Act, 2016 deals with the obligation of Authority consequent upon the lapse of or on the revocation of registration.

Upon lapse of the registration or on revocation of the registration under this Act, the Authority, may consult the Appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority:

Provided that no direction, decision or order of the Authority under this section shall take effect until the expiry of the period of appeal provided under the provisions of this Act:

Provided further that in case of revocation of registration of a project under this Act, the association of allottees shall have the first right of refusal for carrying out of the remaining development works.

Answer 8:

Section 6 of the Real Estate (Regulation and Development) Act, 2016 deals with the extension of registration.

The registration granted under section 5 may be extended by the Authority on an application made by the promoter, due to force majeure, in such form and on payment of such fee as may be prescribed:

Provided that the Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year:

Provided further that no application for extension of registration shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

Explanation.- For the purpose of this section, the expression "force majeure" shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

According to Section 7 (3) of the RERA Act also, the Authority may, instead of revoking the registration under sub-section (1) of Section 7, permit the registration to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.

CASE STUDY 44

The production of sugarcane is reasonably good in Uttar Pradesh from the point of view of both quality and quantity. The cause of worry, however, is the non-receipt of timely payments by the sugarcane-growers from the sugar mills. A common platform, therefore, is an essential requirement to provide a solution to this impending problem. Keeping this prerequisite in view, the sugarcane cultivators came together and formed a co-operative society known as Northwest Agro Produce Cooperative Society (NWAPCS) under the U.P. Co-operative Societies Act, 1965. The main objective of forming the society was to ensure the timely collection of sale proceeds from the domineering sugar mills. However, the Cooperative Society also developed a Charter, in the form of a memorandum for its members, to regulate and control the supply, price, terms of sale of sugarcanes, collection of sale proceeds, and also recovery, if required. This Charter was binding on all the members of the Society.

In order to extend its support to the sugarcane-growers, the NWAPCS asked them to sell their entire farm produce of sugarcane to the Society at a mutually agreed price. The selling of entire farm produce to the Society was rather a pre-condition, because the farmers who wanted to avail the services of NWAPCS were under an obligation not to sell any portion of their farm produce in the open market. The Society, in turn, would sell the sugarcanes so procured from the farmers to the sugar mills.

In order to trade with the sugar mills and to deal with the regulatory authorities, financial institutions, etc., NWAPCS, in accordance with its memorandum, promoting a company called Northwest Agro Limited. Over a period of time, Northwest Agro Limited transformed itself into a significant company, playing its role as an intermediary to augment the process of the sale of sugarcanes.

The extracts from the latest audited financial statements of Northwest Agro Limited are as follows:

S. No.	Particulars	Amount (₹ in cr)
1.	Authorised Share Capital	500
2.	Paid-up Share Capital	489
3.	Sale proceeds (net of taxes) from the sale of sugarcanes	4200
4.	Operating Assets	728
5.	Net Profit	96

Mr. Vijendra Narang, CEO of Northwest Agro Limited, had heard about forward integration as a strategy of expansion and growth. Based on his research work in this direction, he prepared a proposal to takeover Sun Sugar Limited having registered office at Lucknow, which was duly approved by the Board of Directors and thereafter, by the members of the company at an extraordinary general meeting. The strategy adopted by Northwest Agro Limited was to acquire a controlling stake in Sun Sugar Limited from the open market. To recount, Sun Sugar Limited is running a number of sugar mills, with a global presence.

Around 60% of the total sales made by Sun Sugar Limited constitutes the export of raw sugar; the majority of which is exported to Iran. It may be noted that in order to settle the trade balance, Iran had started buying sugar from India because it has been blocked from the global financial system (including using USD) to transact its oil business.

During the last FY, the turnover of Sun Sugar Limited has recorded as ₹ 2200 crores while the operating assets were to the tune of ₹ 470 crores. The paid-up share capital stood as ₹ 126 crores against the Authorised share capital of ₹ 150 crores. It is noteworthy that even after the acquisition, Northwest Agro Limited and Sun Sugar Limited were not merged but maintained respective identities.

Sun Sugar Limited has a strong domestic network with retail shops and stores through which the company sells its sugar under the brand name 'Meetha'. The domestic sale constitutes around 40% of the total turnover. The retail shops and stores which sell 'Meetha' are given instructions by Sun Sugar Limited not to charge a price that is more than what is suggested by it though a lower price may be charged.

Mr. Abhishek Nair, head of the marketing department at Northwest Agro Limited was also given the responsibility to look after the marketing department of Sun Sugar Limited and to suggest ways to acquire substantial market share. After his thorough research, Mr. Nair concluded that the substantial market share in terms of new customers could be captured only if Sun Sugar Limited sold its 'Meetha' brand sugar at a price lower than the cost. Accordingly, a new pricing policy for 'Meetha' was implemented and the retail price was brought down from ₹ 40 per kilogram to ₹ 35 per kilogram. However, in order to restrict loss on account of selling sugar at a price lower than the cost incurred in its production, Sun Sugar Limited asked all the shopkeepers and stores who sold 'Meetha' brand of sugar, not to bill at a time more than 2 kilograms of 'Meetha' per purchaser.

With a view to expanding the business, the directors of Northwest Agro Limited are contemplating adding another segment in the form of 'development and production of seeds' for a variety of crops. For the purpose of financing the current project, the company, in addition to availing of funds from the domestic market, is also hopeful of borrowing foreign currency funds in US dollars from a commercial bank situated in Chicago (USA).

NWAPCS undertook to promote another company called Southwest Agro Limited, whose object clause, inter-alia, included -

- To conduct weather research and provide forecast reports;
- To provide necessary technical knowledge/guidance to the members of NWAPCS;
- To conduct market research for Northwest Agro Limited and Sun Sugar Limited.

According to the detailed market research conducted by Southwest Agro Limited, it was found that Moon Sugar Limited held a major stake in the retailing of packaged sugar under the brand name 'Aur' and covered around 30% market across the whole country at a retail price of ₹ 40 per kilogram. This was a worrying factor as Moon Sugar Limited posed stiff competition among the players who sold packaged sugar in the retail sector. Keeping in view that the acquisition of Sun Sugar Limited by Northwest Agro Limited proved largely a successful event, a bear-hug letter was sent to the senior management of Moon Sugar Limited for its acquisition. For the immediately previous FY, the turnover of Moon Sugar Limited was recorded at ₹ 2800 crores whereas operating assets were to the tune of ₹ 568 crores. Its Authorised capital was ₹ 400 crores and its paid-up share capital stood at ₹ 364 crores.

Undeniably, Moon Sugar Limited was already an undisputed market leader, and therefore, it refused the bear-hug offer. However, Northwest Agro Limited along with Southwest Agro Limited performed hostile acquisitions and each of the companies acquired a 25.5% stake in the voting rights respectively by 'tender notice' over the stock exchange. The governing body of Moon Sugar Limited was restructured completely. Post-acquisition, Northwest Agro Limited got dominance over the market.

In order to obtain the benefit of 'dominance', a new pricing policy was introduced by Northwest Agro Limited. Accordingly, the new price was fixed at ₹ 45 per kg and the packaged sugar was renamed as 'Aur Meetha'. To support the price rise, Northwest Agro Limited started restricting the supply to the market.

Northwest Agro Limited also entered into a Memorandum of Understanding (MOU) with Star Ethanol Limited, which is a USD 30 million company considering the value of its assets, for the transfer of technology by the latter.

MULTIPLE CHOICE QUESTIONS

1. When the merger of Sun Sugar Limited with Northwest Agro Limited, can be considered as a 'combination':
   (a) When the value of assets of the enterprise created after the merger is more than ₹ 1000 crores or the turnover after the merger is more than ₹ 3000 crores.
   (b) When the value of assets of the enterprise created after the merger is more than ₹ 1000 crores and the turnover after the merger is more than ₹ 3000 crores.
   (c) When the value of assets of the enterprise created after the merger is more than ₹ 2000 crores or the turnover after the merger is more than ₹ 6000 crores.
   (d) When the value of assets of the enterprise created after the merger is more than ₹ 2000 crores and the turnover after the merger is more than ₹ 6000 crores.

2. When a notice has been given to the Commission in respect of a 'combination' but the Commission has not passed any order in this respect, such 'combination' shall come into effect after the passing of how many days from the day of giving the notice to the Commission?
   (a) 90 days
   (b) 180 days
   (c) 210 days
   (d) 270 days

3. With a view to adding another segment in the form of 'development and production of seeds' for a variety of crops, Northwest Agro Limited is contemplating financing the project partly by borrowing foreign currency funds in US dollars from a commercial bank situated in Chicago (USA). Any such foreign currency borrowing availed by the company shall be:
   (a) A current account transaction
   (b) A capital account transaction
   (c) Neither a current account transaction nor a capital account transaction
   (d) Either a current account transaction, if the funds to be borrowed are less than USD 1 million, or a capital account transaction if more than USD 1 million

4. In terms of the decision of Northwest Agro Limited, Sun Sugar Limited, through some agreement, asked all the shopkeepers and stores, who sold the 'Meetha' brand of sugar, not to sell more than 2 kilograms of sugar per purchaser. Such agreement can be categorised as:
   (a) Exclusive supply agreement
   (b) Exclusive distribution agreement
   (c) Refusal to deal
   (d) None of the above

5. The Commission is empowered to direct that the 'combination' shall not take effect if it is of the opinion that the 'combination' has, or is likely to have a certain kind of 'effect' on the competition. By choosing the correct option, name that 'effect'
   (a) A severe adverse effect on competition
   (b) An appreciable adverse effect on competition
   (c) A significant adverse effect on competition
   (d) A considerable adverse effect on competition

DESCRIPTIVE QUESTIONS

6. From the given case study, is it justifiable to consider Northwest Agro Produce Cooperative Society (NWAPCS) as a 'cartel'?

7. Does Northwest Agro Limited hold dominance over the market? If yes, mention the instances under which it abuses its dominant position.

8. In the context of Northwest Agro Limited, explain briefly the regulatory aspects of 'combination' as mentioned in the Competition Act, 2002. (Presuming South-west Agro Limited has a relevant turnover of ₹ 500 crores and assets of ₹ 200 crores) Also, explain how the 'combination' is regulated.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) When the value of assets of the enterprise created after the merger is more than ₹ 2000 crores or the turnover after the merger is more than ₹ 6000 crores.

   Reason: Section 5(c)(i)(A) of the Competition Act, 2002 provides that the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if any merger or amalgamation in which the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have, either in India, the assets of the value of more than Rs 1000 crs /turnover more than Rs 3000 crs.

   However, the original thresholds set out in the Competition Act are revised two times in 2011 and in 2016.

   The current thresholds are as follows:

	Combined Assets		Combined Turnover	
	In India	Worldwide	In India	Worldwide
Parties to combination	> ₹ 2000 crores	> USD 1 billion (including atleast INR 1000 crore in India)	> ₹ 6000 crores	>USD 3 billion (including atleast INR 3000 crore in India)
Group of the Parties to a combination	> ₹ 2000 crores	> USD 4 billion (including atleast INR 1000 crore in India)	> ₹ 24000 crores	>USD 3 billion (including atleast INR 3000 crore in India)

2. (c) 210 days

   Reason: Section 6(2A) of the Competition Act, 2002 provides that no combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier.

3. (b) A capital account transaction

   Reason: Section 2(e) of FEMA provides that "capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of Person resident in india or assets or liabilities in India of Person resident outside india, and includes transactions referred to in sub-section (3) of section 6.

   In this case after borrowing in foreign currency the B.S will be altered. The liability side will be increase with borrowing and assets will also increase by Cash (FC) / Assets created out of such borrowing.

4. (b) Exclusive distribution agreement

   Reason: Before answering to this, one has to understand the meaning of 'exclusive supply agreement', 'exclusive distribution agreement', and 'refusal to deal' as provided under the Competition Act, 2002.

"Exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. [Explanation (b) to Section 3(4)]

"Exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods. [Explanation (c) to Section 3(4)]

"Refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought. [Explanation (d) to Section 3(4)]

Thus, the limiting the quantity of 'Meetha' comes under the 'Exclusive distribution agreement'.

5. (b) An appreciable adverse effect on competition

Reason: Section 3(1) of the Competition Act, 2002 provides that No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

As per 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 amongst themselves, limit, control, or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

In the given case it has been mentioned that NWAPCS has asked the sugarcane growers to sell their entire farm produce of sugarcane to the Society at a mutually agreed price. The selling of entire farm produce to the Society was rather a pre-condition, because the farmers who wanted to avail the services of NWAPCS were under an obligation not to sell any portion of their farm produce in the open market. The Society, in turn, would sell the sugarcanes so procured from the farmers to the sugar mills.

From the above, it may be noted that the term 'cartel' has been given inclusive meaning. Although Northwest Agro Produce Cooperative Society was formed to ensure the timely collection of sale proceeds from sugar mills, it also developed a charter, in the form of a memorandum for its members, to regulate and control the supply, price, term of sale of sugarcanes (though only on behalf sugarcane-growers), collection of sale proceeds and also recovery, if required. This charter, in the form of a memorandum, was binding on all the members of the Society. Hence, Northwest Agro Produce Cooperative Society is a 'Cartel' within the meaning of Section 2 (c) of the Competition Act, 2002.

Answer 7:

Yes, North West Agro Limited holds dominance over the market because as per Explanation (a) to Section 4(2) of the Competition Act, 2002, "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-

(i) operate independently of competitive forces prevailing in the relevant market; or
(ii) affect its competitors or consumers or the relevant market in its favour.

Instances of abuse of dominance

(i) **Predatory Pricing after the acquisition of Sun Sugar Limited -** Northwest Agro Limited acquired a substantial network of retailers after the takeover of Sun Sugar Limited and due to such takeover, it tried to penetrate the market using predatory pricing [refer Section 4(2)(a)(ii) of the Competition Act, 2002]. Northwest Agro Limited reduced the price of the brand 'Meetha' from ₹ 40 to ₹ 35 per kilogram which was lower than the cost incurred, whereas other players in the market like Moon Sugar Limited were selling sugar at ₹ 40 per kilogram.

As per Explanation (b) to Section 4(2) of the Competition Act, 2002, the term "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(ii) **Increasing the price after the acquisition of Moon Sugar Limited -** After the hostile acquisition of Moon Sugar Limited by Northwest Agro Limited with the help of another group company Southwest Agro Limited, Northwest Agro Limited raised the price of its branded sugar 'Aur Meetha' from ₹ 35 to ₹ 45 per kilogram, even though Moon Sugar Limited was originally selling its sugar 'Aur' at ₹ 40 per kilogram. According to Section 4 (2)(b)(i) of the Competition Act, 2002, there shall be an

abuse of dominant position under Section 4(1), if an enterprise or a group limits or restricts the production of goods or market therefore through unfair or discriminatory price.

Answer 8:

In the context of Northwest Agro Limited, the regulatory aspects of 'combination' as mentioned in Section 5 of the Competition Act, 2002, are given as under:

Sr. No	Nature of Combination	Facts of the case	Criteria for considering 'Combination'	Whether 'Combination' Or not
1	Acquisition by single acquirer but different goods [Section 5 (a) (i) (A)]	Northwest Agro Limited acquired Sun Sugar Limited.	Joint Asset over ₹ 2,000 Crs or T.O over ₹ 6,000 Crs	Yes. It is acombination. Hint: Joint T.O is ₹ 6,400 Crs (4,200+2,200) which is more than ₹ 6,000 Crs. The joint assets base of ₹ 1198 Crs (728+470) which is less than ₹ 2,000 Crs may be ignored.
2	Acquisition by a group with similar goods [Section 5(b)(ii) (A)]	Northwest Agro Limited acquired Moon Sugar Limited with the help of another group company Southwest Agro Limited.	Group assets over ₹ 8,000 Crs or T.O over ₹ 24,000 Crs	No. It is not a combination. Hint: Joint asset base of the 'group' is only ₹ 1,966 Crs (1198+200+568) and aggregate T.O is also ₹ 9,700 Crs. (6400+500+2800)
3	MOU for transfer of technology	Northwest Agro Limited enters into an MOU with Star Ethanol Limited for transfer of technology.	No criterion prescribed for considering the transfer of technology as 'combination'.	Not Applicable.

Note - Limits are quoted in section 5 of the Competition Act 2002 and further modified through notification number S.O. 675(E) dated 4th March 2016

Regulation of Combinations

According to Section 6 (1) of the act, no person or enterprise shall enter into a combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

Further section 6 (2) of the act says, any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission in the specified form along with a requisite fee, disclosing the details of the proposed combination, within thirty days of:

(a) Approval of the proposal relating to merger or amalgamation by the Board of Directors of the enterprises concerned with such merger or amalgamation;

(b) Execution of any agreement or other document for acquisition or acquiring of control.

Further section 6 (2A) of the act provides, no combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission or the Commission has passed orders under Section 31, whichever is earlier.

CASE STUDY 45

Mr. M R Gulati is a renowned and influential real estate agent. Mr. M R Gulati has over 30 years of experience in the real estate business and enjoys a good reputation, also due to the standing of his father Late Mr. Rattan Mal Gulati, in the education sector. Mr. Rattan Mal Gulati was managing trustee of Easy Key Educational Trust, along with other family members as stated below:

S No	Name	Relation to Mr. Rattan Mal Gulati	Status
1	Mr. Rattan Gulati	Self	Managing Trustee
2	Mrs. Shashi Kala	Wife	Member Secretary
3	Mr. M R Gulati	Elder Son	Member Trustee
4	Mr. O P Gulati	Younger Son	Member Trustee
5	Mrs. Rita Gulati	Daughter-in-law (wife of Mr. M R Gulati)	Member Trustee
6	Mrs. Radha Gulati	Daughter-in-law (wife of Mr. O P Gulati)	Member Trustee
7	Mr. Alok	Grand-Son (Son of Mrs. Rita & Mr. M R Gulati)	Member Trustee

Easy Key Educational Trust runs a group of agriculture colleges. Rita & Radha is a cousin from the Mohanty family with a political background, which supports the businesses of the Gulati Family, where ever possible.

Post to the death of Mr. Rattan Mal Gulati last year, Ms. Alka was admitted as member trustee to Easy Key Education Trust and Mr. M R Gulati took charge as managing trustee. Ms. Alka is the daughter of Mrs. Radha & Mr. O P Gulati; she is studying Agriculture Economics and Business Administration in one of the dual degree programs of Kansas State University, Manhattan, United States. Mr. M R Gulati during the current fiscal year remitted the USD 260,000 (USD 160,000 for tuition fee and USD 100,000 personal expenditure) to Ms. Alka through authorised person without prior permission of RBI under a liberalised remittance scheme.

On the 21st birthday of Ms. Alka, both the parents Mrs. Radha & Mr. O P Gulati, decided to visit Ms. Alka in States, to congratulate her and on the same day there is the 25th Wedding Anniversary of Mrs. Radha & Mr. O P Gulati. While passing by streets in Manhattan Mrs. Radha, find a Jewelry showroom that offers the latest design and exciting offers. Mr. O P Gulati also agrees to buy gold for Mrs. Radha, being fond of jewelry from an investment perspective. The price offered by Goldsmith is USD 45 per gram, which is cheaper than the prevailing prices of gold in India. Therefore, Mr. O P Gulati apart from the purchase of 70 grams of gold ornaments (jewelry) and 100 grams of gold in form of gold coins (these are in excess of what is allowed as per baggage rule); also purchased the latest gizmo device, which is not yet launched in India. On arrival in India, both Mrs. Radha & Mr. O P Gulati, pass through the green channel; without making any disclosure/declaration to custom authority.

Mr. Pandey, a childhood friend of Mr. M R Gulati approached him, and explained about the financial crisis in his business and make a proposal to Mr. M R Gulati for the sale of his ancestral land situated in Vikas-Khand (which is now declared as an Industrial town, with tax holiday) at price below the market prevailed prices of similar land. Mr. M R Gulati, with the intention to develop an elite corporate plaza 'G Square' where Board Meetings, Trade Conferences, Conventions, Workshops can be held, plans to buy land from Mr. Pandey. After negotiation, the price for land settled at ₹ 4 crores. Mr. M R Gulati out of his known sources paid ₹ 1 crore in cash and ₹ 3 crores in form of an account payee cheque. Said cash of ₹ 1 crore later deposited in the joint personal account of Mrs. and Mr. Pandey in parts by Mr. Pandey. Mr. M R Gulati asked Mr. Pandey to register the plot in name of Mr. Alok, and wish that his son should join his business.

To arrange funds for the purchase of land situated in Vikas-Khand, Mr. M R Gulati sold one of his earlier acquired properties for ₹ 5 crores. After making a payment of ₹ 4 crores with a residual amount of ₹ 1 crore, Mr. M R Gulati starts a housing project named 'Paradise' which comprises 6 flats (1 building of 3 floors with 2 flats at each floor) in 650 Square Meters.

Advance equal to 25% of estimated (due to escalation clause) price collected from the customer who booked the flats at the time of entering an agreement to sell, and 20% of these advance amounts used to complete one of an existing ongoing project by Mr. M R Gulati and the remaining amount kept in a separate bank account. Project Paradise is not registered with the Real Estate Regulatory Authority yet. Looking into the high demands among buyers, Mr. M R Gulati decided to enlarge the project by 4 flats, resultantly there is increase the floors from 3 to 5. Installments are also collected as and when become due, and duly accounted for in books of accounts, and acknowledgment is also provided to allottees. Mr. Rahman, who is a friend to the family of Mr. M R Gulati, is also a qualified lawyer by qualification but hotelier by profession, told Mr. M R Gulati about registration requirements of the project under the Real Estate (Regulation and Development) Act, 2016; and Mr. M R Gulati applied for same. In meantime, Mr. M R Gulati using his influence took permission from the Municipal Corporation of the city for an increase of the floor.

Mr. Alok is a fickle-minded young star who graduated from a top-notch B-School willing to start his business of solar panels hence he asked his father to help him with funds in establishing the business. Mr. M R Gulati helped the son to establish the business in form of a private company with the name 'Power Sun Private Limited' by allowing him to use the Vikas-Khand land, in order to avail tax benefit. Mr. Alok raised a loan from a financial institution at a relatively high-interest rate. Due to his capricious nature, no experience in the business of solar panels, and stiff economic conditions; the business went into losses. The situation of the debt trap arises in the second year of operation. The liquidity and solvency position of the business of Mr. Alok is this bad that he is unable to pay-off trade creditors, despite multiple month-long reminders from vendors. One of the unpaid operational creditors sent the demand notice under IBC 2016 to Power Sun Private Limited on 15th November 2019.

Ms. Alka came back to India after completing her academic program; she joined the governing body of a group of agriculture colleges operated by Easy Key Educational Trust. She planned for a strategic restructuring of the business. She decided to attain dominance in the market and beat the competition by the acquisition of the only other agriculture college operational in the state. New programs are also launched which are research-based and featuring industry immersion as a unique selling point. She ensured that all the group agriculture colleges of the group must be accredited by ICAR. Down the line having aspirations, that these affiliated colleges must either emerge as autonomous colleges or become research-based universities. Due to the monopoly in agriculture courses, all fees apart from tuitions fee doubled from the upcoming academic year.

MULTIPLE CHOICE QUESTIONS

1. What will be the maximum amount of penalty, in regard to remittances in US$ to Ms. Alka (in the United States) done by Mr. M R Gulati:
   (a) USD 260,000
   (b) USD 200,000
   (c) USD 60,000
   (d) USD 30,000

2. If the price of each flat is INRs 50 lakhs, then how much will be the maximum amount of advance to book flat
   (a) ₹ 1,50,000
   (b) ₹ 5,00,000
   (c) ₹ 6,00,000
   (d) ₹ 6,50,000

3. Out of the following acts of Mr. M R Gulati, which can be held as offence under the Real Estate (Regulation and Development) Act, 2016
   i. Not applied for registration of the project at an earlier stage (prior to the extension of floors)
   ii. Receive the advance and installments against an agreement to sell, without/prior registration of the project.
   iii. Use 20% of the fund for completion of another on-going existing project

   (a) Both i and ii
   (b) Both ii and iii
   (c) Both i and iii
   (d) All (i, ii, and iii) of these

4. By which date does 'Power Sun Private Limited' need to respond to demand notice of operational creditor served on 15th November 2019
   (a) Latest by 22nd November 2019
   (b) Latest by 25th November 2019
   (c) Latest by 30th November 2019
   (d) Latest by 15th December 2019

5. Can Mr. Alok be held as Benamidar under the Prohibition of Benami Property Transaction Act 1988?
   (a) Yes, because consideration paid by Mr. M R Gulati, but property registered in his name
   (b) Yes, because he is a party to the transaction
   (c) No, because he is the son of Mr. M R Gulati, who paid the consideration
   (d) No, because he didn't participate in the negotiation of price and payment thereof.

DESCRIPTIVE QUESTIONS

6. Is the act of Mrs. Radha & Mr. O P Gulati, on arrival to India; without making any disclosure and pass through the green channel along with the article purchased from Manhattan, United States, constitute as an offence under the Prevention of Money Laundering Act, 2002?

7. Power Sun Private Limited find it difficult to run the operations further, it is already defaulting in making payment to both financial and operational creditors. So, if 'Power Sun Private Limited' can initiate the insolvency resolution process, how it can initiate the process.

8. Ms. Alka is highly passionate about implementing the strategies, which she learned during her business administration classes. Is any of her actions or implication of strategies adopted by her in contravention to provisions of the Competition Act 2002? Explain

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) USD 30,000

   Reason: In terms of Para 1 of Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 individuals can avail of foreign exchange facility for the studies abroad and maintenance of close relatives up to USD 250,000 without the prior approval of RBI. In this case, remittance has been of USD 260,000 (i.e. 160,000+100,000), thus USD 10,000 in excess which requires prior approval of RBI. Thus, penalty of three times of the default amount USD 30,000 (USD10,000 x 3) will be levied as penalty.

2. (b) ₹ 5,00,000

   Reason: Section 13(1) of RERA states that a promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force. Therefore, 10% of 50 lakh rupees, comes to 5 lakh rupees.

3. (a) Both i and ii

   Reason: Registration real estate project is compulsory in terms of section 4(1) of RERA. Advance not exceeding 10% of the cost of flat without first entering into the agreement for sale, as per section 13(1) of RERA.

4. (b) Latest by 25th November 2019

   Reason: The time given under section 8(2) of the IBC is within a period of 10 days of the receipt of demand to respond. Therefore the respond by the corporate debtor should be made latest by 25th November, 2019.

5. (c) No, because he is the son of Mr. M R Gulati, who paid the consideration.

   Reason: Since, Alok is the son of M.R. Gulati, the hence any purchase of property in name of son is exempted vide section 2(9)(A)(b)(iii) of PBPT Act.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

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

Further, as per section 2(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

The Schedule attached to the PMLA describes the following offences:
Part A: Paragraph 12: Offences under the Customs Act, 1962
Section 135: Evasion of duty or prohibitions
Part B: Offence under the Customs Act, 1962
Section 132: false declaration, false documents etc.

Since baggage items are also subject to duty beyond a certain limit. Gold/jewelry purchased by Mrs. Radha & Mr. O P Gulati is in excess of what is allowed as per baggage rules under the custom laws, hence passing through the green channel and not filling declaration to the custom officer on arrival at an airport leads to evasion of duty under custom laws.

Hence the act of Mrs. Radha & Mr. O P Gulati, on arrival to India, without making any disclosure /declaration to custom authority and pass through the green channel along with the article purchased from Manhattan, United States, constitute as offence under the Prevention of Money Laundering Act, 2002.

Answer 7

As per section 6 of the Insolvency and Bankruptcy Code, 2016, where any corporate debtor commits a default, a financial creditor, an operational creditor, or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided. Hence, yes 'Power Sun Private Limited' can initiate insolvency resolution process.

Initiation of corporate insolvency resolution process 'Power Sun Private Limited'

Section 10 of the IBC deals with the matter relating to the initiation of CIRP by corporate applicant. The relevant provision reads as under:

(1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner with such fee as may be prescribed.

(3) the Corporate applicant shall, along-with application, furnish-

(a) the information relating to its books of account and such other documents relating to such period as may be specified;
(b) the resolution professional proposed to be appointed as an interim resolution professional; and
(c) special resolution passed by shareholder of the corporate debtor, approving the filing of the application.

(4) The Adjudicating Authority shall, within a period of 14 days of the receipt of the application, by order -

(a) admit the application, if it is complete and no disciplinary proceeding is pending against the proposed resolution professional; or
(b) reject the application, if it is incomplete, or any disciplinary proceeding is pending against the proposed resolution professional.

Provided that the Adjudicating Authority shall, before rejecting an application, give notice to the applicant to rectify the defects in his application within 7 days from the date of receipt of such notice form the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

Student must note – Due to effect of COVID-19 pandemic, vide newly inserted section 10A, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed under sections 7, 9, and 10, for any default arising on or after 25th March 2020 up-till 24th March 2021.

But as per provision of section 11, in the following circumstances 'Power Sun Private Limited' shall not be entitled to make an application to initiate the corporate insolvency resolution process:

(a) a corporate debtor undergoing a corporate insolvency resolution process (CIRP) or a pre-packaged insolvency resolution process; or

(aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made.

Explanation I.-For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

Explanation II.-For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

Note – The above scenarios are not applicable to Power Sun Private Limited, as per the fact stated in the case study.

Answer 8:

As per sub-section 1 to section 4 of the Competition Act, 2002, no enterprise or group shall abuse its dominant position.

Further as per explanation (a) to section 4(2) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to

i. operate independently of competitive forces prevailing in the relevant market; or

ii. affect its competitors or consumers or the relevant market in its favour.

Further, as per section 4 (2) (a) (ii), there shall be an abuse of dominant position if an enterprise or a group, directly or indirectly, imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or service.

In the given case, the decision by Ms. Alka to attain dominance by the acquisition of only another agriculture college operational in the state is not in contravention to provisions of the Competition Act 2002.

But increasing all fees apart from tuitions fee to double due to monopoly which comes out of dominance over the market by killing the competition, is contravention (abuse of dominance) to provisions of the Competition Act, 2002.

Acquiring dominance is not an offence, but abuse of dominance is an offence.

CASE STUDY 46

Mr. Mohit Agarwal is an engineering graduate from one of the IITs in the civil stream. He has a high dream about his career and started his own business in the form of a private limited company named 'Sweet Homes Private Limited' in association with one of his classmates and best buddy Mr. Rohit. Both Mr. Mohit and Mr. Rohit were the directors of said company.

Mr. Rohit was responsible for the administration of the company and for raising the finance. On behalf of Sweet Homes Private Limited, he met various Angel Investors and Venture Capitalists to raise a requisite amount for funding initial projects. Sweet Homes Private Limited was formed to offer affordable housing for the lower-income group through its initial project 'Hamara Ghar'. The elevator pitch by Mr. Rohit convinced Mr. Kapil Shangi to fund a seed capital of ₹ 1.5 crore in Sweet Homes Private Limited.

Project 'Hamara Ghar', although is located in the outskirt of the city, but surrounded by greenery and an approach from the national highway is pretty well. The railway station is just 1.5 kilometers away. It comprises 18 apartments in a total area of 500 Square Meters in form of 6 legs of 3 floors each (including the ground floor).

Land for the project 'Hamara Ghar' was purchased from Mr. Verma (A renowned and influential industrialist who invest in the real estate sector as well) on 3rd October 2019 for ₹ 90 lakhs. Mr. Verma through his influence tried to take Mr. Mohit under pressure to make half of the payment in cash and the remaining half in form of an account payee cheque, in order to reduce his capital gain liability, to which Mr. Mohit not agreed at all and mentioned that payment will be made entirely through account payee cheque only.

Mr. Mohit also did not wish to lose the deal from his hand, hence agreed at the second request from Mr. Verma, to make payment of ₹ 90 lakhs entirely by account payee cheque in favour of Verma Spun Private Limited (One Person Company) instead of Mr. Verma. After a few days, Mr. Verma received the show-cause notice from the office of the Assistant Commissioner of income tax, to show-cause why should the provision of the Prohibition of Benami Property Transaction Act, 1988 not applied to him.

'Hamara Ghar' is an innovative project of its own type. Under this project, affordable housing will be made and architected in such a manner that there will be fresh air ventilation and rooms will remain largely unaffected by external weather, especially in summers, and will also be in accordance with Vaastu requirements. For expertise in space management, 'Perfect Square Consultancy' an Italy-based architect firm was hired. Perfect Square Consultancy raised a bill of US $ 4000 on Sweet Homes Private Limited.

Each apartment is the comprising of a gross area of 70 Square Meters, including internal partition walls (which amounts to 3% of the gross area of the apartment); and also including an exclusive balcony of 2 Square Meters. Since said apartments are part of an affordable housing scheme, hence sale price of each apartment will be kept at ₹ 30,000 per Square Meter of the super built-up area, which is relatively much lower than prevailing market prices of ₹ 45,000-50,000 per Square Meter. The estimated cost as of now of the entire project will be about ₹ 3 crores.

Soil testing, legal aspects in reference to Municipal Corporation of the city, agreement with fund provider, maintaining escrow account and selection of vendors, etc. had been done in the meantime, in order to meet expected project delivery date 12th May, 2020.

'Home Advisor' is a famous property advisor of the city who has been hired for the Project 'Hamara Ghar'. Hence, Home Advisor was appointed as an authorized real estate agent for project Hamara Ghar, on 11th November, 2019. Home Advisor is registered with the Real Estate Regulatory Authority of the state in which it's having a registered office situated.

Home Advisor started advising their clients about the affordable houses from Sweet Homes Private Limited and within the first five days identified 4 clients, who offered advance to book the apartments under Project 'Hamara Ghar'. Advance collected was deposited into the current account of Sweet Homes Private Limited.

Application for project approval was moved to Real Estate Regulatory Authority on 15th November 2019 along with necessary details and prescribed fees, by Sweet Homes Private Limited. Project 'Hamara Ghar' got the nod from Real Estate Regulatory Authority on 2nd December 2019.

Sweet Homes Private Limited, began the construction on 20th December, 2019. By the 25th of December, all the apartments booking reaches to 100%. All 18 allottees/buyers were provided with the estimated layout and other specification which was earlier provided to the Real Estate Regulatory Authority. But on 20th January, 2020, Sweet Homes Private Limited made certain changes in specification on the advice of a site engineer. Such changes are not alterations to major layouts, but significant in nature. The majority of

the allottees didn't wish to accept the proposed changes. Allottees were making the argument that they took the decision of purchase based upon initially specified promises, after which changing specification was ethically incorrect.

MULTIPLE CHOICE QUESTIONS

1. Carpet Area for each apartment offered under project 'Hamara Ghar' as per applicable provisions of RERA is:
   (a) 70 Square Meters
   (b) 67.9 Square Meters
   (c) 68 Square Meters
   (d) 69.9 Square Meters
2. Out of the following, who can be initiating officer apart from Assistant Commissioner for attachment of the property?
   i. Income Tax Officer
   ii. Deputy Commissioner
   iii. Joint Commissioner

   (a) Only i above
   (b) Only ii above
   (c) Both i and ii above
   (d) Both ii and iii above
3. Changes proposed by Sweet Homes Private Limited need to be approved through written consent by:
   (a) All 18 allottees
   (b) At least 14 allottees
   (c) At least 12 allottees
   (d) At least 10 allottees
4. How much can be the maximum amount of consultancy charges which can be remitted by Sweet Homes Private Limited without RBI approval, presuming it is an infrastructure project:
   (a) USD 1,000
   (b) USD 10,000
   (c) USD 100,000
   (d) USD 10,000,000
5. Real Estate Regulatory Authority (RERA) must approve or reject the application for registration of Sweet Homes Private Limited maximum by:
   (a) 30th November 2019
   (b) 15th December 2019
   (c) 30th December 2019
   (d) 14th Janauary 2020

DESCRIPTIVE QUESTIONS

6. Can the act of offering apartments at prices lower than prices prevailing in the market by Sweet Homes Private Limited in the stated case, concluded as predatory bidding under the Competition Act, 2002?
7. In response to the notice issued from the Assistant Commissioner of Income Tax (ACIT), Mr. Verma appeared in the office of ACIT. ACIT compelled Mr. Verma to produce books of accounts and record evidence on affidavits, which Mr. Verma tried to avoid by stating, the same could not come within the powers of ACIT. Explain powers of authorities and state whether ACIT is justified or not.
8. Sweet Homes Private Limited offered the apartment at a price of ₹ 30,000 per Square Meter of the super built-up area. Is this the correct method of pricing under the RERA, 2016? What can be the price of the apartment and how much should be advance or booking money?
9. The Real Estate (Regulation and Development) Act, 2016 imposes certain responsibilities/functions on registered Real Estate Agents. Explain the legal position of 'Home Advisor' and is there any act of 'Home Advisor' that constitutes an offence.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) 68 Square Meters

   Reason: According to Section 2(k) of RERA "carpet area" means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment. In the given case, the cost of the project is ₹ 3 crores and the total price will be ₹ 3.672 crores (18 apartments x 68 square meters x ₹ 30000 per square meter). The carpet in this case is 68 sq meter.

2. (b) Only ii above

   Reason: According to Section 2(19) of the PBPT Act, "Initiating Officer" means an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the Income-tax Act, 1961.

   Therefore, the Deputy Commissioner can also be an initiating officer apart from the Assistant Commissioner.

3. (c) At least 12 allottees

Reason: Section 14(2)(ii) of the RERA provides that any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building. In the given case the total number of allottees are 18, so the two-third of 18 comes to 12.

4. (d) US $ 10,000,000

Reason: Para 2(iii) of Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 provides that the remittances by persons other than individual, exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India shall require prior approval of RBI.

5. (b) 15th December 2019

Reason: Section 5(1) of RERA provides that on receipt of the application under sub-section (1) of section 4, the Authority shall within a period of thirty days. In the given case, the application for registration was made on 15.11.2019 so 30 days period will end on 15.12.2019.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6

As per section 4(2)(a)(ii) of the Competition Act,2002 there shall be an abuse of dominant position, if an enterprise or a group, directly or indirectly, imposes an unfair or discriminatory condition or price (including predatory price) in purchase or sale of goods or services.

Further, as per explanation (b) to section 4(2), "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

In the given case, the price is less than the comparative market price but not less than the cost. The cost of the project is ₹ 3 crores and the total price will be ₹ 3.672 crores (18 apartments x 68 square meters x ₹ 30000 per square meter). Hence, the act of Sweet Homes Private Limited, offering apartments at prices lower than the price prevailing in the market shall not be considered as predatory bidding under the Competition Act, 2002.

Answer 7

Section 19(1) of the Prohibition of Benami Property Transaction Act, 1988, prescribed the powers of authorities.

Further, as per section 18 of the Act, authorities for purpose of this Act includes Initiating Officer. Further as per section 2(19) of the Act, Initiating Officer means an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the IT Act, 1961 (43 of 1961).

Hence ACIT for the purposes of this act shall have power specified under 19 (1) as same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely;

(a) discovery and inspection;
(b) enforcing the attendance of any person, including any official of a banking company or a public financial institution or any other intermediary or reporting entity, and examining him on oath;
(c) compelling the production of books of account and other documents;
(d) issuing commissions;
(e) receiving evidence on affidavits; and
(f) any other matter which may be prescribed.

In the given case, the notices issued by Assistant Commissioner of Income Tax (ACIT) is justified because rights are vested with him u/s 19 (1) (c) of Prohibition of Benami Property Transaction Act, 1988 to compel Mr. Verma to produce books of accounts and record evidence on affidavits.

Answer 8

Pricing for the sale of the property shall be based upon the carpet area. Hence the method of pricing (based upon super built-up area) adopted by Sweet Homes Private limited is not in line with the intentions of the Real Estate (Regulation and Development) Act, 2016 (based upon reasonable construction).

Section 2(k) of the Real Estate (Regulation and Development) Act, 2016 defines carpet area as the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area, and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.

In the given case, the built-up area is 70 square meters but the carpet area is 68 square meters i.e. 70-2. Hence, the price should not be per square meter of 70 square meters, it should be for 68 square meters.

If we presume that price remains ₹ 30,000 per Square Meter then the price for each apartment will be ₹ 20.40 lakhs (i.e. ₹ 30,000 x 68 square meters).

As per section 13(1) of the Real Estate (Regulation and Development) Act, 2016, a promoter shall not accept a sum more than ten percent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force. Hence, the maximum of advance money that can be taken from the customer is ₹ 2.04 lakhs (i.e. 10% of ₹ 20.40 lakhs)

Answer 9

As per section 10(a) of the Real Estate (Regulation and Development) Act, 2016, every real estate agent registered under section 9 (in given case 'Home Advisor') shall not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority.

'Home Advisor' was appointed as authorized real estate agent for project Hamara Ghar, on 11th November 2019. Home Advisor started advising their clients about the affordable house from Sweet Homes Private Limited and within the first five days means till 15th November 2019, identifies 4 clients, who offered advance to book the apartment.

Whereas application for project approval was moved to the Real Estate Regulatory Authority on 15th November 2019 by Sweet Homes Private Limited and Project Hamara Ghar got the nod from the Real Estate Regulatory Authority on 2nd December, 2019.

Hence, 'Home Advisor' is guilty of facilitating the sale of apartments under project Hamara Ghar, prior to its registration with Real Estate Regulatory Authority.

CASE STUDY 47

Vashi Food Industries Limited (VFIL) was established around 3 decades ago by Mr. Kalyan along with his two friends Mr. Rajeev and Mr. Adil as a private company that later became public and its securities also got listed. VFIL performed really well till a decade ago and was among the market leaders.

In expansion and diversification drive VFIL relies upon the un-organic mean of growth, it makes numerous mergers and acquisitions largely cash mergers and financed by debt. The major component of debt, which VFIL owes is in form of a syndicated loan or from a consortium of financial institutions. VFIL defaulted in serving the financial debt. Financial creditors moved the application under section 7 of the Insolvency and Bankruptcy Code (IBC) wherein the name of Mr. Syal was suggested as interim resolution profession (IRP). The application was admitted by the Mumbai Bench of National Company Law Tribunal (Adjudicating Authority) and appoint Mr. Syal as Interim Resolution Professional on 19th July, 2019. On the same date, the moratorium is also declared.

Mr. Syal constitutes a Committee of the Creditor on 18th, August 2009 and the first meeting of the Committee of Creditors took place on 3rd September 2019. In the first meeting of the Committee of Creditors, Mr. Syal is appointed as a resolution professional (RP) with an exact 66% of the voting share.

The CoC with 87% of voting power approved the resolution plan submitted by Britannia Holmes Limited (BHL). This resolution plan quoted an upfront payment at an amount lesser than the liquidation value of the corporate debtor. When the matter was placed before the Adjudicating Authority, the authority pointed out the following objections;

- The CoC should sell the plot of land immediately at Lower Parel in Mumbai as it would fetch an exceptionally high value of ₹ 100 crores as there is a boom in the property market at Lower Parel due to corporate houses, malls, and exquisite restaurants being set up.
- All financial creditors having a claim amount of over ₹ 100 crores would be entitled to 65% of their admitted claim. It also states that 62% of the admitted claim to certain operational creditors having claims of more than ₹ 1 crore.
- Financial Creditors in whose favour guarantees were executed, as their total claim stands satisfied to the extent of the guarantee, cannot re-agitate such claims as against the principal borrower

The CoC conveyed their point to the Adjudicating Authority that they did not wish to give more time in executing the sale of the property as they wanted to arrive at a Resolution Plan immediately. Still, the Adjudicating Authority was objecting on decision taken by the CoC. The CoC stated that they have taken the decision on the basis of their commercial wisdom & the resolution plan is in accordance with section 30 (2).

VFIL has acquired a substantial stake in Rico Limited, whose headquarter is based in Mumbai, and engaged in the export of rice and other foodstuffs to middle-east and European countries. Rico Limited has a stake of 26% in a Dubai-based company named Dibschi LLC. Rico Limited has an overseas office in Dubai but at the third-party location and Mr. Raj, senior project manager at Rico Limited manages Dubai's operations of Rico Limited. Currently, Mr. Raj used to work from his own location as Rico Limited doesn't have any office premises in Dubai. The Rico Limited is now approaching various real estate brokers to find a suitable space for opening an office in Dubai.

Mr. Sridhar left India on 26th May 2006 for employment with the subsidiary of Rico Limited based in Germany. Mr. Sridhar was born and brought in India and holds an Indian passport with non-resident status. Mr. Sridhar acquired a commercial property in Pune in May 2018 for which he paid out of funds held in any non-resident account. He while being a non-resident had also inherited an ancestral house situation in Mumbai from his deceased father, who was resident in India.

Mr. Sridhar who is also the nominee for the purpose of the bank account of his deceased father in India approached the branch manager of the bank for the closure of the account and withdrawal of the balance amount. Considering Mr. Sridhar is a beneficial owner, the bank asked him to verify his identity by showing the Aadhaar Card. Since Mr. Sridhar doesn't have the Aadhaar Card, he showed the other proof of his identity and relation with his father apart from the death certificate of his deceased father. The banker has shown sympathy with him but denied him to transact in absence of furnishing the Aadhaar Card as proof of identity.

Mr. Sridhar took her mother to Germany along with him as he is the only son and decided to permanently settle there. In order to acquire bigger property there, he decided to sell both the property he owns in India; hence start looking for buyers. Through his brother-in-law, who is a real estate broker (but not charged any commission from Mr. Sridhar); he was able to found two genuine buyers. The inherited property got sold

for ₹ 2.5 crores and the property at Pune got sold for ₹ 4.5 crores. Since Mr. Sridhar holds NRI status for purpose of Indian income tax laws purposes hence buyers deduct tax of ₹ 52 lakhs and ₹ 93.6 lakhs respectively at the source. Mr. Sridhar wishes to repatriate the realised funds to his German account.

MULTIPLE CHOICE QUESTIONS

1. Regarding the committee of creditors and its meeting, which of the following statements are incorrect;
   i. The committee of creditors shall conduct its first meeting by 2nd September 2019.
   ii. The committee of creditors shall comprise both operational and financial creditors
   iii. In the case of consortium all the participant banks shall be part of the committee of creditors that too with equal voting share.

   (a) i and ii only
   (b) i and iii only
   (c) ii and iii only
   (d) i, ii, and iii

2. With reference to property acquired by Mr. Sridhar in Pune in May 2018, choose the correct statement out of the following considering the legal validity in the context of provisions of the Foreign Exchange Management Act, 1999 and regulations made there under;
   (a) Mr. Sridhar shall not acquire any immovable property in India
   (b) Mr. Sridhar may acquire immovable property other than plantation property.
   (c) Mr. Sridhar may acquire the immovable property in India, but only in joint ownership with anyone who is resident in India
   (d) Mr. Sridhar may acquire only one immovable property, but not from the fund held in a NR account

3. Regarding the appointment of Mr. Syal as the resolution profession, choose the correct statement/s out of the following:
   i. Appointment of Mr. Syal is legally invalid because his appointment is approved by a voting share of not more than 66%.
   ii. Appointment of Mr. Syal is legally valid because his appointment is approved by voting share which is not less than 66%.
   iii. Written consent of Mr. Syal is required.

   (a) i only
   (b) ii only
   (c) i and iii only
   (d) ii and iii only

4. Regarding the duration of moratorium identify incorrect statement/s out of the following:
   i. The order of moratorium shall have effect from the date of admission from application filled under sections 7, 9, and 10 of the IBC.
   ii. The order of moratorium shall have effect till the completion of the CIRP.
   iii. If Adjudicating Authority approves the resolution plan under sub-section (1) of section 31, then the order of moratorium shall have effect till the date of such approval order.

   (a) i only
   (b) i and ii both
   (c) i and iii both
   (d) ii and iii both

5. Rico Limited is now approaching various real estate brokers to find a suitable space for opening an office in Dubai. Can Rico Limited buy office premises (immovable property) in Dubai?
   (a) Rico Limited, being an Indian company cannot buy office premises outside India.
   (b) Only Dibschi LLC can buy office premises in Dubai for Rico Limited.
   (c) Rico Limited can buy office premises in Dubai.
   (d) Dibschi LLC and Rico Limited can buy office premises jointly only.

DESCRIPTIVE QUESTIONS

6. In the given case, the CoC with 87% of voting power approved the resolution plan which quoted an upfront payment at an amount lesser than the liquidation value of the corporate debtor. Is NCLT (Adjudicating Authority) justified in challenging the commercial wisdom of the committee of creditors on the ground that the resolution plan offers something less than liquidation value? Can Adjudicating Authority send back the resolution plan to CoC?

7. Whether the bank is legally correct while denying Mr. Sridhar to transact in the absence of furnishing the Aadhaar Card as proof of identity? Can Mr. Nishankh use his passport as proof of his identity, for purpose of verification by the bank?

8. Since Mr. Sridhar is not aware of the local laws of the country, hence looking for your assistance to know can he repatriate funds back to his German account; if yes then how much amount of the sale proceeds can be repatriated? Advice.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) i, ii, and iii

   Reason: Examining each of the options gives in the MCQ:

   Option (i): The committee of creditors shall conduct its first meeting by 2nd September 2019.

   Answer: Section 22(1) of the IBC provides that the first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors. In the given case the CoC was constituted on 18.08.2019, so it should be held latest by 24.08.2019. Since the meeting was held on 02.09.2019, so this option is wrong.

   Option(ii): The committee of creditors shall comprise both operational and financial creditors.

   Answer: Section 21(2) states that the committee of creditors shall comprise all financial creditors of the corporate debtor. So the option (ii) is wrong.

   Option (iii): In the case of consortium all the participant banks shall be part of the committee of creditors that too with equal voting share.

   Answer: Section 21(3) of the IBC provides that Subject to sub-sections (6) and (6A), where] the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them. In the given option, the equal voting right is mentioned, which is wrong.

   After analysing each of the options, all the other options (a),(b) and (c) are wrong.

2. (b) Mr. Sridhar may acquire immovable property other than plantation property.

   Reason: Regulation 3(a) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 state that an NRI or an OCI may acquire immovable property in India other than agricultural land/ farm house/ plantation property.

3. (d) ii and iii only

   Reason: Section 22(2) of the IBC provides that the committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent. of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

   Further section 22(3)(a) provides that where the committee of creditors resolves under sub-section (2) (a) to continue the interim resolution professional as resolution professional, subject to a written consent from the interim resolution professional in the specified form it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority.

   In the gives case, it is mentioned that Mr. Syal is appointed as a resolution professional with an exact 66% of the voting share, which fulfills the requirement of section 22(2). It means the vote in favour of appointment of IRP should not be less than 66%. If exact 66% vote is in favour, Syal can be appointed as RP.

4. (a) i only

   Reason: Section 13(1)(a) of the IBC provides that the Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order declare a moratorium for the purposes referred to in section 14.

   Further options (ii) and (iii) are not correct.

5. (c) Rico Limited can buy office premises in Dubai.

   Reason: Regulation 5(3) of the FEM (Acquisition and transfer of immovable property outside India) Regulations, 2015 states that a company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

The facts given in the case are more or less similar to Maharasthra Seamless Limited vs. Padmanabhan Venkatesh & Ors (SC, Civil Appeal No. 4242 of 2019 dated 22.01.2020).

In this case, the Supreme Court held that it was completely within the CoC's commercial wisdom to approve the resolution plan of Maharasthra Seamless, which proposed an upfront payment of ₹ 477 crores, an amount which was ₹ 120.54 crores lower than the liquidation value of the corporate debtor. Court further held that the object behind prescribing valuation process is to assist the CoC to take a decision on a resolution plan properly, hence resolution need to match liquidation value as no provision of Code warrant so. The also Court held that it is not up to the Adjudicating Authority to look into the merits (commercial wisdom) of the decision of the CoC.

Court further held that CoC should make sure that the corporate debtor needs to keep going as a going concern because the rationale being that during resolution, the corporate debtor remains a going concern, whereby the financial creditors will have the opportunity to lend further money, the operational creditor's will have a continued business and the workmen and employees will have job opportunities; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of during the insolvency resolution process.

If the Adjudicating Authority finds the abovementioned parameters have not been taken care of, it may send a resolution plan back to the CoC. If the adjudicating authority has been satisfied that the CoC has taken care of the parameters mentioned then only it has to pass the resolution plan. Further, the reasons given by the CoC while approving a resolution plan may thus be looked at by the Adjudicating Authority.

Court further held, once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of section 30 thereof.

Hence NCLT (Adjudicating Authority) is not justified in challenging the commercial wisdom of the committee of creditors on the ground that the resolution plan offers something less than liquidation value.

Yes, NCLT (Adjudicating Authority) can send back the resolution plan to CoC; if it finds the parameters of going concern have not been taken care of.

Extra reference notes for students

No doubt, the CoC's commercial wisdom can't be challenged and it is always presumed that CoC has rational commercial wisdom but the same is not boundless

While interpreting the preamble of the IBC in Swiss Ribbons Pvt. Ltd. v. Union of India, the Supreme Court observed that the IBC was enacted with the primary objective of reviving and keeping a corporate debtor as a going concern by maximisation of the value of assetsand balancing the interests of all the stakeholders. The Court thus observed that the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests.

Answer 7:

Section 11A(3) of PMLA provides that the use of modes of identification under subsection (1) shall be a voluntary choice of every client or beneficial owner who is sought to be identified and no client or beneficial owner shall be denied services for not having an Aadhaar number.

Thus, as per sub-section 3 to section 11A of the Prevention of Money Laundering Act, 2002, the use of modes of the identification under sub-section (1) shall be a voluntary choice of every client or beneficial owner who is sought to be identified and no client or the beneficial owner shall be denied services for not having an Aadhaar number. Hence, the bank is legally incorrect while denied Mr. Sridhar to transact in the absence of furnishing an Aadhaar Card as proof of identity.

As per sub-section 1 to section 11A of the prevention of Money Laundering Act, 2002, every reporting entity shall verify the identity of its clients and the beneficial owner, by-

- Authentication under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 if the reporting entity is a banking company; or
- Offline verification under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016; or
- Use of a passport issued under section 4 of the Passports Act, 1967; or
- Use of any other officially valid document or modes of identification as may be notified by the Central Government on this behalf.

Further sub-section 3 becomes relevant here because it says the use of the modes of identification under sub-section (1) shall be a voluntary choice of every client or beneficial owner who is sought to be identified.

Mr. Sridhar has an Indian passport, which is issued under section 4 of The Passport Act 1967. Hence, Mr. Sridhar can use his passport as proof of his identity, for purpose verification by the bank.

Extra reference note for students
Students must note, section 4 of The Passports Act 1967 explain the classes of passports and travel documents. Sub-section 1 following classes of passports may be issued under this Act, namely ordinary passport or official passport or diplomatic passport.

Answer 8:
As per Regulation 8 (a) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, a person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section

Here it is worth noting that section 6(5) in the Foreign Exchange Management Act, 1999 read as a person resident outside India may hold, own, transfer or invest in Indian currency, security, or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India'.

Further regulation 8 (b) provides, in the event of sale of immovable property other than agricultural land/ farm house/ plantation property in India by an NRI or an OCI, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:

(a) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of his acquisition or the provisions of these Regulations;

(b) the amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in Foreign Currency Non-Resident Account or out of funds held in Non-Resident External account;

(c) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

Thus, Mr. Sridhar can repatriate of sale proceed of both the immovable properties.

Mr. Sridhar can repatriate ₹ 1.98 crores (₹ 2.5 crores - ₹ 52 lakhs), the net proceed from the sale of an inherited ancestral house; under regulation 8 (a) with permission from RBI, whereas authorised dealer may allow repatriation of ₹ 3.564 crores (₹ 4.5 crores - ₹ 93.6 lakhs) the net proceed from sale of commercial property under regulation 8 (b).

CASE STUDY 48

Mr. XYZ worked with the BANK-I for over 30 years before his retirement in 2018 and thereafter he is drawing pension from BANK-I. Post his retirement, Mr. XYZ cleared the Limited Insolvency Examination and registered with the Insolvency and Bankruptcy Board of India (IBBI) as an Insolvency Professional and later got himself empanelled with BANK-I.

ABC Steels Limited (ASL) is a steel company having its manufacturing facilities in the State of Maharashtra under the leadership of its Managing Director Mr. DEF. For its business needs, ASL had availed loan facilities from a consortium of banks led by Bank-I to the tune of ₹ 4,000 crore in the year 2010. In January 2018, ASL defaulted in making payment of interest to the consortium of Banks and the default continued for more than 90 days post which the account has classified as NPA.

In April 2019, BANK-I filed an application as a financial creditor for initiation of Corporate Insolvency Resolution Process (CIRP) against ASL (Corporate Debtor) under the Insolvency and Bankruptcy Code, 2016 (either IBC or Code) before the Mumbai Bench of National Company Law Tribunal (either NCLT or Adjudicating Authority) and had proposed Mr. XYZ as the Interim Resolution Professional (IRP). A copy of the application was dispatched to the registered office of the corporate debtor, post which the corporate debtor filed the following objections before the Adjudicating Authority:

i. That the Corporate Debtor has initiated One Time Settlement (OTS) with the consortium of banks and the same is under negotiation

ii. Mr. XYZ, the proposed IRP is ineligible to as there is an apprehension of bias on account of being an ex-employee of BANK-I and currently drawing pension from BANK-I

After hearing the arguments of both parties, the Adjudicating Authority dismissed the objection of the Corporate Debtor with respect to the OTS proposal with the Banks. However, the Adjudicating Authority observed that the objection raised by the Corporate Debtor with respect to the appointment of proposed IRP is valid and that there is indeed an apprehension of bias as the IRP is continuing to draw a pension from the applicant financial creditor (i.e. BANK-I). Accordingly, the NCLT admitted the application for initiation of CIRP filed by BANK-I on 24th August 2019 and appointed Mr. UVW from the panel of Insolvency Professionals nominated by the Insolvency and Bankruptcy Board of India to act as the Interim Resolution Professional in the instant matter and declared a moratorium.

Subsequently, on 15th October 2019, Mr. DEF preferred an appeal before the National Company Law Appellate Tribunal (NCLAT) on behalf of the Corporate Debtor, against the order passed by the NCLT admitting the application initiating CIRP against the Corporate Debtor. The NCLAT, without going into merits, dismissed the appeal on the ground that it is barred by limitation as provided in the Code.

After initiation of the CIRP and declaration of a moratorium, the IRP published the public announcement inviting claims from the creditors and other stakeholders of the Corporate Debtor. After verification of the claims, the IRP submitted a report on the constitution of the Committee of Creditors (CoC) and subsequently convened the first meeting of the CoC on 22nd September 2019, and to the same meeting, the IRP also invited the Directors of the Corporate Debtor, including Mr. DEF, the Managing Director. During the first meeting of the CoC, the financial creditors resolved to appoint the IRP as the Resolution Professional (RP) of the Corporate Debtor.

Subsequently, the RP appointed two registered valuers who have submitted their valuation reports on fair value and the liquidation value of the Corporate Debtor. The valuation reports were produced by the RP before the CoC in their meeting where the CoC resolved to appoint a third valuer to provide estimates of fair value and liquidation value. As per the instructions of the CoC, the RP appointed another registered valuer and then the average of the two closest estimates are considered as fair value & liquidation value, by the RP.

The RP prepared the information memorandum (IM) and submitted the same for consideration of the CoC. After obtaining the consent of the CoC with respect to the eligibility criteria of the resolution applicant (RA), the RP published Invitation for Expression of Interest (EoI) as per the prescribed form inviting the prospective RAs who meet the eligibility criteria to submit their EoI. The RP received ten EoIs based on which the RP prepared the final list of Resolution Applicants (RAs). To each of the prospective RA in the final list of RAs, the RP shared the IM, evaluation matrix (EM), and request for resolution plan (RFRP). As per the RFRP, the prospective RAs are required to submit their resolution plans within 45 days thereof.

Of the 10 RAs, the RP received resolution plans from 5 RAs within the prescribed timeline of 45 days and 3 of the RAs have withdrawn from the process. The RP verified whether the submitted resolution plans meet the required compliances as per the Code and subsequently, the RP presented only the compliant resolution

plans before the CoC and rejected the plans submitted by the other 2 RAs which are not meeting the requirements of the Code.

During the meeting of the CoC where the resolution plans are considered, the financial creditors requested the RP not to allow the Directors from participating in the meeting when the resolution plans are discussed and further requested the RP not to circulate the resolution plans to the Directors as the same were only to be given to the CoC for its consideration. The RP agreed to the request of the CoC and subsequently did not invite the directors to the meeting of the CoC where the resolution plans are considered. Also, the Directors were not provided with the resolution plans. Aggrieved by these actions of the CoC and the RP, the Managing Director Mr. DEF and the other Directors have moved an application before the NCLT with a prayer to direct the RP to invite the Directors of the Corporate Debtor to all the meetings of the CoC, as required under the Code and to circulate all the documents relevant to the agenda discussed during the meeting of the CoC including the resolution plans to the Directors. The NCLT dismissed the application directing the RP to invite the Directors to all the meetings of the CoC but not to insist upon being provided information that was considered confidential either by the resolution professional or the CoC. Having aggrieved by such decision of the NCLT, the Directors preferred an appeal before the NCLAT which upheld the order of the NCLT and dismissed the appeal. Aggrieved thereof, the Director filed an appeal before the Supreme Court of India. The Supreme Court ruled in favour of the Director by holding that the Directors are entitled to a copy of the resolution plan.

Subsequently, the CoC discussed the resolution plans in the presence of the Directors and finally approved the resolution plan submitted by M/s Rare Steel Limited. The RP filed the approved resolution plan with the Adjudicating Authority for its approval. The NCLT after considering that the plan is met with the requirements under the Code approved the resolution plan.

MULTIPLE CHOICE QUESTIONS

1. Which of the following statement/s is/are correct as per IBC regarding the appointment of Mr. XYZ as an Interim Resolution Professional?

   i. Mr. XYZ being an ex-employee of the applicant financial creditor is ineligible to be appointed as IRP
   ii. Mr. XYZ is eligible for appointment as IRP of the Corporate Debtor
   iii. The proposed IRP (Mr. XYZ) shall never be subject to any disciplinary proceeding

   (a) i only
   (b) ii only
   (c) i & iii
   (d) ii & iii

2. Which of the following does the adjudicating authority look into, before admission of any application for initiation of CIRP by the financial creditor?
   (a) Occurrence of the default, the existence of the dispute, and application is complete in all respects
   (b) Occurrence of the default, the application is complete in all respects, and no pending disciplinary proceedings against the proposed IRP
   (c) Pending suit or arbitration before any other forum with respect to the default, the application is complete in all respects
   (d) Affidavit of the financial creditor as to there is no existence of dispute in addition to the occurrence of the default, the application is complete and no apprehension of bias and/or no disciplinary proceedings against the proposed IRP

3. If the CoC, in their first meeting, decided to appoint another insolvency professional as Resolution Professional, which among the following describe the correct procedure?
   (a) IRP to file an application before the Adjudicating Authority for the appointment of the proposed RP whose name shall be forwarded to the IBBI for its confirmation along with the consent of the proposed RP
   (b) The proposed RP shall file an application before the Adjudicating Authority for consideration of his/her appointment as the RP, whose name shall then be forwarded to the IBBI for its confirmation
   (c) The CoC to file an application before the Adjudicating Authority for the appointment of the proposed RP whose name shall be forwarded to the IBBI for its confirmation
   (d) The CoC and the RP shall file a joint application before the Adjudicating Authority for the appointment of the proposed RP after obtaining confirmation from the IBBI

4. In the appeal filed by Mr. DEF before the NCLAT against the admission order passed by the Adjudicating Authority, which among the following is the correct statement?
   (a) The limitation for filing an appeal before the NCLAT is 60 days including the time period for condonation of delay.

(b) The limitation for filing an appeal before the NCLAT is 30 days and any delay up to 15 days may be condoned by the NCLAT on a case-to-case basis
(c) The limitation for filing an appeal before the NCLAT is 30 days and if sufficient cause is shown to the NCLAT then it shall condone any delay up to 15 days thereafter
(d) Condonation of delay is the absolute discretion of the NCLAT and no time limit be imposed on NCLAT in this regard.

5. In the case study, after the admission of the application for initiation of CIRP, what is the legal position of the Directors of the Corporate Debtor?
(a) The Board of Directors are suspended and their powers are exercised by IRP/RP
(b) The IRP/RP shall be the Designated Chief Executive Officer and the BOD shall stand suspended
(c) The powers of the Board of Directors are suspended
(d) The Board of Directors are suspended and the Directors are deemed to have resigned from the Board of the Corporate Debtor

DESCRIPTIVE QUESTIONS

6. Mr. DEF wants to initiate disciplinary proceedings against Mr. UVW (for illegality in appointing a third registered valuer with regard to provision detailed in Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016). Mr. DEF approached you to take your opinion regarding his right to file a complaint before the IBBI against Mr. UVW.

7. Assuming Mr. DEF is ineligible to submit a resolution plan, he wants to continue negotiating for One Time Settlement with the consortium of Banks based on the resolution plans received during CIRP and provided to the Directors for their consideration as per the directions of the Supreme Court. Advice on the possibility of withdrawal of application under the IBC.

8. One of the prospective RAs whose resolution plan has been rejected by the RP wants to file an application before the Adjudicating Authority with a prayer to direct the RP to present their plan before the CoC on the ground that RP does not have the power to reject the resolution plans.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (b) ii only

Reason

Regulation 3(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, provides that an insolvency professional shall be eligible to be appointed as an interim resolution professional or a resolution professional, as the case may be, for a corporate insolvency resolution process of 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.

Therefore, if the IP independent of the CD, he can be appointed as IRP/RP. It is irrelevant that the IP was an ex-employee of the FC.

2. (b) Occurrence of the default, the application is complete in all respects, and no pending disciplinary proceedings against the proposed IRP.

Reason

Section 7(5)(a) of the IBC provides that where the Adjudicating Authority is satisfied that a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application.

Hence, the option (b) is correct.

3. (c) The CoC to file an application before the Adjudicating Authority for the appointment of the proposed RP whose name shall be forwarded to the IBBI for its confirmation.

Reason

Section 22(3)(b) of the IBC provides that where the committee of creditors resolves under sub-section (2) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form.

Hence, the option (c) is correct.

4. (b) The limitation for filing an appeal before the NCLAT is 30 days and any delay up to 15 days may be condoned by the NCLAT on a case-to-case basis

Reason

Section 61(1) of the IBC provides that notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

Sub-section (2) states that every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal.

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

Please note that in option (d) the word 'shall' is used, while is option (c) the word 'may' is used. 'May' denotes the discretionary power of the NCLAT.

Hence, the option (b) is correct.

5. (c) The powers of the Board of Directors are suspended.

Reason

Section 7(6) provides that the CIRP shall commence from the date of admission of the application.

Section 13(1)(c) provides that the Adjudicating Authority after admission of the application under section 7 or section 9 or section 10, shall by an order appoint and IRP.

Section 17(1)(b) provides that from the date of appointment of the IRP the powers of the board of directors shall stand suspended and exercised by the IRP.

Therefore, the moment the application is admitted by the AA and IRP is appointed the powers of the BoD are suspended and vests with the IRP.

Hence, the option (c) is correct.

The student must interpret section 19 (1) of Insolvency and Bankruptcy Code, 2016 in light of NCLAT judgement pronounced in case of M/s. Subasri Realty Private Limited vs. Mr. N. Subramanian & Anr, wherein NCLAT clearly stated to ensure that Corporate Debtor remains an on-going-concern, all the Director/ employees are required to function and to assist the Resolution Professional who manages the affairs of the Corporate Debtor during the period of moratorium. Hence reasonable construction is that the power of board (of directors) or 'its functions as the board' is suspended, but not the directorship and board because, in the case of Hero Fincorp Limited, the NCLAT clearly noticed that directors of the company do not cease to be directors, as they are not suspended but their function as "board of directors" is suspended.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

Pursuant to the provisions of Section 217 of the Insolvency and Bankruptcy Code, 2016 (IBC), A stakeholder, who wishes to file a complaint, shall file it with the Board in Form A along with a demand draft for two thousand and five hundred rupees drawn in favour of the Insolvency and Bankruptcy Board of India payable at New Delhi or an online acknowledgement of two thousand and five hundred rupees paid to the credit of the Board towards fee.

Further as per regulation 3(4), a grievance or a complaint, as the case may be, shall be filed within forty-five days of the occurrence of the cause of action for the grievance or the complaint.

The proviso to regulation 3(4) states that a grievance or a complaint may be filed after the aforesaid period, if there are sufficient reasons justifying the delay, but such period shall not exceed 30 days.

Extra reference notes for students
As per provisions of Regulation 35 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; the fair value and liquidation value shall be determined as follows; (a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor; (b) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate of the value computed in the

same manner; and

(c) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

Further sub-regulation 2 says, after the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain the confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under section 29 (2).

However, in the instant case of Mr. UVW, the Resolution Professional wrongly produced copies of valuation reports before the meeting of the Committee of Creditors (CoC) where the CoC resolved to appoint a third valuer to provide estimates of fair value and liquidation value. This act of the Resolution Professional is in contravention of Regulation 35(2) of the CIRP Regulations which mandates that the fair value and liquidation value shall be provided to every member of the CoC only after the receipt of the resolution plan.

Answer 7:

Withdrawal of application initiating Corporate Insolvency Resolution Process (CIRP) shall be pursuant to Section 12A of the Insolvency and Bankruptcy Code (IBC) read with Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations).

Section 12A. Withdrawal of application admitted under section 7, 9 or 10: The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.

Regulation 30A of of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations).

(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority -

(a) before the constitution of the committee, by the applicant through the IRP.

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

In the given scenario, the One Time Settlement proposed by Mr. DEF cannot be placed before the CoC as a resolution plan. Hence, Mr. DEF shall ensure that negotiations are made with the CoC members and the applicant who filed the CIRP Application shall obtain the approval of ninety percent voting share of the CoC and subsequently make an application before the Adjudicating Authority through the RP.

Extra reference note for students

Hon'ble NCLAT in the matter of Sterling Biotech directed the Adjudicating Authority to allow withdrawal of the CIRP application when the requisite majority of the CoC had given its approval.

Answer 8:

No doubt, section 30 (3) of the Insolvency and Bankruptcy Code, 2016 (IBC) says the resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

Here it is important to note that sub-section (2) of section 30 specifies certain conditions that resolution professionals need to check in the resolution plans submitted under section 30(1).

But, section 30 (3) of the IBC shall be read in conjunction with section 25 (2) (i) which clearly states it is the duty of the resolution professional to present all resolution plans at the meetings of the CoC. However, in the instant case, the RP rejected the resolution plan submitted by one of the prospective RAs on the ground that it does not meet the requirements of the Code.

Reasonable construction here signifies that all resolution plans must be presented at the meeting of the CoC, but a resolution plan which is in conformity to conditions laid down by section 30 (2) shall be

accepted, and it is the duty of RP under 30 (3) to identify such through due diligence, but not to take a decision of the rejection (the decision to accept reject the resolution plan reserved with CoC)

Extra reference note for students

Hon'ble Supreme Court in the matter of Arcelor Mittal India Private Limited vs. Satish Kumar Gupta & Ors held; It must not be forgotten that a Resolution Professional is only to "examine" and "confirm" that each resolution plan conforms to what is provided by Section 30 (2). Under Section 25 (2) (i), the Resolution Professional shall undertake to present all resolution plans at the meetings of the Committee of Creditors. This is followed by Section 30 (3), which states that the Resolution Professional shall present to the Committee of Creditors, for its approval, such resolution plans which confirm the conditions referred to in sub-section (2). This provision has to be read in conjunction with Section 25 (2) (i), and with the second proviso to Section 30 (4), which provides that where a resolution applicant is found to be ineligible under Section 29A (c), the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding 30 days, to make payment of overdue amounts in accordance with the proviso to Section 29A (c). A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it.

In view of the reading of section 30 (3) in light of section 25 (2) (i), and the observations made by the Hon'ble Supreme Court, it is clear that the RP in the instant case had exceeded his authority by taking a decision to reject the resolution plan and by not placing the same before the CoC for its approval. In this regard, it is advised that the prospective RA whose resolution plan is rejected by the RP, may file an application before the Adjudicating Authority under Section 60(5) of the IBC directing RP to present their plan before the CoC.

CASE STUDY 49

ABC Industries Limited is a company incorporated under the Companies Act, 1956, and holds diverse business interests spanning oil and gas, telecom, and retail, amongst others. It was founded in the year 2002 by Mr. A who is the managing director of ABC Industries Limited. It has five subsidiaries of which two are wholly owned subsidiaries. In the year 2013, the Central Bureau of Investigation, New Delhi registered an FIR under the provisions of the Prevention of Corruption Act, 1988 against the promoters of ABC Industries Limited on the basis of which the Enforcement Directorate started an investigation into the promoters and the company for offences under Prevention of Money Laundering Act, 2002 ("PMLA").

As the investigation kept unfolding, the role of different accused persons and determination of various assets which were proceeds of crime or that of laundered money lead to attachment of property involved in money laundering which is nothing but proceeds of crime to the tune of approximately INR 5000 Cr.

Parallel to this, ABC Industries Limited also defaulted in payment of interest and principal to First Bank Limited, and accordingly the account of ABC Industries Limited was declared as a Non-Performing Asset by First Bank Limited. After the declaration of account as NPA, the promoters of ABC Industries Limited in active connivance with each other and other persons laundered the funds of ABC Industries Limited for their personal advantage and use through a complex web of shell companies controlled and managed by them through dummy directors who are their employees and bought various properties with the such laundered funds.

The promoters of ABC Industries Limited had proposed a one-time settlement with the lenders including First Bank Limited which was rejected by the lenders. The First Bank Limited subsequently filed an application for initiation of the Corporate Insolvency Resolution Process ("CIRP") under the Insolvency and Bankruptcy Code, 2016 (Code or IBC). The Adjudicating Authority admitted the application and thereby declared a moratorium against the Corporate Debtor and appointed Mr. X as the interim Resolution Professional of ABC Industries Limited (Corporate debtor).

One of the responsibilities of an Interim Resolution Professional is to take into custody the assets of the corporate debtor over which it has ownership rights and which may or may not be in the possession of the corporate debtor. While collecting the financial information of the corporate debtor, the interim Resolution Professional was informed by the employees of the corporate debtor of the pending proceedings before the Enforcement Directorate and the provisional attachment order of the Enforcement Directorate on the assets of the corporate debtor.

The Interim Resolution Professional had sent a letter to the Enforcement Directorate requesting the release of the properties of the corporate debtor on the ground that the Code overrides any other enactment including the PMLA. To this letter of the Interim Resolution Professional, the Enforcement Directorate replied that the assets which are provisionally attached are proceeds of crime, and as per the doctrine of priority of precedence enshrined in the constitution of India the state will have first right to confiscate the proceeds of crime over the right of a person to recover their debts from an accused. The Enforcement Directorate further stated in its reply that based on the necessity of public policy if the proceeds of crime are not considered by the state then the criminal will have free play by mortgaging such proceeds with different persons thereby threatening the very existence of a civilized society. It was further stated in the reply that the object of the Code and the PMLA are distinct and different from each other and that the PMLA has been enacted to address the cause of international convention while the Code does not deal with the proceeds of crime at any stretch of the imagination. Having said so, the Enforcement Directorate finally stated that civil law like the IBC cannot be given to stand over a criminal law such as the PMLA, and hence it cannot override the criminal law by any stretch of the imagination. With the above justification, the Enforcement Directorate denied giving possession to the Interim Resolution Professional over the assets of the corporate debtor being provisionally attached by the Enforcement Directorate prior to the insolvency commencement date.

With the Enforcement Directorate not releasing the assets owned by the corporate debtor, the Interim Resolution Professional filed an application before the Adjudicating Authority stating that the Code provides for immunity from attachment against the properties of the corporate debtor for the successful resolution applicant and hence having the attachment continue during CIRP is against the provisions of the Code. In addition to this, the Interim Resolution Professional also stated that the action of the Enforcement Directorate in continuing the attachment even after the declaration of the moratorium is in violation of the provisions inscribed under the Code on the moratorium. In response thereof, the Enforcement Directorate filed its counter stating that the immunity from attachment shall be granted only to the successful resolution applicant and that the Resolution Professional has no locus-standi to plead for the same. It was

further stated in the counter that until the Corporate Debtor is successfully resolved under the Code, the attachment order shall continue and the Interim Resolution Professional has no right or power to take custody of the same.

During the pendency of the proceedings, the committee of creditors has been constituted and in its first meeting, the committee of creditors had approved to continue the same Interim Resolution Professional as the Resolution Professional. The Resolution Professional prepared the Information Memorandum in which all the assets of the corporate debtor have been disclosed. However, the Resolution Professional failed to disclose the fact that the majority of the assets of the Corporate Debtor are under attachment by the Enforcement Directorate. This has been deliberately done by the Resolution Professional with due information to the Committee of Creditors, in order to attract better resolution plans from prospective Resolution Applicants. After due process of law, the Expression of Interest has been received from various resolution applicants. After sending the information memorandum, evaluation matrix, and request for a resolution plan, the resolution applicants have been provided with access to the virtual data room where the details of all the documents and copies thereof have been uploaded. The Resolution Professional took due care not to upload the attachment orders passed by the Enforcement Directorate against the assets of the Corporate Debtor. The Resolution Professional deliberately concealed this information from the Resolution Applicants in order to ensure that the Resolution Applicants do not back off from this process.

However, during the process of the external due diligence undertaken by one of the resolution applicants the attachment order of the Enforcement Directorate has surfaced, and thereby the same information has become public as a result of which even the resolution applicant has backed off since they lost the trust over the information provided to them in the information memorandum.

With the failure of this process and since the Adjudicating Authority did not pass any favorable order directing the Enforcement Directorate to release the assets, no Resolution Applicant has shown interest in the corporate debtor and hence the Committee of Creditors resolved to liquidate the Corporate Debtor.

The liquidator, after passing the liquidation order by the Adjudicating Authority, has filed a fresh application before the Adjudicating Authority for the release of attachments on the assets by the Enforcement Directorate on the ground that the sale of assets during liquidation is only possible when the attachment is released. The Enforcement Directorate argued that only the successful resolution applicants can make such application for release of attachments and since the corporate debtor has been ordered to be liquidated, the liquidator does not have any locus standi to apply before the adjudicating authority for release of the attachments because Adjudicating Authority is not the appropriate forum and moreover the liquidator shall approach the forums under the PMLA in this regard.

The liquidator has been left with confusion as to whether he can sell the assets which are subject to attachment or not. When the liquidator approached the market for the sale of the assets the buyers showed no interest because the assets are under attachment and unless the attachments are released, the buyers cannot purchase the assets.

This time around, the liquidator filed yet another fresh application before the adjudicating authority with a prayer to nullify the effect of attachment of assets made by the Enforcement Directorate as the Code provides for immunity against the attachments against the properties of the corporate debtor even during sale under the liquidation process. Hence, the liquidator has not pressed for passing an order for detachment but had pleaded for relief to proceed with the sale of the assets which were under an attachment with a liberty to the buyer to apply before the Enforcement Directorate for release of the attachment for which the Enforcement Directorate shall co-operate. The Adjudicating Authority after duly considering the argument of the liquidator and having agreed to the same had passed an order to the effect that the liquidator can proceed with the sale of the assets under liquidation process with the liberty to the buyer to file an application for detachment before the Enforcement Directorate and further directed the Enforcement Directorate to render co-operation to the liquidator to proceed with the sale of the assets. With this order of the Adjudicating Authority, the liquidator proceeded for the sale of all the assets of the corporate debtor including those of the assets which are under attachment.

MULTIPLE CHOICE QUESTIONS

1. Which of the following statement/s is/are correct in the context of the moratorium declared under the Insolvency and Bankruptcy Code, 2016?

   i. Pending suits/proceedings shall be prohibited from being continued against the Corporate Debtor during the CIRP
   ii. Any action to enforce security interest by a secured creditor is prohibited during CIRP

(a) i only
(b) pii only
(c) None of i and ii
(d) Both i and ii

2. Which among the following is false in the context of "Proceeds of Crime" under the Prevention of Money Laundering Act, 2002 ("PMLA"):
   (a) Property derived as a result of criminal activity
   (b) Criminal activity shall relate to a scheduled offence
   (c) Intangible property remains excluded from the scope
   (d) Property includes movable and immovable and tangible property of any kind used in the commission of an offence under PMLA

3. Which among the following statements are not correct in regard to the information memorandum:
   i. The Information Memorandum shall be prepared by the Resolution Professional in the manner instructed by the Committee of Creditors
   ii. The resolution professional may provide to the resolution applicant access to all relevant information in the physical and electronic form
   iii. The Resolution Applicants shall be bound by the principles of confidentiality with respect to the disclosures made in the Information Memorandum

   (a) i and ii only
   (b) ii and iii only
   (c) i and iii only
   (d) i, ii and iii

4. Which of the following is not a ground for initiation of liquidation?
   (a) Non-receipt of resolution plans during CIRP
   (b) Decision of CoC to liquidate even when the resolution plans have been submitted by resolution applicants during CIRP
   (c) No business operations of the corporate debtor
   (d) Contravention of resolution plan approved by Adjudicating Authority

5. Mr. X is duty-bound to which of the following statements?
   i. Collect all information relating to the assets, finances, and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to business operations in addition to financial and operational payments for the previous three years;
   ii. Receive and collate all the claims submitted by creditors to him, pursuant to the public announcement
   iii. Monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors

   (a) i, ii and iii
   (b) i and ii only
   (c) i and iii only
   (d) ii and iii only

DESCRIPTIVE QUESTIONS

6. Does the Insolvency and Bankruptcy Code, 2016 provide for immunity from any action against the property of the Corporate Debtor in relation to the offence committed prior to the commencement of the Corporate Insolvency Resolution Process ("CIRP"). If yes, please explain the relevant provisions keeping in view the facts of the case study.

7. In the case study, the Enforcement Directorate argued that "the civil law like the IBC cannot be given to stand over a criminal law such as the PMLA and hence it cannot override the criminal law at any stretch of the imagination". Do you agree with this? Justify.

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (d) Both i and ii

Reason: Section 14(1)of the IBC provides that Subject to provisions of subsections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting the followings:

(a) As per this sub-clause, the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.

(c) As per this sub-clause, any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

2. (c) Intangible Property remains excluded from the scope

Reason:
According to Section 2(1)(u) of the PMLA, "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;

Explanation.-For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.

Further, as per section 2 (1) (v) property means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

3. (a) i and ii only

Reason:
Section 29(1) provides that the resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes-

(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have access to; and

(c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

Option (i): This is incorrect since it says that the Information Memorandum shall be prepared by the Resolution Professional in the manner instructed by the Committee of Creditors, whereas section 29(1) says that IM shall be prepared by the RP as may be specified by the Board (IBBI).

Option (ii): This is also incorrect, since in the option the word 'MAY' is used whereas in section 29(1) the word SHALL is used.

Option (iii): This is correct as per the provisions of section 29.

4. (c) No business operations of the corporate debtor

Reason:
Option (a): Yes, this is one of the ground for initiation of liquidation in terms of section 33(1)(a).
Option (b): Yes, this is also one of the ground for initiation of liquidation in terms of section 33(2).
Option (c): This is incorrect, since there is no mention of it in section 33.
Option (d): Yes, this is also one of the ground for initiation of liquidation in terms of section 33(3).

5. (d) ii and iii only

Reason:
Option (i): No. As per section 18(a)(i) The interim resolution professional shall collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to business operations for the previous two years.

However, in the option it is mentioned as three years, which is incorrect.

Option (ii): Yes, as per section 18(b), it is the duty of IRP to receive and collate all the claims submitted by creditors to him.

Option (iii): Yes, as per section 18(d), it is the duly of the IRP to monitor the assets of the CD and manage its operations until a resolution professional is appointed by the CoC.

Therefore option (ii) and (iii) only are correct.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:

Section 32A of the Insolvency and Bankruptcy Code, 2016 (IBC) was inserted by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 promulgated by the president of India with effect from 28-12-2019, in order to provide for immunity from any action against the property of the Corporate Debtor in relation to the offences committed prior to the Insolvency Commencement Date (ICD).

In the instant case, the Enforcement Directorate, using its powers conferred under the Prevention of Money Laundering Act, 2002 (PMLA) attached the assets of the Corporate Debtor on the ground that the assets are proceeds of crime. Subsequently, the CIRP commenced and during the CIRP no resolution plans were received during the maximum period of CIRP and hence the Adjudicating Authority ordered for liquidation of the Corporate Debtor.

Notes for students

One shall refer to the matter of Nathella Sampath Jewelry Private Limited decided by National Company Law Tribunal Division Bench, Chennai (NCLT). An application was filed by the Resolution Professional one day before the publication of expression of interest. The properties of the Corporate Debtor were attached by the Joint Director, Directorate of Enforcement (ED). The COC did not find any evincing Resolution applicant and passed the resolution with a requisite majority of 97.90% voting share to liquidate the company. The Corporate Insolvency resolution process was at standstill due to an appeal pending before the Hon'ble Appellate Tribunal of PMLA. The NCLT Division Bench, at Chennai, passed the order for liquidation and held that this order of liquidation does not affect the enforcement proceeding which is pending against the erring of the promoters. However, the NCLT Division Bench at Chennai did not answer the issue of whether the assets attached by the ED form part of the Liquidation estate of Corporate Debtor or not.

Section 32A(2) of the IBC states that no action shall be taken against the property of the Corporate Debtor in relation to an offence committed prior to the commencement of the CIRP where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II or this Code to a person, who has not -

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

In the instant case, the relevant situation is that of the sale of liquidation assets under the IBC. As per the facts of the instant case, the offences were committed by the erstwhile promoters of the Corporate Debtor before the ICD. Applying the legal provision provided under Section 32A(2) to the facts of the Case, one can infer that the Enforcement Directorate cannot take any action against the properties of the Corporate Debtor which were attached as proceeds of crime. In order to clarify this position, we can rely on the explanation provided under Section 32A wherein it is clarified that:

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor.

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through CIRP or liquidation process under this Code and fulfils the requirement specified in this section, against whom such an action may be taken under such law as may be applicable.

From this, it can be inferred that the Enforcement Directorate may continue to act against the promoters of the Corporate Debtor or their assets but not against the Corporate Debtor or its properties.

Hence, we can conclude that the object behind Section 32A is to ensure that the successful Resolution Applicant or the buyer of liquidation assets, shall not be put to the burden of regulatory action against the assets of the Corporate Debtor which will derail the entire object of the Code. Keeping this in view adequate immunity has been provided under Section 32A to ensure that no action is taken against the properties of the Corporate Debtor for any offence committed prior to the ICD.

Notes for students

In the insolvency proceedings initiated by M/S Bhushan Power & Steel Limited, M/ S JSW Steels was the resolution applicant. In the meantime, the ED attached the properties of M/S Bhushan Power & Steel

Limited stating that the assets were acquired from proceeds of crime. The resolution applicant approached the National Company Law Appellate Tribunal seeking protection from attachment by the ED. The Hon'ble NCLAT opined that the ED would have a claim over the assets in the nature of Operation Debt. The Ministry of Corporate Affairs, the respondent in the pertinent matter filed an affidavit before the NCLAT stating that once the Resolution is approved it is binding on every stakeholder including the government agencies. The NCLAT opined that there is a need to solve the tussle between the two wings of the Central Government. The matter was still pending before the NCLAT Hon'ble President of India promulgated an ordinance which later became an act wherein Section 32A was introduced in IBC. The NCLAT based on the amendment ordered that the right to object is available till the time resolution plan is not approved. When the resolution plan is approved it is binding on all stakeholders. Thus, the resolution plan by JSW Steels stands approved and all the proceedings against Corporate Debtor are abated. The parties in the matter preferred an appeal and the matter is sub-judice before the Supreme Court. The legislative intent on the conflict between PMLA and IBC is clear as after the ordinance which later became an Act introduced Section 32A in IBC which states that no liability will be attracted towards the corporate debtor and no proceeding can continue against the corporate debtor when the resolution plan is approved.

Answer 7

No, the contention of the enforcement directorate is not tenable.

Section 238 of the Insolvency and Bankruptcy Code, 2016 ("Code" or "IBC") states that The provisions of this Code shall have an effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

The language of Section 238 clearly suggests the intention that is to allow the IBC to override any other law, including civil and criminal, which is inconsistent with the provisions of the IBC.

Section 238 of the IBC and section 71 of the Prevention of Money Laundering Act, 2002 (PMLA) contains non-obstante clauses, hence inconsistent with each other. The argument shall be on the inconsistency between two laws and not the two laws per se.

Hence, where the IBC provides for immunity from taking any action against the assets of the Corporate Debtor for any offence committed prior to the Insolvency Commencement Date, the Enforcement Directorate cannot purely rely on the provisions of the PMLA and thereby over-ride the provisions of the Code.

Students are advised to note, very carefully that on 9 April 2021, the National Company Law Appellate Tribunal, Delhi (NCLAT) passed a landmark judgment in the Directorate of Enforcement vs. Sh. Manoj Kumar Agarwal and Ors on the interplay between the provisions of PMLA and IBC. The issue before the NCLAT was whether an attachment of property made under the PMLA would be impacted by the imposition of moratorium following the initiation of the corporate insolvency resolution process (CIRP) under the IBC. The NCLAT held that there is no conflict between the PMLA and the IBC and property attached under the PMLA which belongs to the corporate debtor should become available to fulfill the objects of the IBC following the commencement of the CIRP.

Note - The above judgement was passed in two connected appeals in The Directorate of Enforcement v. Sh. Manoj Kumar Agarwal and Ors. (Company Appeal (AT) Insolvency No. 575/2019) and the Directorate of Enforcement v. Sh. Vishal Ghisulal Jain & Ors. (Company Appeal No. 576/2019).

While recognizing that both IBC and PMLA are special statutes, the NCLAT held that the IBC (enacted later in time) will override the PMLA by virtue of section 238 of IBC. But here is also important to note that NCLAT's view is at variance with the Delhi High Court judgment in The Deputy Directorate of Enforcement Delhi & Ors vs. Axis Bank & Ors 259 (2019) DLT 500 which inter alia held that IBC cannot prevail over the PMLA. A Special Leave Petition (SLP (Crl.) No. 7927/2019) against the said judgment is pending before the Supreme Court, hence the matter is sub-judice.

CASE STUDY 50

XYZ Consumer Products Limited (XCPL) is a company incorporated under the Companies Act 1956, with the Registrar of Companies - Mumbai, Maharashtra. ABC Petrochemicals Private Limited (APPL) as the del-credere agent of DEF Industries Limited (DIL) had supplied PVC materials to XCPL.

APPL raised the following invoices on XCPL for the same to be paid by XCPL to DIL.

S. No.	Invoice Details		
	Number	Date	Due Date
1.	105/XYZ0291	22.07.2017	02.08.2017
2.	307/XYZ0321	28.07.2017	08.08.2017
3.	567/XYZ0511	11.08.2017	22.08.2017
4.	568/XYZ0512	11.08.2017	22.08.2017
5.	569/XYZ0513	11.08.2017	22.08.2017
6.	750/XYZ0642	22.08.2017	02.09.2017
7.	788/XYZ0669	26.08.2017	06.09.2017
8.	821/XYZ0721	28.08.2017	08.09.2017
9.	823/XYZ0722	28.08.2017	08.09.2017
10.	922/XYZ0789	09.09.2017	20.09.2017

The total amount payable against the invoices was ₹ 52,94,356/- and the XCPL failed to make the payment to DIL. In the capacity of a del-credere agent, the APPL had ended up paying an amount of ₹ 83,79,552/- on behalf of XCPL for material supplied to XCPL against various invoices for the period from 1st July 2017 to 30th September 2017 along with interest thereon and to that effect DIL issued a certificate. Eventually, APPL followed up with XCPL for the payment made on its behalf. Subsequently, XCPL issued Cheque No.151546 dated 10th November 2018 for a sum of ₹ 78,54,982/- which was dishonoured when presented to the XCPL's bankers.

APPL in the capacity of an operational creditor of XCPL (Corporate Debtor) had sent a demand notice under the provisions of the Insolvency and Bankruptcy Code, 2016 (Code or IBC) to the Corporate Debtor on 16th December 2018 to which the Corporate Debtor has sent a reply on 2nd January 2019 wherein they have, inter alia, the alleged existence of the dispute. However, the operational creditor filed the application for initiation of Corporate Insolvency Resolution Process (CIRP) on 1st January 2019 with the amount of default as ₹ 83,79,552/-before the Adjudicating Authority. In the application, the name of Mr. Kamran was proposed as interim resolution professional. Corporate Debtor has set up the following defence against the application:

(a) Material was supplied directly by DIL and the APPL is only a consignee;

(b) The APPL is not carrying on business in accordance with the main objects of its Memorandum of Association. The APPL was incorporated to carry on the business of authorised distributors, commission agents, sub-agents, brokers of Indian Petrochemicals Corporation Limited, Baroda. The APPL is claiming to be acting as a del-credere agent of DIL in the present Petition, which is not the main object of APPL. Therefore, the alleged transaction is ultra vires and therefore void;

(c) The Demand Notice is invalid since it has not been issued by the APPL but by the Advocate;

(d) There is no cause of action for filing the present petition since there are no pleadings of default in terms of section 47 of the Sale of Goods Act;

(e) The statement of accounts and bank certificate is not as per provisions of section 2A and section 4 of the Bankers Books Evidence Act;

(f) In addition to all the above grounds, there was an existence of a dispute between the Corporate Debtor and the APPL and hence, this application filed by the APPL under the provisions of the Insolvency and Bankruptcy Code, 2016 is completely baseless and against the objective of the Code.

(g) APPL has to plead on the documents on which he relies, but this has not been done in terms of the CPC

Having heard both the parties, the Adjudicating Authority observed that the reply of the Corporate Debtor is predicated wholly on technical grounds such as non-compliance with various provisions of the Code of Civil Procedure, the Sale of Goods Act, the law of evidence, the law relating to affidavits, etc. and that these defences are wholly untenable within the IBC architecture. It further observed that the enquiry in an

application filed by the operational creditor for initiation of CIRP against any Corporate Debtor under the IBC is essentially restricted in scope and extent only to the three Ds - Debt, Default and Dispute and that the legislature clearly did not intend it to conform to the rigid requirements of the Civil Procedure Code. It also observed that any such exercise will effectively injure the legislative construct of the IBC itself and that as the Adjudicating Authority, it is not inclined to travel beyond its remit.

With respect to the Corporate Debtor's objection that the objects clause in the MoA failed to contain any clause on del credere agency based on which the APPL (Operational Creditor) filed the application for initiation of CIRP, the Adjudicating Authority held that it is not concerned with this aspect, nor does it consider this a valid defence that can be taken in a petition filed by the operational creditor for initiation of CIRP against any Corporate Debtor under the IBC.

Finally, the Adjudicating Authority held as follows:

(a) The application made by the APPL (Operational Creditor) is complete in all respects as required by law.

(b) It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of the minimum amount of one lakh rupees stipulated under the provisions of the IBC.

(c) Therefore, the default stands established and there is no reason to deny the admission of the Petition.

(d) In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

Accordingly, the Adjudicating Authority passed its order on 25th February 2019 admitting the application for initiation of CIRP by the operational creditor and declared moratorium against the Corporate Debtor. Mr. Kamran was appointed as Interim Resolution Professional.

A week later the Managing Director of the Corporate Debtor, filed an appeal before the Appellate Authority against the order passed by the Adjudicating Authority on the ground that there was an existence of a dispute between the Corporate Debtor and the Operational Creditor even before the demand notice has been issued by the Operational Creditor under the provisions of the Code

The matter is pending hearing the argument of the Operational Creditor by the Appellate Authority.

MULTIPLE CHOICE QUESTIONS

1. Which of the following is not mandatory for an application filed by the APPL (Operational Creditor) for initiation of CIRP under the Code?
   (a) No existence of dispute before the receipt of demand notice by the Corporate Debtor
   (b) Proof of occurrence of default
   (c) Proposing the name of an Interim Resolution Professional
   (d) Sending demand notice to the Corporate Debtor before filing an application for initiating CIRP against the Corporate Debtor

2. Which among the following constitutes a default under the Code?
   (a) Non-payment of a creditor's claim
   (b) When both principal and interest are unpaid
   (c) The liability or obligation in respect of a claim shall become due and payable and remains unpaid
   (d) Non-payment of financial or operational debt

3. On 25th February 2019, the adjudicating authority admit the application for initiation of CIRP. Which of the following statements hold truth?

   (i) Adjudicating authority shall listen to both the parties only then admit the application
   (ii) Adjudicating authority may give notice to the applicant before rejecting the application
   (iii)Adjudicating authority shall within 14 days of receipt of the application, by order either accept or reject the application

   (a) ii only
   (b) iii only
   (c) i and iii only
   (d) ii and iii only

4. Whether APPL as an operational creditor, on behalf of DIL, can initiation CIRP against XCPL :
   (a) No, because APPL is simply an agent acting on behalf of its principal DIL.
   (b) Yes, the application for CIRP can be made by both DIL and APPL jointly.
   (c) Yes, APPL can initiate CIRP since the debt has been assigned by the DIL
   (d) No, Only DIL can initiate CIRP against XCP .

5. Mr. Kamran (Interim Resolution Professional) shall hold the office till;
   (a) 30 days from the commencement of the corporate insolvency resolution process.
   (b) Till the date first meeting of the committee of creditors.
   (c) Till the date of appointment of the resolution professional under section 22.
   (d) Till the date notified by adjudicating authority in the order wherein corporate insolvency resolution process was ordered.

DESCRIPTIVE QUESTIONS

6. With the reference to facts given in the case study, explain how APPL qualifies as an Operational Creditor under the provisions of the Insolvency and Bankruptcy Code, 2016.

7. Imagine you are approached by the APPL to counter the appeal made by the Corporate Debtor before the Adjudicating Authority. How do you defend the case of an Operational Creditor? Advance any three counter-arguments.

8. APPL seeks your advice on the relevance of the 'existence of a dispute' in the context of an application filed for initiation of CIRP against the Corporate Debtor. Does NCLT need to look into the merit of the cause of dispute prior to admit the application?

ANSWER TO MULTIPLE CHOICE QUESTIONS

1. (c) Proposing the name of an Interim Resolution Professional

   Reason:
   Section 9(3) of the IBC provides that the operational creditor shall, along with the application furnish-

   (a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

   (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

   (c) 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;

   (d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

   (e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

   As per the above provisions, proposing the name of an IRP is not mandatory.

2. (c) The liability or obligation in respect of a claim shall become due and payable and remains unpaid

   Reason:
   According to Section 3(12) of the IBC "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.

3. (b) iii only

   Reason:
   The proviso to section 9(5) provides that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

   Section (5) of the IBC states that the Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order (i) admit; or (ii) reject the application.

   Students must note consciously
   Statement ii become incorrect because the word may is used instead of shall. Proviso to section 9(5) of the Insolvency and Bankruptcy Code 2016, provides Adjudicating Authority, shall before rejecting an application under sub-clause (a) (i.e. Incomplete) of clause (ii) to section 9(5) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

4. (c) Yes, APPL can initiate CIRP since the debt has been assigned by the DIL

Reason:
As per Section 5(20) of the IBC "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. In the given case, the APPL is working as del-credere agent of DIL.

5. (c) Till the date of appointment of the resolution professional under section 22.

Reason:
Section 16(5) of the IBC states that the term of the interim resolution professional shall continue till the date of appointment of the resolution professional under section 22.

ANSWER TO DESCRIPTIVE QUESTIONS

Answer 6:
A del-credere agency is a type of principal-agent relationship wherein the agent acts not only as a sales person, or broker, for the principal, but also as a guarantor of credit extended to the buyer.

As per section 5 (20) of the Insolvency and Bankruptcy Code 2016, an operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

In the instant case, APPL has filed the CIRP Application, due to its capacity as a del-credere agent. APPL after making payment to the Principal (DIL) shall step into the shows of the Principal to recover dues from the customer i.e. the Corporate Debtor (XCPL) in this case.

Further, it is worth noting as per section 5 (21) operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

In the instant case, the claim of APPL is in respect of the provision of goods to the Corporate Debtor Hence, in view of the above APPL qualifies the definition of an operational creditor under the provisions of the IBC.

Answer 7:
The appeal made by the Corporate Debtor can be rebutted on the following grounds (refer to any three)

(a) APPL is a del-credere agent and hence DIL will not be the operational creditor in this case as it has received all the payments from APPL.

(b) The IBC does not warrant MoA and AoA of the Operational Creditor to ascertain whether a transaction is operational in nature.

(c) The Demand Notice is valid and as per the orders of the Hon'ble Supreme Court in the matter of Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd (Supreme Court, Civil appeal number 15135 of 2017) demand notice can be issued by the Advocate of the Operational Creditor;

(d) There is absolutely no intent behind IBC to mandate the creditors to conform to the rigid requirements of the Civil Procedure Code.

Answer 8:
Facts given in case and issue on which question is raised are more or less similar to what was decided by the Hon'ble Supreme Court in civil appeal 9405 of 2017 in the matter of Mobilox Innovations Private Limited vs Kirusa Software Private Limited. It is better to go through the legal provision prior to referring to judicial precedence.

Section 8 (2) (a) says the corporate debtor shall, within a period of ten days of the receipt of the demand notice bring to the notice of the operational creditor, the existence of a dispute if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.

It is important to note that the word 'and' was written in section 8 (2) (a) earlier, such 'and' is substituted by 'or' in 2018, with the retrospective effect from 6th June 2018. The reason for substitution highlighted by interpretation of section 8 (2) (a) by the apex court in the stated case;

Court held the word 'and' occurring in Section 8 (2) (a) must be read as or. The Supreme Court was of the opinion that such an understanding shall lead to great hardship as the corporate debtor would then be able to stave off the bankruptcy process provided a dispute is already pending in a suit or arbitration proceedings.

Further, the Supreme Court held that the existence of the dispute and/or suit or arbitration proceeding necessarily be pre-existing, that is to say, it should exist prior to receipt of the Demand Notice.

Supreme Court provided a new test plausible contention to determine the existence of a dispute.

The Supreme Court holds that while determining the existence of a dispute, all that the NCLT is to see is whether there is a plausible contention that requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence.

Court says under section 9, NCLT must answer these three questions to accept or reject the application;

1. Whether there is an operational debt of more than the threshold notified under section 4?
2. Whether the documentary evidence provided with the application shows the debt is due and payable and has not yet been paid?
3. Whether there is an existence of a dispute between the concerned parties or any record of the pendency of the suit or arbitration proceeding filed before the receipt of Demand Notice?

Finally, the court says NCLT is not required to satisfy itself that the defence is likely to succeed or to examine the merits of the dispute.

Extra reference notes for students
Plausible means possible and feeble mean not capable of hold on

May 2022 Case Study Digest

CASE STUDY 51

Anuradha cleared B.Tech from IIT, Kanpur in June 2015. She got a good placement in a US based company. She joined the ABC(US) Ltd. at Boston. on 01.09.2015. She was offered company's furnished flat along with car. She opened a bank account there, where in her employer credited her salary. Every month she remits half of the amount of salary to her NRESB Account at SBI, Mumbai.

In the month of February 2016, Radha, Anuradha's mother, was diagnosed cancer. Mohan, Anuradha's father decided to get the medical services of US Hospital and accordingly planned to visit in Boston by the first week of March, 2016. Mohan was having an International Credit Card, issued by Axis Bank. Apart from this he also took Forex Card from his bank and USD 1,00,000 was taken in that Forex Card.

After reaching Boston, Anuradha took care of her parents to meet out all the necessary medical requirements. During the course of hospitalization of her mother, she came closer to Dr John, who is a Cancer Specialist in the hospital and was very much impressed with the way he treated her mother. Radha was slowly recovering from cancer and was finally discharged from the hospital in the month of August, 2016.

Anuradha went on dating with Dr John and finally they both decided to get married. Anuradha talked to her parents and they too were happy. Dr. John's parents also agreed to this decision and finally the marriage was solemnised in the month of September 2016. Radha and Mohan thought to return to Mumbai and accordingly informed Anuradha. Anuradha and Dr. John decided to visit India and all the four persons came to Mumbai on 20.10.2016, which was Diwali time and enjoyed the festival.

Some of the builders of Mumbai, gave advertisement in the newspaper for booking of flats. Anuradha also saw such advertisements. She planned to have a flat in Mumbai, so she informed her proposal to Dr. John. They both agreed and contacted Shivam Builders Pvt. Ltd (SBPL), who was constructing a township in Panvel. After seeing the sample flats and site plan, Anuradha agreed to book the flat. The cost of the flat was 50 lakh rupees plus ₹ One lakh for AMC amount of one year, till the formation of society. The promoter asked her to deposit 10 lakh rupees as booking amount. Anuradha was having sufficient balance in her NRE-SB a/c, so she gave cheque of 10 lakh rupees to the builder on the eve of auspicious day of Dhanteras. Agreement for sale was executed after 15 days of taking booking amount. The possession of the flat was to be given by the end of October, 2019. The further amount of 40 lakh rupees was to be deposited in quarterly instalments as under:

Date	Instalment(in ₹)	Slab completion
Nov. 2016	10,00,000	Booking Amount
31.12 2016	5,00,000	On completion of 5th Slab
31.03.2017	5,00,000	On completion of 8th Slab
30.06.2017	5,00,000	On completion of 10th Slab
30.09.2017	5,00,000	On completion of 13th Slab
31.12.2017	5,00,000	On completion of 15th Slab
31.03.2018	5,00,000	On completion of plastering, light and sanitary fitting
30.06.2018	5,00,000	On completion of flooring and installation of doors and windows
30.09.2018	5,00,000	One month before the possession date i.e., 31.10.2019
Total	**50,00,000**	

Dr. John was planning to purchase this flat in the joint name of Anuradha. But the builder's advocate suggested that as per the Indian Law, Dr. John cannot buy immovable property jointly with his spouse. So Anuradha finalised the deal in her individual name only.

After booking the flat and enjoying the Diwali festival in November, 2016, Anuradha and Dr. John went out to explore India and visited some prominent places and returned back to Boston on 01.12.2016.

The construction of the township at Panvel went on without any interruption. Anuradha paid instalments on due dates upto 30.09.2017. Till this date, she has paid ₹ 30 lakh (including the advance amount). But now she was getting it difficult to pay, so she approached her SBI branch for availing of the loan of remaining amount of 20 lakh rupees. The SBI agreed to give the loan of 20 lakh rupees on the basis of her income and good market value of the township, constructed by the SBPL, on account of upcoming airport at New Panvel. Anuradha executed a power of attorney in favour of her father Mohan for documentation and mortgaging of the property papers with the bank.

The loan of ₹ 20 lakh was sanctioned to Anuradha for 10 years @ 7.50% and the EMI was fixed at ₹ 25,000 per month starting from January 2020. Out of the loan, the remaining instalments of ₹ 20 lakh was paid through the SBI. For AMC for one-year Anuradha paid ₹ one lakh from her NRE-SB account.

SBPL was committed to its promise and handed over the possession of flats on 31.10.2019 to each of the flat owner. Mohan took the possession of the flat on the basis of Power of Attorney executed by Anuradha.

In the month of March 2020 Anuradha planned to visit India to meet her parents and also to see her newly purchased flat. Dr. John was busy in his upcoming medical operations, so he did not accompany Anuradha. She arrived on 5th March, 2020 in Mumbai. At this time the wave of Covid-19 was spreading and thus many of the international flights were getting cancelled. Anuradha was to return back to Boston by the end of March 2020, but could not got the flight ticket. She had to remain in India with her parents in Mumbai. Due to her long stay in India and not resuming back to her official duties at Boston, her employer expelled her in June 2020. The salary income almost stopped and Anuradha was not able to service the EMI to the Bank.

The house loan account was turned NPA by the end of November 2020. The Bank took legal recourse and send a notice under section 13(2) of the SARFAESI and recalled the entire loan amount (which was ₹ 20 lakh + interest accrued) and to pay before the expiry of the notice period as mentioned, days, else the Bank will be forced to take possession of the flat.

On account of continuous contact with the patients, Dr. John also got infected of Covid-19. His position was very much critical. Anuradha felt so bad, she was not able to help her husband nor she was able to regularise the housing loan account. Due to critical condition of Dr. John, she could not take financial help from him to liquidate the housing loan account.

The notice of 60 days given under the SARFAESI by the Bank was going to expire on 5th January 2021. Since Anuradha did came forward to negotiate / liquidate the house loan account, the Bank took the possession of the flat and put its lock and displayed a notice on the flat door 'Under possession of SBI'.

The SBI after taking possession of the flat advertised in sale of the mortgaged property. The expression of interest was invited from the prospective buyers with a reserve price of ₹ 60 lakh. The flat was finally auctioned for ₹ 65 lakh.

MULTIPLE CHOICE QUESTIONS

1. What is the residential status of Anuradha as per the provisions of FEMA for Financial Year 2015-16:
(a) Person resident in India
(b) Person resident out of India
(c) Overseas Citizen of India
(d) US Citizen

2. Mohan used his International Credit Card (ICC) in making various payments when he was in Boston:
(a) Yes, Mohan can use ICC without any prior approval of RBI
(b) No, Mohan cannot use ICC
(c) Use of ICC requires prior approval of RBI
(d) There is a limit / ceiling on use of the ICC

3. Dr. John was planning to purchase a flat in Mumbai. Whether Dr. John, not being an Indian Citizen, can buy a flat in Mumbai:
(a) Yes, he can buy a flat in Mumbai, since he was married with Anuradha
(b) No, he cannot buy a flat in Mumbai, since two years has not been elapsed of his marriage with Anuradha
(c) There is no bar in purchasing of flat by foreign national in India
(d) Dr. John can purchase the flat with prior approval of the RBI

4. What is the notice period, under section 13(2) of SARFAESI, after expiry of which the Bank can take possession of the flat:
(a) 30 days
(b) 45 days
(c) 60 days
(d) 90 days

5. Under the provisions of RERA, how much amount can be taken as advance at the time of booking of flat:
(a) Not more than 5%
(b) Not more than 10%
(c) Not more than 15%
(d) Not more than 20%

DESCRIPTIVE QUESTIONS

6. What are the pre-conditions for exercising rights by the lender under the SARFAESI for taking possession of the secured assets without the intervention of the court?

7. When can a foreign national (Non- Resident Indian) acquire an immovable property of flat in India? What will be your answer, if that foreign national wish to purchase a farm house in India?

8.

(i) In the given case, if Anuradha had bought agricultural land near Panvel (instead of a flat) then whether the Bank would be entitled to take possession of farm house, due to non-payment of loan EMI.

(ii) If the outstanding amount including interest, in the housing loan account remains 9 lakh rupees, whether the Bank is entitled to issue notice under SARFAESI.

Answers to Multiple Choice Questions

1. (b) Person resident out of India

Reason:

According to Section 2(v) of the FEMA "person resident in India" means—

(i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include—

(A) a person who has **gone out of India** or who stays outside India, in either case—
(a) for or on taking up employment outside India, or
(b) for carrying on outside India a business or vocation outside India, or
(c) for any other purpose,
in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than—
(a) for or on taking up employment in India, or
(b) for carrying on in India a business or vocation in India, or
(c) for any other purpose,
in such circumstances as would indicate his intention to stay in India for an uncertain period.

Section 2(w) defines the meaning of **"person resident outside India"**, which means a person who is not resident in India.

In order to know the residential status for FY 2016-17, the preceding FY 2015-16 is to be seen.

Anuradha went to Boston on 01.09.2015 for the purpose of employment and returned back to Mumbai on 20.10.2016. So, during the FY 2015-16 **she stayed in India from 01.04.2015 to 31.08.2015 only i.e., for 153 days,** which is less than minimum requirement of 182 days. Since Anuradha is not fulfilling the criterial of section 2(v)(i) hence she will be treated as **person resident outside India** as per section 2(w) of FEMA.

2. (a) Yes, Mohan can use ICC without any prior approval of RBI

Reason: Rule 5 of the FEM (Current Account Transactions) Rules, 2000 provides that certain transactions require prior approval of the RBI. However, Rule 7 which deals with the matter relating to the **use of International Credit Card while outside India, further states that nothing contained in rule 5 shall apply to the use of International Credit Card for making payment by a person towards meeting expenses while such person is on a visit o/s India.**

3. (b) No, he cannot buy a flat in Mumbai, since 2 yrs has not been elapsed of his marriage with Anuradha

Reason: Regulation 6 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 deals with the matter relating to **Joint acquisition by the spouse of an NRI or an OCI. It reads as under:**

A person resident outside India, not being a Non-Resident Indian (NRI) or an Overseas Citizen of India (OCI), who is a spouse of a NRI or an OCI may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse.

The proviso (iii) provides that the marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property.

In the given case, the two years were not elapsed of marriage, so Dr. John cannot purchase immovable property in India.

However, in terms of Regulation 3 an NRI or an OCI may acquire immovable property in India, other than agricultural land/ farm house/ plantation property. Hence Anuradha can buy the property in her individual name only.

4. (c) 60 days

   Reason: Section 13(2) of the SARFAESI states that where any borrower, who is under a liability to a secured creditor under a security agreement, **makes any default in repayment of secured debt** or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as **non-performing asset**, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor **within sixty days** from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

5. (b) Not more than 10%

   Reason: Section 13(1) of the RERA provides that a promoter shall not accept a sum more than ten per cent. Of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

   Here, the cost of the flat is Rs 50 lakh, so 10% of it comes to Rs 5 lakh only. While the SBPL has taken Rs 10 lakh as an advance which come to 20% of the cost of flat, which is wrong.

Answers to Descriptive Questions

6. Section 13(1) of the Act provides that notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

   Section 13(2) states that where any borrower, who is under a liability to a secured creditor under a security agreement, **makes any default in repayment of secured debt or any instalment** thereof, and his account in respect of such **debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4).**

   Section 13(3) specifies that the notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

   Section 13(4)(a) states that in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), **the secured creditor may take recourse to one or more of the following measures** to recover his secured debt, **take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset.**

7. Regulation 3 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 deals with the Acquisition and Transfer of Property in India by a Non-Resident Indian or an Overseas Citizen of India. It reads as under:

   An NRI or an OCI may -

   (a) acquire immovable property in India other than agricultural land/ farm house/ plantation property:
   Provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non- thereunder.
   Provided further that no payment for any transfer of immovable property shall be made either by traveller's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause.

   (b) acquire any immovable property in India other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013;

   (c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;

   (d) transfer any immovable property in India to a person resident in India;

(e) transfer any immovable property other than agricultural land/ farm house/ plantation property to an NRI or an OCI.

As per the above provisions, foreign national (Non- Resident Indian) cannot purchase a farm house in India.

8.

(i) Section 31(i) of the SARFAESI provides that the provisions the Act shall not apply to any security interest created in agricultural land. Accordingly, even if the finance availed by Anuradha and loan accounts becomes NPA, the Bank would not be having the legal authority to issue notice under section 13(2) to the borrower.

(ii) Section 31(j) of the SARFAESI provides that the provisions of the SARFAESI Act shall not apply in any case in which the amount due is less than 20% of the principal amount and interest thereon. The question states that the loan amount remains 9 lakh rupees including the interest, which is less than 20% of the loan amount (20% of 50 lakh comes to 10 lakh rupees) taken by Anuradha, hence the Bank would not be legally entitled to issue notice under section 13(2) to the borrower.

CASE STUDY 52

Mridula Textiles Ltd. is a company engaged in the business of manufacturing polyester and woollen suitings. The company have an expansion plan to enter into the business of the readymade garments for which the company needs 50 crores rupees for importing and installing of high technology machines. The company approached its bankers and a consortiums of bankers sanctioned a term loan of 40 crores rupees and 10 crores rupees towards the working capital finance.

In consortiums of bankers, the lead banker is SBI. The other bankers and their proportion of share in lending is as under:

Name of bank	Term Loan (₹ Crs)	Working Capital (₹ Crs)	Total (₹ in Crs)	% share
SBI	15	10	25	50
Federal Bank	5	0	5	10
Bank of Baroda	7	0	7	14
ICICI Bank	8	0	8	16
Axis Bank	5	0	5	10
Total	40	10	50	100

Plant and Machineries were imported and installed. The company started producing the ready garments for men's wear in premium category, party wears, office wears and casuals. Initially the company got good response specifically for its range in casual and party wears. So, the company was focussing on this segment.

In March 2020, the COVID-19 spread all over the globe and its effect also affected the company's operations. The skilled labours started to migrate to their home town, inspite of the making the best efforts by the company to retain them. The production unit remained closed for almost a year.

Due to stoppage of production, the distribution channel effected. Moreover, the demand also went down due to lock-down in most of the urban areas. As a result, the cash flow of the company mis- matched and the term loan account and cash credit working capital account were classified by the bankers as Non-performing Accounts.

In the consortium of meeting, the members bank decided to take legal action against the borrower company and they issued a recall notice followed by a legal notice from a lawyer. The company asked some time to pay the overdue interest on the credit facilities and to regularise the account. However, after allowing sufficient time, the company was not able to regularise the credit facilities.

The consortium of bankers decided to issue a demand notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI). The member banks authorised State Bank of India (SBI) to initiate action and take possession of the secured assets and also take control of the management of the affairs of the company.

Accordingly a demand notice dated 01.09.2020 was issued under section 13(2) to the company mentioning therein to repay the entire outstanding of the bankers within a given period, failing which the bank shall exercise its power given under SARFAESI to take possession of the secured assets of the borrower, take over the management of the business of the borrower, appoint a manager to manage the secured assets (the possession of which has been taken over by the secured creditor) and/or require the payment of the secured debt by any person from whom money is due to the borrower.

After the lapse of the specified period as mentioned in the notice the bankers took possession of the secured assets which were mortgaged exclusively with the Financial Creditor since the Corporate Debtor failed to repay the debt due.

After following the procedure as mentioned in the SARFAESI, the banker made an advertisement for sale of the secured assets by way of e-auction. The secured assets were successfully auctioned on 01.02.2021 for ₹ 35 crore and the successful bidder deposited 25% of the bid amount (₹ 8.75 crore) instantly and the balance of 75% (₹ 26.25. crore) of the bid amount was supposed to be deposited within 15 days by the successful bidder.

In the meantime, the Mridula Textiles Ltd, filed an application under section 10 of the Insolvency and Bankruptcy Code, 2016 (IBC). Upon committing a default, the corporate applicant itself can file an application for initiating Corporate Insolvency Resolution Process (CIRP) before Adjudicating Authority i.e. the National Company Law Tribunal (NCLT).

The application filed by the company was admitted by the NCLT on 05.02.2021. The NCLT declared a moratorium under section 14(1) of the IBC and appointed a Resolution Professional (RP).

On 08.02.2021, the Financial Creditors (all the members of the consortium members) filed a claim of ₹ 65 crore with the RP in Form C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The operational creditors who supplied the raw materials to the company, also lodged their claim was for Rs 5 crore. Besides the employees and labours' whose salaries were due, also filed their claim which was of ₹ 0.75 crore.

The RP admitted the claim and constituted the Committee of Creditors (CoC) which was comprising of the bankers only. The operational creditors and the employees also raised the issue before the RP for inclusion of their names as a member of the CoC. However, the RP refused to entertain their request for inclusion of their names in the CoC, but he allowed them to attend only the CoC meeting, if they wish so.

However, after receipt of the balance 75% of the bid amount on 11.02.2021, the Bankers filed a revised claim of ₹ 38.75 crore (65-26.25 = 38.75 crore) in Form C on 11.02.2021 post disclosing that the Bankers had realised the collateral security through an e-auction of the secured assets of the Corporate Debtor.

Thereafter, the company being the Corporate Debtor filed an application in the NCLT requesting to set aside the sale made by the bankers since moratorium was imposed. The NCLT set aside the sale made by the bankers in the light of the initiation of the CIRP and moratorium was imposed.

Aggrieved by the order of NCLT, the Banker filed an appeal in the National Company Law Appellate Tribunal, New Delhi (NCLAT).

MULTIPLE CHOICE QUESTIONS

1. What is the main purpose of issue of demand notice under section 13 of the SARFAESI:
(a) To enforce the security interest without the intervention of the court or tribunal
(b) To recover the amount outstanding from the borrower
(c) To threaten the borrower for not repaying the dues of the bankers
(d) To do business by acquiring the machinery of the borrower

2. Whether the provisions of the IBC supersedes the provisions of the SARFAESI:
(a) No, the SARFAESI was enacted in 2002, while IBC in 2016, hence SARFAESI will supersede
(b) As per Section 35 of the SARFAESI, this Act will have effect.
(c) As per Section 238 of the IBC the provisions of the Code have overriding effect on any other laws.
(d) The SARFAESI and IBC stands on equal footing.

3. In the given case, who shall be the member of the Committee of Creditors:
(a) The Bankers (being the financial creditors) only
(b) The Operational Creditors
(c) The Employees and Labours
(d) The Bankers as well the operational creditors only

4. Where a borrower makes any default in repayment of secured debt, the secured creditor may require the borrower by notice in writing to discharge, in full, his liabilities to the secured creditor ---------- from the date of notice:
(a) within 30 days
(b) within 45 days
(c) within 60 days
(d) within 75 days

5. Under the provision of SARFAESI, on failure of the borrower to discharge his liability in full within the period specified in the notice, the secured creditor may:
I take possession of the secured assets of the borrower
II take right to transfer the secured assets of the borrower by way of lease, assignment or sale for realising the secured asset;
III take over the management of the business of the borrower
Choose the correct option from below:
(a) Only I
(b) Only I and III
(c) Only II and III
(d) I, II and III

DESCRIPTIVE QUESTIONS

6. What are the conditions prescribed under the SARFAESI before issuing a notice under section 13(2)?

7. In the given case, the Resolution Professional has included only the bankers as members of the CoC. Whether the operational creditors have the right to be member of the CoC. What would be your answer, if in any case there are no financial creditors and only operational creditors are there?

8. In the given case, bankers have already received 25% of the bid offer and remaining 75% was to be payable within 15 days by the successful bidder. Meanwhile the corporate debtor initiated CIRP. Since the sale exercise through auction was already initiated by the bankers, prior to initiation of CIRP, by the corporate debtor, whether such sale transaction will be nullified in light of the declaration of moratorium by the Adjudicating Authority?

Answers to Multiple Choice Questions

1. **(a)** To enforce the security interest without the intervention of the court or tribunal

Reason: Section 13(1) of the SARFAESI states that notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, **without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.**

2. **(c)** As per section 238 of the IBC the provisions of the Code have overriding effect on any other laws.

Reason: Section 238 of IBC provides that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

Further various judicial pronouncement also supports this view that IBC overrides the provisions of any other law.

3. **(a)** the Bankers (being the financial creditors) only

Reason: Section 21(2) states that the committee of creditors shall comprise all financial creditors of the corporate debtor.

4. **(c)** within 60 days

Reason: Section 13(2) of the SARFAESI states that where any borrower makes any default in repayment of secured debt, the secured creditor may require the borrower by notice in writing to discharge, in full, his liabilities to the secured creditor **within 60 days** from the date of notice.

5. **(d)** I, II and III

Reason: Section 13(4) of the SARFAESI provides in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—

(a) **take possession of the secured assets of the borrower** including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) **take over the management of the business of the borrower** including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

Answers to Descriptive Questions

6. Section 13 of the SARFAESI prescribes certain conditions for issue of notice under sub-section (2), which are as under:

- The borrower shall under a liability to a secured creditor under the security agreement.
- The borrower has defaulted in making repayment of the secured debt or any instalment thereof.
- The borrower's loan account has been classified as NPA in the books of the secured creditor as per the guidelines of the RBI
- The secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice.
- If the borrower do not liquidate the account within the prescribed period of 60 days, the secured creditor shall be entitled to exercise all or any or rights as mentioned in sub-section (4).

What is security interest:

The security interest has been defined in section 2(1)(zf) which means means right, title or interest of any kind, **other than those specified in section 31**, upon property created in favour of any secured creditor and includes—

(i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset

Further the following condition are also prescribed under section 31 of the SARFAESI, before invoking the section 13(2), which are as under:

- The security interest for securing repayment of any financial asset should not be exceeding one lakh rupees. [Section 31(h)]
- Security interest should not have been created in agricultural land. [Section 31(i)]
- The amount outstanding (principal plus interest) should not be greater than 20% of the principal amount and interest thereon. [Section 31(j)]

7. Section 21(2) of the IBC provides that the committee of creditors shall comprise all financial creditor of the corporate debtors.

Further section 21(3) states that subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

Sub-section (6) provides that where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may—

(a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(b) represent himself in the committee of creditors to the extent of his voting share;

(c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

(d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

Section 24(3)(d) of the IBC states that the resolution professional shall give notice of each meeting of the CoC to operational creditor or their representatives if the amount of their aggregate dues is not less than 10% of the debt.

Section 24(4) states that the operational creditors, may attend the meetings of CoC, but shall not have any right to vote in such meetings.

Situation where there is no financial creditor

Regulation 16 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides as under:

(1) Where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation.

(2) The committee formed under this Regulation shall consist of members as under –

(a) Eighteen largest operational creditors by value:

Provided that if the number of operational creditors is less than eighteen, the committee shall

include all such operational creditors; 14

(b) one representative elected by all workmen other than those workmen included under sub-clause (a); and (c) one representative elected by all employees other than those employees included under sub-clause (a).

8. Section 10(1) of the IBC states that where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

Section 14(1)(c) of the IBC provides that on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The facts given the question are similar to that of Indian Overseas Bank v. RCM Infrastructure Ltd. and Ors. [Company Appeal (AT) (Insolvency) No. 736 of 2020] decided on 26 March 2021 by the National Company Law Appellate Tribunal, New Delhi.

The NCLAT expressed that imposition of moratorium as per Section 14 of IBC is toprotect the interest of the Corporate Debtor by protecting the assets of the Corporate Debtor for the sole objective to maximisation the value of assets. This Tribunal in the matter of "Encore Asset Reconstruction Company Pvt. Ltd. Vs. Charu Sandeep Desai and Others" reported in 2019 SCC OnLine NCLAT 284 also held that Section 238 of IBC will prevail over any of the provisions of the SARFAESI Act, 2002 if it is inconsistent with any of the provisions of IBC. Paragraphs 12, 14 & 15 of the said judgment is reproduced here at:

"12. From the explanation below Section 18, it is clear that the terms "assets" do not include the assets owned by a third party in possession of the 'Corporate Debtor'.

14. Decision in "Transcore v. Union of India" was rendered in the year 2008 when the 'I&B Code' was not in existence. The 'I&B Code came into force w.e.f. 1st December, 2016 and Section 238 read as follows: "238. Provisions of this Code to override other laws:- The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

15. 'SARFAESI Act, 2002' being an existing law, Section 238 of the 'I&B Code' will prevail over any of the provisions of the 'SARFAESI Act, 2002' if it is inconsistent with any of the provisions of the 'I&B Code."

The NCLAT stated that from the above judgment of the Hon'ble Supreme Court it is clear that when the Adjudicating Authority commences the CIRP proceeding and imposes moratorium, no proceeding shall be continued or commenced and not to carry out any auction of the assets of the Corporate Debtor.

The NCLAT opined that, in the facts of the present case and upon deliberating the issues as framed in paragraph 22 above, we hold that:

(1) When the moratorium was imposed by the learned Adjudicating Authority, receipt of the balance sale consideration is illegal and the learned Adjudicating Authority rightly set aside the sale transaction.

(2) Further **Section 238 of IBC, have overriding effect over other laws** as held by the Hon'ble Apex Court, and this Tribunal in Encore Asset Reconstruction Company Ltd.

CASE STUDY 53

Unique Builders and Developers Ltd. (UBDL) advertised for booking of 40 residential flats, which are to be constructed in Jaipur. The cost of each flat was kept as Rs. 50 lakh. On the very first day of bookings, all the flats were booked. The UBDL took booking amt of Rs. 8 lakh from each of allottees. The agreement of sale was executed with all the allottees within a period of one month from the date of receipt of the booking amt.

On the date and venue of booking of flats, the AXIS Bank displayed their counter and offered housing loan to the allottees. The Bank offered the competitive rates to the allottees with a loan amount of 90% of the cost of flat. All the allottees agreed to the terms and conditions narrated by the Bank. When the agreement to sale deed was executed, the Bank sanctioned the loan amount to each of the allottees by executing the simple documentation and equitable mortgage of the document 'agreement to sale', income tax returns for the last 3 years, KYC documents and Income Proof. The Bank also got it registered with the Central Registry of Securitisation Asset reconstruction and Security Interest of India (CERSAI).

The UBDL started the construction work. The UBDL for the purpose of working capital, raised loan on the land (on which the construction is going on) of Rs. 20 crores from the ICICI Bank. This was done after the allotment of flats was made. According to the allottees this was done without verification of existing charge on the properties in question. The allottees therefore alleged before RERA that such loan was sanctioned wholly fraudulently and with malafide intentions.

In the meantime, since the developer failed to repay the dues to the bank, the ICICI Bank treated the account as NPA and tried to recover its unpaid dues by resorting to provisions of SARFAESI Act. Some of the allottees approached the Debts Recovery Tribunal (DRT) and thereafter Debts Recovery Appellate Tribunal (DRAT) to prevent the ICICI Bank from auctioning the properties and thereafter approached RERA for taking suitable action against all concerned including the ICICI Bank.

Before RERA the ICICI Bank raised several contentions including that RERA has no jurisdiction to entertain any complaint against the ICICI Bank and that in view of the proceedings which are pending before the DRT and DRAT, the complaints should not in any case be entertained.

The UBDL being unable to pay the debt of the ICICI Bank filed an application for initiation of the CIRP under section 10 of the IBC with the NCLT. The NCLT admitted the application, declared moratorium and appointed a Resolution Professional. As a result of the declaration of the moratorium, the suits lying against the UBLD in the DRT/ DRAT were stayed.

The Interim Resolution Professional (IRP) collated all the claims and constituted a committee of creditors. The RP invited the expression of interest from the prospective resolution applicants. In the meeting of the CoC the members confirmed the continuation of same IRP as RP.

Satguru Builders Ltd (SBL) expressed its interest and submitted the Resolution Plan to the RP. The SBL offered to take over all the existing liabilities and assets of the UBDL and also agreed to the same terms and conditions which were agreed by the allottees at the time of booking of the flat, except some minor changes as recommended by the company's Architect are necessary due to architectural and structural reasons. However, the allottees objected for it and threatened to refer the matter to the RERA Authority.

MULTIPLE CHOICE QUESTIONS

1. The cost of the flats offered for sale by the UBDL was Rs. 50 lakh. How much advance UBDL can take from the customers without entering into a written agreement:
(a) Rs. 2,50,000
(b) Rs. 5,00,000
(c) Rs. 7,50,000
(d) Rs. 10,00,000

2. What is the effect of the registration of transactions of creation security interest by a secured creditor under the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI):
(a) It shall be deemed to constitute a notice to the other lenders
(b) It shall be deemed to constitute a notice to the other builders
(c) It shall be deemed to constitute a notice to the other allottees
(d) It shall be deemed to constitute a public notice for creation of such security interest

3. The following particulars of creation, modification or satisfaction of security interest are NOT eligible for registration on the CERSAI portal:
I Immovable property by mortgage other than mortgage by deposit of title deeds
II Hypothecation of plant and machinery, stocks, debts including book debts or receivables, whether existing or future.

III 'Under construction' residential or commercial or a part thereof by an agreement or instrument other than mortgage
IV Intangible assets, being know how, patent, copyright, trademark, license, franchise or any other business or commercial right of similar nature.

Choose among the following options:

(a) Only I
(b) Only I and III
(c) Only II and IV
(d) I, II, III and IV

4. The Resolution Professional constitute a Committee of Creditors. Who shall be entitled to become a member of the COC:

(a) Only ICICI Bank
(b) Only Axis Bank
(c) Only Home Allottees
(d) Only ICICI Bank and Home Allottees

5. After the transfer of the new project, the new promoter intend to do some minor changes. Can he do so?

(a) No, the after transfer of the project, the new promoter cannot make changes in the sanctioned plan
(b) The promoter can make major changes if the allottees do not object
(c) The promoter can make changes subject to the approval of the RERA Authority
(d) The minor changes as per the recommendation of the architect can be done after proper declaration and intimation to the allottee.

DESCRIPTIVE QUESTIONS

6. What is the effect of the registration of transactions of creation of security interest and how it gets the priority over the secured creditors?

7. What conditions have been prescribed under the IBC for initiation of CIRP by the Corporate Debtor itself?

8. The registration of creation of security interest over any property of the borrower secures the repayment of any financial assistance granted by any secured creditor. Elucidate the statement.

Answers to Multiple Choice Questions

1. (b) Rs. 7,50,000.

Reason: Section 13(1) of the RERA provides that a promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

The 10% of Rs. 50 lakh comes to Rs. 5 lakh, therefore the UBDL cannot take advance more than Rs 5 lakh from the customers.

2. (d) It shall be deemed to constitute a public notice for creation of such security

Reason: Section 26C of the SARFAESI provides that without prejudice to the provisions contained in any other law, for the time being in force, any registration of transactions of creation, modification or satisfaction of security interest by a secured creditor or other creditor or filing of attachment orders under this Chapter shall be deemed to constitute a public notice from the date and time of filing of particulars of such transaction with the Central Registry for creation, modification or satisfaction of such security interest or attachment order, as the case may be.

3. (d) I, II, III and IV

Reason: The RBI vide its circular No. RBI/ 2018-19/ 96 DBR.Leg.No.BC.15/ 09.08.020/ 2018-19, dated 27.12.2018 at Para No. 2 has stated that the Government of India has issued a Gazette Notification dated January 22, 2016 for filing of the following types of security interest on the CERSAI portal:

(a) Particulars of creation, modification or satisfaction of security interest in immovable property by mortgage other than mortgage by deposit of title deeds.
(b) Particulars of creation, modification or satisfaction of security interest in hypothecation of plant and machinery, stocks, debts including book debts or receivables, whether existing or future.
(c) Particulars of creation, modification or satisfaction of security interest in intangible assets, being know how, patent, copyright, trademark, licence, franchise or any other business or commercial right of similar nature.
(d) Particulars of creation, modification or satisfaction of security interest in any 'under construction' residential or commercial or a part thereof by an agreement or instrument other than mortgage.

Therefore, all options mentioned at I, II, III and IV are eligible.

4. (d) Only ICICI Bank and Home Allottees

Reason: Section 21(2) of the IBC provides that the committee of creditors shall comprise all financial creditors of the corporate debtor.

Section 5(7) states that "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

Explanation (i) of section 5(8) states that for the purposes of this sub-clause, any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.

Therefore, who ever have financed the UBDL (i.e. ICICI Bank and the Home Allottees only) will be considered the financial creditors. Here it is to be mentioned that AXIS Bank has given loan to the home allottees and not to the UBDL hence AXIS Bank is not the part of the CoC.

5. (d) The minor changes as per the recommendation of the architect can be done after proper declaration and intimation to the allottee.

Reason: The provision to section 14(2)(i) states that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Answers to Descriptive Questions

6. The provisions relating to Central Registry are contained in Sections 20 to 26A of Chapter IV of the SARFAESI. Further Chapter IVA consisting of section 26B to 26E of the SARFAESI deals with the registration by secured creditors and other creditors.

Section 26C of the SARFAESI deals with the matter relating to the effect of the registration of transactions, etc., which reads as under:

(1) Without prejudice to the provisions contained in any other law, for the time being in force, any registration of transactions of creation, modification or satisfaction of security interest by a secured creditor or other creditor or filing of attachment orders under this Chapter shall be deemed to constitute a public notice from the date and time of filing of particulars of such transaction with the Central Registry for creation, modification or satisfaction of such security interest or attachment order, as the case may be.

(2) Where security interest or attachment order upon any property in favour of the secured creditor or any other creditor are filed for the purpose of registration under the provisions of Chapter IV and this Chapter, the claim of such secured creditor or other creditor holding attachment order shall have priority over any subsequent security interest created upon such property and any transfer by way of sale, lease or assignment or licence of such property or attachment order subsequent to such registration, shall be subject to such claim.

Provided that nothing contained in this sub-section shall apply to transactions carried on by the borrower in the ordinary course of business.

7. Section 10 of the IBC deals with the initiation of corporate insolvency resolution process by corporate applicant, which reads as under:

(1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

(3) The corporate applicant shall, along with the application, furnish—

(a) the information relating to its books of account and such other documents for such period as may be specified;

(b) the information relating to the resolution professional proposed to be appointed as an interim resolution professional; and

(c) the **special resolution passed by shareholders of the corporate debtor** or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.;

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order—

(a) admit the application, if it is complete; and no disciplinary proceeding is pending against the proposed resolution professional or

(b) reject the application, if it is incomplete: or any disciplinary proceeding is pending against the proposed resolution professional

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

8. Section 20 (1) of Chapter IV of the SARFAESI provides that the Central Government may, by notification, set up or cause to be set up from such date as it may specify in such notification, a registry to be known as the Central Registry with its own seal for the purposes of registration of transaction of securitisation and reconstruction of financial assets and creation of security interest under this Act.

Accordingly, the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI) was set up under section 20(1) of the SARFAESI Act. The CERSAI is a Government of India company, licensed under section 8 of the Companies Act, 2013. The company has been incorporated for the purpose of operating a Registration System Later, CERSAI was entrusted upon the responsibility of operating and maintaining a KYC Registry, governed under PML Rules 2005 (Maintenance of Records).

Registration by secured creditor and other creditors - Section 26B(1) further states that the Central Government may by notification, extend the provisions of Chapter IV relating to Central Registry to all creditors other than secured creditors as defined in section 2(1)(zd), **for creation, modification or satisfaction of any security interest over any property of the borrower for the purpose of securing due repayment of any financial assistance granted by such creditor to the borrower**.

(2) From the date of notification under sub-section (1), any creditor including the secured creditor may file particulars of transactions of creation, modification or satisfaction of any security interest with the Central Registry in such form and manner as may be prescribed.

(3) A creditor other than the secured creditor filing particulars of transactions of creation, modification and satisfaction of security interest over properties created in its favour shall not be entitled to exercise any right of enforcement of securities under this Act.

(4) Every authority or officer of the Central Government or any State Government or local authority, entrusted with the function of recovery of tax or other Government dues and for issuing any order for attachment of any property of any person liable to pay the tax or Government dues, shall file with the Central Registry such attachment order with particulars of the assessee and details of tax or other Government dues from such date as may be notified by the Central Government, in such form and manner as may be prescribed.

(5) If any person, having any claim against any borrower, obtains orders for attachment of property from any court or other authority empowered to issue attachment order, such person may file particulars of such attachment orders with Central Registry in such form and manner on payment of such fee as may be prescribed.

CASE STUDY 54

M/s MT Agencies Pvt. Ltd, is engaged in the business of whole sale distributorship of Rice and Pulses, in Anaz Madi, Jaipur. In order to increase the business, the company requires some additional working capital finance. The company approached his banker- HDFC Bank for increase of the Cash Credit Limits from the existing 25 lakh rupees to 75 lakh rupees and offered to the Bank, three immovable properties (which are in the name of Rajesh Kumar, Managing Director and Guarantor of the company) which were purchased through registered sale deed dated 13.10.2019) as mortgage for securing the cash credit limit. HDFC Bank after having the equitable mortgage of the property, sanctioned a credit limit of Rs. 75 lakh to the company.

The HDFC Bank also got the registration of the mortgage of the properties with the CERSAI under the provisions of the SARFAESI.

After some time, the business of the company could not run well and was classified as NPA in the books of the HDFC Bank. A recall notice was sent to the company but not response was given. The company issued a notice under section 13(2) of the SARFAESI to the company mentioning there in that the Bank shall take possession of the secured assets and will also take over the management of the company.

After receipt of the notice, the company applied for the initiation of the CIRP under section 10 of the IBC. The CIRP application was admitted by the Adjudicating Authority, moratorium was declared and an Interim Resolution Professional (IRP) was appointed.

The IRP collated the claims from the creditors. HDFC Bank submitted its claim as the financial creditor. Apart from the HDFC Bank, some other operational creditor also lodged the claim. The Committee of Creditor was constituted in which there was a single financial creditor i.e. HDFC Bank.

Meanwhile the notice period under section 13(2) of the SARFAESI was closed and the HDFC Bank started to take possession of the secured assets which were mortgaged by Rajesh Kumar in the capacity of personal guarantor.

Rajesh Kumar objected that since the company is under moratorium all the legal proceedings against the company are put on hold by the Adjudicating Authority and the decision of Bank to take possession of the mortgaged properties is not valid. He filed a case in the NCLT pleading that since the moratorium is under way, so the enforcement of security interest under the SARFAESI against the company be stopped at once.

Meanwhile, the Enforcement Directorate (ED), on the basis of some solid information, that the company on the guise of dealing in Rice and Pulses, is dealing with the prohibited drugs which is an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985. The ED along with its team, in the early hours of morning, raided at the office of the company and at the residence of Rajesh Kumar and found huge quantity of poppy straw at the office of the company as well as at in the garage of Rajesh Kumar. The ED ordered for the provisional attachment of the office premises and the residence of Rajesh. Both these properties were already under mortgaged with the HDFC Bank.

MULTIPLE CHOICE QUESTIONS

1. The provisions of the IBC are not applicable on:
(a) Private Limited Company
(b) Limited Liability Company
(c) Personal Guarantors to corporate debtors
(d) None of the above

2. Who is the Adjudicating Authority for the personal guarantor:
(a) The National Company Law Tribunal
(b) The Debt Recovery Tribunal
(c) The District Court
(d) The High Court

3. Keeping of Poppy Straw is an offence under which Act:
(a) The Indian Penal Code, 1860
(b) The Narcotic Drugs and Psychotropic Substances Act, 1985
(c) The Unlawful Activities (Prevention) Act, 1967
(d) The Protection of Plant Varieties and Farmers Rights Act, 2001

4. Who among the following shall not be entitled to exercise any right of enforcement of securities by registration with CERSAI under the SARFAESI Act:
(a) Secured creditor
(b) Unsecured creditor
(c) Both secured and unsecured creditor
(d) None of the above

5. Which among the following Act, overrides the other laws:
(a) The Insolvency and Bankruptcy Code, 2016
(b) The Prevention of Money Laundering Act, 2002

(c) The SARFAESI Act, 2002
(d) The Recovery of Debts and Bankruptcy Act, 1993

DESCRIPTIVE QUESTIONS

6. After the expiry of the notice issued under section 13(2), how the secured creditor may proceed to take the possession of the security interest under the SARFAESI?

7. Whether moratorium declared by the Adjudicating Authority is also applicable on the personal guarantor? Examine the statement in light of the provisions contained in the IBC.

Answers to Multiple Choice Questions

1. (d) None of the above

Reason:
Section 2 of the IBC provides that the provisions of this Code shall apply to—
(a) **any company** incorporated under the Companies Act, 2013 (18 of 2013) or under any previous company law;
(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;
(c) any **Limited Liability Partnership** incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009);
(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf;
(e) personal guarantors to corporate debtors;
(f) partnership firms and proprietorship firms; and
(g) individuals, other than persons referred to in clause (e),

2. (a) The National Company Law Tribunal

Reason:
Section 60(1) of the IBC provides that the **Adjudicating Authority**, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and **personal guarantors thereof shall be the National Company Law Tribunal** having territorial jurisdiction over the place where the registered office of the corporate person is located.

3. (b) The Narcotic Drugs and Psychotropic Substances Act, 1985

Reason
Paragraph 2 of Schedule of PML Act provides the list of offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 under which section 15 deals with the contravention in relation to poppy straw.

4. (b) Unsecured creditor

Reason:
Section 26B(3) of the SARFAESI provides that a creditor **other than the secured creditor** filing particulars of transactions of creation, modification and satisfaction of security interest over properties created in its favour **shall not be entitled to exercise any right of enforcement of securities** under this Act.

5. (b) The Prevention of Money Laundering Act, 2002

Reason:
Section 71 of the PMLA states that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.
The High Court of Delhi in the matter of The Deputy Director Directorate of Enforcement, Delhi Vs. Axis Bank & Ors [CRL.A. 143/2018 & Crl. M.A. 2262/2018 dated 2nd April, 2019] held at Para 171 (V), (vi), (vii) and (viii) held as under:

(v). If the person accused of (or charged with) the offence of money-laundering objects to the attachment, his claim being that the property attached was not acquired or obtained (directly or indirectly) from criminal activity, the burden of proving facts in support of such claim is to be discharged by him.

(vi). The objective of PMLA being distinct from the purpose of RDBA, SARFAESI Act and Insolvency Code, the latter three legislations do not prevail over the former.

(vii). The PMLA, by virtue of section 71, has the overriding effect over other existing laws in the matter of dealing with "money-laundering" and "proceeds of crime" relating thereto.

(viii). The PMLA, RDBA, SARFAESI Act and Insolvency Code (or such other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting which there is material available to show the same to have been "derived or obtained" as a result of "criminal activity relating to a scheduled offence" and consequently being "proceeds of crime", within the mischief of PMLA.

Answers to Descriptive Questions

6. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset

Section 14 of the SARFAESI Act deals with this matter. It reads as under:

(1) Where the **possession of any secured assets is required to be taken by the secured creditor** or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Act, the **secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate** within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or as the case may be, the **District Magistrate shall**, on such request being made to him—

(a) **take possession** of such asset and documents relating thereto; and

(b) **forward such asset and documents to the secured creditor:**

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that—

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii)above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub- section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets within a period of 30 days from the date of application:

Provided also that if **no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of 30 days** for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period **but not exceeding in aggregate 60 days.**

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,—

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

7. According to Section 5(22) of the IBC, "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor.

Section 13(a) states that the Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order declare a moratorium for the purposes referred to in sec 14.

Section 14(1) states that on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings **against the corporate debtor** including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.—For thepurposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

In the case of State Bank of India Vs. Ramkrishnan [Civil Appeal Nos. 3595 & 4553 of 2018, (2018) 17 SCC 394], the Supreme Court held that section 14 did not apply to the personal guarantor of the CD but only to the CD. The court held that in a contract of guarantee, the liability of surety and that of principal debtor is coextensive and hence, the creditor can proceed against assets of either the principal debtor or the surety, or both, in no particular order. The court also took into consideration the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 which amended the provision of section 14 and held the same to be retrospective (clarificatory in nature).

CASE STUDY 55

Mahesh after having completed an engineering degree in agriculture got a placement in a bank as Agriculture Officer. He worked in the bank for about 4 years, but was not having the job satisfaction. So, he decided to quit the job and to associate with his father in agriculture business. He belongs to a village Peethawas, near to Jaipur city. He planned to purchase an agriculture land in the village and ultimately found out one seller. He negotiated deal with the seller and purchased that land out of his savings.

Mahesh wanted to grow some agriculture produce on that land and for this he needs money for purchasing the seeds, fertilizers etc. He approached SBI which is having branch in his village and applied for the Kisan Credit Card (KCC) Limit. A limit of Rs. 5 lakh was given on the KCC by the bank by mortgaging the land with the bank. The name of the bank was registered with SDO record and so of with the CERSAI.

Mahesh hired some labours for the daily work on the farm and started cultivation of the vegetables & fruits.

Mahesh got married with Yukti of Jaipur. Yukti is a Chartered Account and presently is in employment with a CA firm in Jaipur. Since his area of scope is in city, so Mahesh also decided to settle down in Jaipur.

In Jaipur, the builders regularly advertise for booking of flats. Mahesh and Yukti contacted some builders and also saw some sample flats and finalised the deal with Yash Builders Ltd. The cost of the 3 BHK flat was Rs. 75 lakh. Mahesh and Yukti decided to avail loan facility and approached Axis Bank in Jaipur. Based on the profile of Mahesh and Yukti, the Axis Bank sanctioned loan of 90% of the cost of flat and 10% as margin money was to be contributed from their own savings.

Yash Builders demanded Rs. 10,000/- as token amount of commitment and Rs. 7 lakh on the execution of agreement to sale. Mahesh and Yukti demanded from the builder the names of the person who have booked the flats so far, to know who is in their known list, but builder denied to provide the same.

In the village, the farming was not upto the mark due low rainfall. SBI asked Mahesh to liquidate the KCC limit, but since the money was utilised in paying the margin money for booking of the flat in Jaipur, Mahesh was short of liquidity, so he requested the bank to wait for some time. The Agricultural Loan account was classified as NPA in the books of the bank. The bank served a notice under section 13(2) of the SARFAESI to Mahesh and to liquidate the KCC loan account within 60 days from the date of notice, failing which the bank may take possession of the land.

Mahesh's friend Arvind is an Advocate. When Mahesh discussed with Arvind about the notice of SARFAESI, his lawyer friend said that the notice issued by the bank is tenable in the eyes of law.

The builder after getting the booking amount from all the allottees started constructing the site on full swing. The builder observed that some structural changes are required to be made which differ from the sanctioned plan / outlay. So called a meeting of the allottees and described the need of such changes. Some of the allottees objected and threatened to approach the RERA authority. However, the builder tried to convince them and majority of the allotees agreed with the builder. Those who did not agree with the proposal of the builder, were offered the refund. These vacant flats were again booked by the present allottees who attended the meeting since the location was having the prime advantages in near future.

The construction work was on its full swing and the builder was committed to complete the work as per the agreement. The builder asked the allottees to have a look of their flats to ensure that everything is complete as per the agreement and obtain a completion certificate from the Jaipur Development Authority (JDA), then only he will provide the possession of the flats. Mahesh together with Arvind argued with the builder that obtaining of the completion certificate from the competent authority is not the allottees duty and complete this formality at your end and provide the possession of the flat.

At last, Mahesh got the possession of the flat and shifted in it along with Yukti.

MULTIPLE CHOICE QUESTIONS

1. The promoter at the time of booking and issue of allotment letter is NOT responsible to make available to the allottee:
(a) Sanction plans as approved by the competent authority
(b) Stage wise time schedule of completion of the project
(c) Provisions for civil infrastructure like water, sanitation and electricity
(d) List of allottees who have booked the flats showing their names, addresses, cast/ religion

2. Where the borrower is aggrieved by the measures taken by the secured creditor under the SARFAESI, the borrower may make an application ---------- from the date on which such measure had been taken:

(a) Within 30 days
(b) Within 45 days
(c) Within 60 days
(d) Within 75 days

3. Who shall be responsible to obtain the completion certificate:
(a) The Real Estate Agent
(b) The Banker who provided loan to the allottee
(c) The promoter
(d) The allottee himself

4. The provisions of the SARFAESI shall be applicable on which of the following:
(a) Security interest created on Agricultural Land
(b) Outstanding amount is less than 20% of the principal amount and interest thereon
(c) Where the loan account is irregular but not classified as NPA in the books of the lender
(d) Security interest for securing repayment of any financial asset not exceeding one lakh rupees

5. After completion of the real project and handing over the possession to the allotees, who shall form an association:
(a) The Allottees
(b) The Promoter
(c) The Registrar of Co-operative Society
(d) The Real Estate Agent

DESCRIPTIVE QUESTIONS

6. In the given case the Mahesh is not happy with the way his banker has exercised its right of enforcement of the security interest. What recourse is available to Mahesh?

7. The RERA casts some obligations on the promoter to observer adherence to the sanctioned plans and project specifications by the promoter. Elucidate the statement.

Answers to Multiple Choice Questions

1. (d) List of allottees who have booked the flats showing their names, addresses, cast/ religion

Reason: Section 11(3) of the RERA provides that the promoter, at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:-
(a) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;
(b) the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

2. (b) Within 45 days

Reason: Section 17 of the SARFAESI states than any person (including borrower), aggrieved by any of the measures referred to in section 13(4) taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter **within forty-five days** from the date on which such measure had been taken.

3. (c) The promoter

Reason: Section 11(4)(b) of the RERA provides that **the promoter shall be responsible to obtain the completion certificate or the occupancy certificate,** or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be.

4. (c) Where the loan account is irregular but not classified as NPA in the books of the lender

Reason: Section 13(2) of the SARFAESI provides that where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of **such debt is classified by the secured creditor as non-performing asset**, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

Further, Section 31(h), (i) and (j) of the SARFAESI provides that the provisions of the SARFAESI Act shall not apply to –
(h) any security interest for securing repayment of any financial asset notexceeding one lakh rupees;
(i) any security interest created in agricultural land;
(j) any case in which the amount due is less than 20% of the principal amount and interest thereon.

5. (b) The Promoter

Reason: Section 11(4) (e) of the RERA provides that the promoter shall enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable.

Answers to Descriptive Questions

6. Section 17 of the SARFAESI deals with the measures against measures to recover secured debts. It provides that-

Sub-section (1) state that any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter **within forty-five days** from the date on which such measure had been taken:

The Explanation attached to this sub-section provides that 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.

Sub-section (1A) provides that an application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction the cause of action, wholly or in part, arises; where the secured asset is located; or (c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

Sub-section (2) states that the Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

Sub-section (3) states that if , the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

Sub-section (4) states that if, the DRT declares the recourse taken by a secured creditor under section 13(4), is in accordance with the provisions of this Act then, the secured creditor shall be entitled to take recourse to one or more of the measures specified under section 13(4) to recover his secured debt.

Sub-section (5) provides that any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application. The DRT may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, **shall not exceed four months** from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the DRT within the period of four months, any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the DRT for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the DRT.

(7) Save as otherwise provided in this Act, the DRT shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.

7. Section 14 of the RERA deals with the adherence to sanctioned plans and project specifications by the promoter.

(1) The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

(2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—

(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

(ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation. —For the purpose of this clause, the allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

Judgements Econimic laws (Only Relevant)

Act Name	S. No.	Judgement Name	Facts	Question of law/ facts	Final Judgement
Competition Act, 2002	1	**Mahindra Electric Mobility Limited& Ors.**	Three car manufacturers restricted free availability of **spare parts in the open markets.**	**1. CCI exercising judicial functions 2. Revolving door practice.**	**1. Cannot be considered solely discharging judicial powers. 2. Who herd must decide first.**
	2	**Competition commission of India VS M/s Fast way transmissio n**	Day & Night news agreement with MSO, **Notice served to terminate the agreement with Day night channel.** Alleged that MSO abused dominant position by denying market access.	Abuse of Dominant position be exercised by one creditor against the other. **MSO and day night are not competitors does not mean abuse of dominant not enacted.**	**As per apex court, market access denial is being done by a competitor or not is not relevant once dominance is made out.MSO held not guilty and penalty waived.**
	3	**Rajasthan Cylinders and Containers Limited VS UOI**	Tender floated by IOCL for purchase of LPG cylinders, terms of purchase challenged by purchasers. **Bid rigging and cartelization allegations imposed by IOCL in revert.**	Enterprises in violation of the act when market conditions not conducive.	Supreme court: CCI had to inquire the relevant factors. Since there were only limited LPG manufacturers hence cartelization cannot be proved. **Hence not sufficient evidence to hold LPG manufacturers violative of Competition act. Order of COMPAT set aside.**
	4	**Umar Javed and Google LLC.**	Google alleged for abuse of dominant position in the mobile operating systems market. Manufacturers of android phones had to **enter into agreement of MADA with google.**	Whether google abused it's dominant position	Case pending at SC
	5	**House of Diagnostics LLP and Esaote Asia Pacific Diagnostics Pvt ltd.**	HOD alleged Esaote abused dominant market position. (Refusing to supply spare parts to HOD and **insisted Comprehensive Maintenance Contract.**	Did Easote acted in contravention of Sec 4?	**Easote found to abused dominant position and penalty imposed on it.(Opinion of CCI members)**
	6	**Anti competitive conduct in dry cell batteries market in India.**	Panasonic manufactures Zinc carbon batteries, agreement with Godrej for supply. **Panasonic entered into price fixing agreement with it's competitors Everyday and Nippo.**	Bilateral ancillary cartel existed between Panasonic and Godrej	**CCI held Panasonic, everyday and Nippon guilty of Cartel** Godrej Suggested Vertical agreement and not horizontal agreement.

Competition Act, 2002	7	**FX Enterprises Solutions India Pvt Ltd and Hyundai Motor India Ltd.**	Alleged that Hyundai perpetuates "hub and spoke agreement" wherein bilateral vertical agreements between Hyundai and it's dealers & horizontal agreements between dealers resulted price collusion.	**Whether Hyundai acted in contravention of section 3 of the act?**	NCLT observed section 19 (relevant market factors) have not been considered by CCI, hence view of CCE overruled by NCLT.
	8	**Sanshaer Kataria Vs Honda Siel Cars India Ltd. And ors.**	**OEM and automobile manufacturers alleged for restricting the availability of genuine parts of automobiles in open market.**	Whether OEM abusing dominant positions.?	CCI observed cluster market existed for spare parts for each brand of car manufacturer by OEM. **Hence found Indian spare parts market as separate market from that of cars.**
	9	**CCI vs Bharti Airtel Ltd.**	**Deny of access to Jio by not providing adequate ports for POI's**	CCI has jurisdictions to enter into matters not decided by TRAI?	**CCI is ill equipped to proceed on account of absence of determination of Jurisdictional aspects hence, first TRAI decides then CCI.**
	10	**Harshita Chawla Vs WhatsApp.**	Alleged WhatsApp and Facebook Inc. for abusing the dominant position in launching their payment app services.	Whether introduction of payment mechanism of WhatsApp pay can be considered as "coercion."	**Voluntary installation of WhatsApp not mandatory,** cci did not find any contravention of provisions of sec 4.
	11	**Samir Agrawal Vs CCI**	**Alleged uber and Ola forming hub and spoke cartel.**		Locus standi to approach the CCI lies with person either consumer of goods/ services or beneficiary of competition. **No pricing agreement found between the operators hence CCI held not guilty.**
Insolvency and Bankruptcy Code, 2016	1	**Swiss Ribbons Pvt Ltd and Anr Vs Union of India & ors.**		1. No difference of Operational and Financial Creditors. 2. Constitutional validity of IBC challenged. 3A. How RP can take quasi judicial power. 3B. RP appointed in Quasi judicial capacity.	**1. Financial and operational creditors different (section 5(8))** 2. Article 14 not affected. 3A B. Section 28 66.66 % approval needed of COC hence acts as facilitator only.
	2	**Pioneer Urban Land and Infrastructure Ltd. And anr vs Union of India.**	**Amount raised from allottees and questioned as financial or operational debt.**	1. Debt from homer buyers is different from operational debt or debt from home buyers shall be financial debt.?	**Amount raised from allottees is covered by the term "borrow" hence as per section 5(8)(f), such amount is financial debt.**
	3	**Macquirie Bank Limited Vs Shilpi Cable Technologies Ltd.**	**Hamera International private ltd and Macquirie Bank agreement for dealership**	**Advocate/ Lawyer can raise a notice u/s 8 on behalf of the operational creditor.?**	**Lawyer can raise on behalf of operational creditor notice under section 8 of the code.**

Insolvency and Bankruptcy Code, 2016	**4**	**BK educational service private ltd. Vs Parag Gupta and Associates.**		1.Limitations act 1963 can be invoked for applications before **commencement of the code?** 2.In exam refer: **From the submission of claims or date of transactions**	1. Yes limitations act is applicable on applications filed under sections 7 and 9. 2. From date of submission and transactions even though 3 years lapsed the application can be admitted.
	5	**State Bank of India Vs Ramakrishna**	SBI gave loan to Veesons energy. Upon default proceedings initiated under SARFAESIA. MD claimed that during moratorium period his personal guarantee is also covered and hence can not be attached.	Whether moratorium period applies to personal guarantee of corporate debtor?	Section 14 of the code does not apply to personal guarantor of the code.
Insolvency and Bankruptcy Code, 2016	**6**	**Mobilox Innovations Pvt Ltd Vs Kirusa Software Pvt Ltd.**	Kirusa raised demand notice to Corporate debtor. Mobilox relied existence of dispute though no such evidence of dispute existed.	To what extent can NCLT go into depth of existence of dispute?	Supreme court: Plausible contention (documentary evidence) required for further investigation, dispute is not patently feeble argument or an assertion of fact unsupported by evidence. Hence SC allowed the application of CIRP. **In exam if reply is with email and the same is not supported with any documentary evidence the allow such application for CIRP.**
	7	**K. Sashidhar Vs Indian Overseas Bank & ors.**	**Approval of 66.67 % received in COC (old law 75%)**	**Can NCLT reject the resolution plant approved by COC.**	**Section 30(4) of the code makes mandatory to gain approval of requisite 66.66% (75 percent old law). Hence NCLT can not adopt a different approach in these matters.**
	8	**M ravindranath Reddy Vs G Krishna and Ors**	**Appellant alleged the respondent for not paying the dues of rental charges.**	**Whether landlord providing the lease will be treated as providing services and hence the operational creditors?**	**NCLT: Coded does not defines the meaning of goods and services and hence as per general parlance such claim is a debt and will be considered as operational debt for providing services.**

Insolvency and Bankruptcy Code, 2016	9	Maharashtra Seamless Limited Vs Padmanphan and ors	An appeal was filed by the promoter of the Corporate Debtor and the dissenting financial creditor on the preliminary ground that the amount provided in the resolution plan is lower than the average of the liquidation value arrived at by the valuers. NCLAT held that since the amount provided in the resolution plan was lower than the average of the liquidation value arrived at by the valuers, therefore, the resolution plan approved by the Adjudicating Authority is against Section 30(2)(b) of the Code. Aggrieved by the decision of NCLAT, the successful resolution applicant preferred an appeal before the Hon'ble Supreme Court. The primary issue for consideration before the Apex Court was whether the scheme of the Code contemplate that the sum forming part of the resolution plan should match the liquidation value or not.	Whether scheme of resolution plan should match the value of liquidation?	The Hon'ble Supreme Court held that there is no breach of the provisions of the Code or the regulations, and upheld the order of the Adjudicating Authority approving the resolution plan.
	10	Bijay Kumar Agarwal, Ex-Director of M/s Genegrow Commercial Pvt. Ltd. v. State Bank of India and Anr	Financial creditor filed an application for CIRP against the principal debtor as well as the guarantor for the claim of debts.	Whether a financial creditor is permitted to initiate CIRP proceedings under Section 7 of the IBC against the principal debtor as well as the guarantor, for the same set of claims?	For the same set of claims, if an application is filed against one of them, a second application filed by the same Financial Creditor for the same set of claims and default is not to be admitted

Insolvency and Bankruptcy Code, 2016	**11**	**Flat Buyers Association, Winter Hills – 77, Gurgaon v. Umang Realtech Pvt. Ltd. and Ors.**	CIRP initiated by allottees against Umang Realtech Pvt ltd and Ors.	Whether the Corporate Insolvency Resolution Process **(CIRP) proceedings initiated by a flat buyer in relation to one project of a real estate company will affect the other group projects of the company.?**	NCLAT held that CIRP against corporate debtor is limited to a project in accordance with the approved plan by the Competent Authority and **not other projects which are separate at other places for which separate plans approved. If the same real estate company (Corporate Debtor herein) has any other project in another town such as Mumbai or Kerala or Delhi, they cannot be clubbed together nor the asset of the Corporate Debtor (Company) for such other projects can be maximized.**
	12	**savan godiawala vs mr apalla siva Kumar**	Corporate debtor did not create funds for gratuity payment as per the legal requirements of Payment of Gratuity Act. **Application filed to NCLT to treat gratuity payment as high priority payment.**	Can liquidator be directed to pay for the funds even though gratuity fund not created by the corporate debtor.?	**Gratuity, PF and pension fund do not form part o the assets of liquidation. Liquidator cannot avoid payment of liability of Corporate Debtors for not maintaining the funds for payments.**
	13	**JSW Steels Ltd Vs Mahender Kumar Khandelwal and Ors.**	**NCLT approved the resolution plan** submitted by JSW of the IBC cirp **thereafter the ED attached the property of Bhushan Power**	Whether ED has jurisdiction to attach the property of a corporate debtor or part thereof which is undergoing a 'corporate insolvency resolution process?	**CLAT stayed the order of attachment passed by the ED** and also prohibited it from attaching property of Bhushan Power without seeking prior approval of the NCLAT. **NCLAT also directed the that the property already attached by the ED be realised in favour of the resolution professional immediately.**

Insolvency and Bankruptcy Code, 2016	**14**	**Sagufa Ahmed Vs Upper Assam Plywood Products Pvt Ltd.**	The appellants filed an appeal, against the NCLT order, before the National Company Law Appellate Tribunal (NCLAT) on 20.07.2020. The appeal was filed along with an application for condonation of delay. NCLAT, through an order dated 04.08.2020, dismissed such application as the period for condonation of delay was 45 days and the tribunal would have no power to accept any application beyond such period.	1) NCLAT erred in computing the limitation period from the date of NCLT order, contrary to Section 421(3) of the Companies Act, 2013 which states that such limitation period should be computed from the date on which a copy of NCLT order is available to an aggrieved person. **2) NCLAT failed to take note of the lockdown due to COVID-19 as well as the order passed by SC on 23.03.2020 to extend the limitation period for filing an appeal before a tribunal w.e.f. 15.03.2020.**	The appeals were dismissed and the appellants could not claim the benefit of extension of the limitation period for the period of condonation of delay. The Court held that the order passed by this court on 23.03.2020 extends only the period of limitation and not the period of condonation of delay. Section 421(3) of the Companies Act, 2013 provides that the period of limitation for an appeal before NCLAT is 45 days from the date on which a certified copy is available to the aggrieved party, i.e., 19.12.2019. This period shall expire on 02.02.2020 **Further, the proviso to Section 421(3) empowers the tribunal to condone the delay up to 45 days. This period shall expire on 18.03.2020.** The lockdown was imposed on 24.03.2020 and no such impediment was there for the appellants to file an appeal on or before 18.03.2020. **The court held that the extension was only for "the period of limitation and not the period up to which delay can be condoned in exercise of discretion conferred by the statute".**
Prohibition of Benami Property Transactions Act,1988	**1**	**Magathai Ammal (Died) Through Lrs Vs Rajeshwari**	Narayan Mundailer sold ancestral property and purchased suit property in name of Rajesahwari (wife). Consideration was paid by Narayan Mundailer and stamp duty was also in his name.	Whether transaction can be claimed as benami transaction when sale deed / transaction in name of Rajeshwari?	**6 guiding circumstances.**
	2	**Smt. P. Leelavathi vs V Shankarnarayan Rao.**	GV Rao purchased property in name of 3 sons and daughter claimed 1/4 share in property acquired from ancestral property.	Whether **financial assistance** can be said to be the benami transaction which was given by father to three sons.?	**Not Benami as intention was to provide financial assistance.** **In exam mention: 6 situations of case law 01.**
	3	**G Mahalingappa vs GM Savitha**	Father of the respondent(daughter Savitha). Father purchased the property when the respondent was a minor child thereafter after her marriage she asked the father to vacate the property and for payment of property rent to her. Respondent filed a recovery proceeding suit	Dows plaintiff (daughter) prove that she is the owner of the property? Is she entitled for damages as claimed by her?	**Real owner should have purchased the property in name of ostensible owner for being a benami transaction. The father in this case purchased the property for his own benefit supported the inference that he is the real owner. Also the property was mortgaged and father had rented the premises for his own benefit.** **Apex court held the property as Benami Transaction.**

			against the father.		
Prohibition of Benami Property Transactions Act,1988	4	**Meenakshi Mills, Madurai vs CIT**	Created shell firms to distribute the profits CIT opined to club the profits of all the firms in the computation of Meenakshi Mills	Does the four firms form as benamidar ?	Apex court: Mentioned two transactions as benami. 1. A sold the property to B ut mentioned in name of X. (Benami Transaction) 2. A purports that he sold the property to B but there is not actual transfer of property. - check whether there is any consideration involved.
	5	**Sh. Amar N Gugnani Vs Naresh Kumar Gugnani**	Plaintiff came provided funds to father and purchased the property in name of property. Cases existed between the Brothers. The Plaintiff's was of the view that such property was held by father in name of father as trustee/ **fiduciary relation**.(Perpetual lease)	Whether suit falls in the transactions of Benami Transactions act 1988?	Expression **"fiduciary relationship" and a " relationship"** of trustee cannot be so interrelated so as to in fact negate the Benami Act because all the properties are in nature of trust otherwise all the transactions would amount to holding that there is no Bemai act at all.
	6	**Pawan Kumar Gupta Vs Rochiram Nagdeo**	**Pyarelal father of Pawan paid the consideration for the purchase of property by Pawan.**	Whether plaintiff is the real owner of the suit premises? Whether defendant is tenant of plaintiff of disputed premises?	In definition of benami transaction, term **"provided"** in the clause cannot be constructed in relation to the source of funds for the purchase of property**.Eg. Other interpretation would harm the actual genuine transactions like bank providing funds for purchase of property.** **Hence not benami transaction.**
	7	**Bhim Singh Vs Kan Singh**	Kan Singh brother of Bharat Singh purchased property and kan Singh upon is death transferred the property in his name. Patta court transferred the property to Bhim Singh (Nephew of Bharat Singh). Kan Singh claimed property as it was his family property.	**Ownership of the house issue.(Not related to Benami property)**	**The intention of the transferor matters .**An order is passed directing the defendant to deliver possession of the suit house to plaintiff No. 2 (Bhim singh Son) as Bharat singh who purchased the property and handed the pattas (title deeds) to Bhim Singh,**his intentions were clear to give property to Bhim Singh's Son.**
	8	**Vallliammal (D) By Lrs vs Subramaniu m &Ors.**	Malaya (Son1 of Angappa) purchased property (from family consideration) after an auction and registered in name of Wife (Ramayee). Marappa(Son2) objected and claimed it as family property. Malaya failed to prove why he named the property in name of wife.Claim of property denied and property declared as family property.	Whether property in name of Ramayee was benami transaction? Cases between daughters of two sons.	As basis of 6 parameters such property is benami.

PBPT Act,1988	**9**	**Niharika Jain W/o Shri Andesh Jain Vs Union Of India**	Before the amendment in Benami Property act search was conducted u/s 132 of income tax act. Section 3 amendment of the benami act came after the transactions took place.	**Whether the amendment will be prospective or retrospective ?**	**Entire transaction treated as prospective act.**
Prevention of Money Laundering, 2002	**1**	**Directorate of Enforcement Vs Deepak Mahajan.**	**Deepak Mahajan Arrested by Directorate of Enforcement for an offence under FERA.Special leave petition filed with Supreme court on certain grounds.**	**1. Special leave petition maintainable. 2.Whether magistrate of FERA has jurisdictional rights to authorize the detention of person under 167 of the code of criminal procedures. 3.Whether ED of FEMA OR CUSTOMS are the competent persons to take judicial remand of an arrested person.?**	**1. As per 136 of the code of criminal procedures the SLP is maintainable 2.Magistrate has jurisdictional rights under section 167(2) of the code to authorise the detention o person arrested by any authorised officer of the enforcement under FERA. 3.Not a pre-requisite that person should be arrested by the police officer, apex court stated that the enforcement officer or customs officer can be termed as 'police officer' for the purpose of the arrest.**
	2	**PMT Machines Ltd vs The Deputy Director, Directorate of Enforcement, Delhi**	Search and seizure conducted under income tax act and provisional attachment was issued on properties of Corporate debtor **under moratorium period. (Section 14 of the code)**	**Validity of attachment when properties were under moratorium period.? In exam: Remember if properties are under moratorium period and such property relates to proceeds of crime then PMLA prevails else IBC wins.**	**Such property was not from the proceeds of crime hence stance of Resolution Professional upheld**
	3	**B.K Singh vs Suraj Pal @Chacha.**	**Delhi police along with forest department officials arrested Chacha on grounds of wildlife contraband alonwith upon search conducted confiscated INR 52 lakhs money.**	**1. Whether such offence covered by the scheduled offence? 2.Whether the wildlife examiner can be examined in court? 3.Is there any requirement to physically produce wildlife contraband under the trial of court.**	**1.Yes scheduled offence under PMLA 2 and 3. No need as per Wild life act.**

Prevention of Money Laundering, 2002	**4**	**Chhagan Chandrakunt Bhujbal vs Union of India and ors.**	**PWD minister arrested on rounds of generating huge illicit funds of 840.16 crores as he awarded public works for self gain.**	**1. Section 45 of PMLA made all offences non cognizable and accordingly without magistrate's cognizance from special court the arrest could not have been effected.** **2. Grounds of arrest not mentioned in writing in the arrest warrant.** **3.AD not competent to exercise powers of section 19 , hence had no power to arrest without CG approval.**	**1. AD power to arrest does not depend on the question as to whether the offence is cognizable or non cognizable.** **2.Only condition required under section 19 was to have reasonable basis to arrest.** **3.DD and AD do not require any approval of CG for arrest.**
	5	**Dalmia Cement Bharat Ltd. Vs state of AP, Hyderabad.**	Based of the allegations charge sheet was filed against the company for being accused under offence of PMLA	**Whether statement made before ED PMLA is binding on the accused without proofs?**	**All summoned persons are bound to state truth or make statements and produce such documents may be required.(section 50)**
	6	**Financial Intelligence Unit- IND vs Corporation Bank**	Sting operation conducted on banks for accepting black money in form of Fixed deposits. Penalty imposed and later an amendment reduced the penalty.	**Exam question: Any reduction in penalty through any modification, in enactment will have retrospective effect,** discuss in the view of the relevant case law?	Supreme court: T Barai v Henry Ah Hoe & Anr, no person can be convicted by such ex facto law nor can the enhanced punishment prescribed by the amendment be imposed, **but there is no reason why should accused not have any benefit from the reduced punishment.**
	7	**Smt k Soubhagya vs Union of India.**	Political family accused of offence under PMLA and now claimed the PMLA unconstitutional.	**Even if person is not held guilty of offence under PMLA for proceeds of crime u/s 8 of the act proceedings may be initiated against such person are unconstitutional** , discuss in the light of relevant case laws.? Validity of section 17, 18 and 19 questioned.	**Money laundering is an independent standalone offence, definition of proceeds of crime can be extended to include money laundering arising out of proceeds of crime. Measures of search and seizure can not be considered as draconian (harsh). Provision of PMLA clearly enable unambiguously initiate proceeding for attachment and confiscation of the property in possession of person not accused to commit violations of section 3 and Article 14 of the constitution.**

Prevention of Money Laundering, 2002	**8**	**B. Rama Raju V Union of India (satyam computers)**	Raju rama of satyam computers alleged for money laundering acts.	**1.Property owned by or in possession of the other person not charged for scheduled offence is liable for attachment and confiscation? 2.Provisions of section 5 are applicable on properties acquired before the enforcement of the provisions. 3. Whether provisions of section 8 are invalid for procedural vagueness? 4.Whether presumption of section 23 are unreasonable and excessively disproportionate ? (interconnected persons) 5.Whether shifting the burden of proof by section 24 of the act is arbitrary and invalid? (Burden of proof on the alleged)**	**1. Proceeds of crime serves broad objectives of the code. Thus property owned or in possession of the other person not accused of scheduled offence was equally liable for attachment. 2. Parliament has authority to legislate and provide for forfeiture of the proceeds of crime which is a procedure of specified criminality acquired prior to the enactment of the act as well. Thus provision of second proviso to section 5 are applicable to properties acquired even before the coming in force of the provisions of the act and can not be penalized for retrospective application. 3. Vaid attachment even before conviction of the accused. 4.Section 23 enjoins the rule of evidence and rebuttable presumption considered essential and integral to effectiveness of the act, thus provision valid. 5. The other person in whose possession the property exists has a presumption attached to it under section 23 (that the proceeds of crime are involved), therefore there is no need to apply burden of proof. Such property is already liable for money laundering provisions allegations.**
	9	**J Sekar And others V ED**	Writ petition filed on validity of section 5 is ultra virus to Article 14 of the constitution of India.	Exam: Without forwarding the report to magistrate as required us 173 of CRPC Director proceeded for provisionally attaching the property is in violation of sec 5 of PMLA. Discuss?	**5. The other person in whose possession the property exists has a presumption attached to it under section 23 (that the proceeds of crime are involved), therefore there is no need to apply burden of proof. Such property is already liable for money laundering provisions allegations.**

Foreign Exchange Management Act, 1999	**1**	**IDBI Trusteeship Services Limited Vs Hub town Ltd.**	FMO(PROI) invested in CCPS and Equity of Vinca (PRI), Vinca invested in 100 Percent wholly owned OPCD of it's two subsidiaries and assigned trusteeship to IDBI. Such Trusteeship was secured by corporate guarantee of Hubstown (PROI).	**Under which circumstances defendant may be granted leave to defend in a suit for summary judgement?**	**High court held ensuring fixed payment of return to the PROI is in violation of FEMA hence held the transaction in violation to FEMA. Supreme court upon examination of the facts held, vinca could own the 99% stake upon conversion hence at the current stage such transaction is valid. No prima faci breach of law, court directed Huston to deposit the principal amount claimed under guarantee as a precondition to defend suit.**
	2	**Cruz City I Mauritius HoldingsV Unitech limited.**	Foreign arbitral award challenged in the Indian judicial system.	Whether violation of any regulation or provision of FEMA would affect the public policy (fundamental policy) of India.? **Exam: Can foreign arbitral awards be declared as null and void as opposed to public policy.?**	Foreign arbitral awards can be enforced in India pertaining to put options, exit at assured return, and guarantee arrangements and provisions of FEMA and related regulations cannot be claimed as defence by Indian parties. **Can be declared as null and void only if such award affects the fundamental policies of India.**
	3	**NTT DoCoMo Inc. V Tata sons ltd.**	DoCoMo and TSSL agreement violated and DoCoMo offered it's shares as per the agreement. RBI contended neither award nor the consent terms should be given effect since it would lead to violation of foreign exchange regulations.	Legitimacy of RBI objections under award questioned.?	**Arbitral award was capable of being performed without special permission of RBI**
	4	**Venture Global v Tech Mahindra. (NOT VERY IMPORTANT)**	Agreement between the parties entered and upon non fulfilment patent illegality invoked under public policy.	What is the applicability of **patent illegality** of public policy to international commercial arbitrations.?	Amendment to Arbitration act patent illegality would not apply to international commercial arbitrations which did not apply to the case as this amendment came after the commencement of proceedings.
	5	**Mr.S. Bhaskar Vs enforcement directorate FEMA**	Appellant found in possession of USD 20 thousand, DD imposed penalty and released the balance amount.	Appellant was justified in law in modifying the order of DD by directing confiscation of foreign currency?	Section 13(1) and (2) are in addition to each other hence correctly order passed by arbitral tribunal.
	8	**Kanwar Natwar Singh vs Director of Enforcement &Anr.**	Natwar Singh alleged for holding foreign exchange in violation of the FEMA and in cross challenged the non furnishing the **all documents** in Delhi High court.	Whether a noticee is entitled to demand to furnish all the documents upon which no reliance has been placed to issue show notice ?	Principles of natural justice do not require supply of documents upon which no reliance has been placed by the Authority to set law in motion.

FEMA, 1999	**9**	**SK Sinha, Chief Enforcement Officer Vs Videocon International Ltd. (NOT VERY IMPORTANT)**	Not relevant as it relates to the FERA and FEMA transition.	Whether issuance of process in criminal case is one and the same thing or can be equated with taking cognizance by criminal court?	Taking cognizance does not involve any formal action of any kind, occurs as soon as magistrate applies his mind to the suspected commission of offence.
Real Estate (Regulations & Development) Act, 2016	**1**	**M/s M3M India Pvt ltd. & Anr v Dinesh Sharma & Anr**	Dinesh allottee filed upon a dispute complaint under Consumer protection act and with RERA authority.	**Whether proceedings of CPA can be commenced after commencement of RERA proceedings.?**	**Remedies available under both the authorities concurrently.**
	2	**Jatin Mavani Vs Rare Township Pvt Ltd.**	Multiple proceedings on the same issue.	Multiple proceedings on the same issue permissible?	Not allowed: Maharashtra RERA
	3	**Lavase corporation Limited vs Jitendra Jagdish Tulsiani**	Entered into agreement for Lease not for sale. Such agreement for 99 years and paid substantial amount initially for 99 years.	Provisions would apply to Agreement of lease as well.?	Yes considering the facts, 99 years lease such agreement will be considered agreement for same mere such nomenclature will not affect tights of allottees.
	4	**Neel Kamal Realtors Subarban Pvt. Ltd. And anr vs UOI.**	Delay in agreement terms allotment and allottees claimed for refund along with interest. Promoter challenges the existence of RERA against Article 14 of the constitution of India.	Provision of rera against article 14 to the constitution of India?	Provisions held valid and legal.
	5	**Simmi Sikka vs M/s Emaar MGF Land Ltd.**	Complainant filed by allottee against promoter for projects issued completion certificates prior to rules commencement of rera.	Objections raised by the promoter on projects not ongoing as per rules of rera ?	The projects mentioned in section 3 are exempted from registration requirements and not fro the purview of the provisions of the act. Hence aggrieved may claim damages for such projects as well under RERA.
	10	**Sushil Ansal Vs Ashok Tripathi(Important)**	**RERA recovery claimed against delay of completion. Thereafter promoter failed to provide the compensation. CIRP initiated by allottees.**	**1. Case fit to settlement under rule 11 of the NCLAT rules? 2.Application filed under section 7 of the code is valid?**	**Rule 11 of the NCLAT rules means:** Inherent power to NCLAT to decide the case under **natural justice** in favour of the party. CIRP proceedings require section 7 application by 100 allottees or 10 percent of the allottees (higher). Such application received by less than required allotees. Such allottees determined as **decree holders. Decree holders are creditors but not financial creditors to the party hence CIRP proceedings set aside by appellate tribunal.**

MTP/Aug 2018/Case Study-1

MR. Greed (FEMA,PMLA)

Mr. Greed is engaged in the real estate business of development of townships through his company– M/s Exotic Homes Ltd. During the course of business, he has accumulated enormous amount of wealth in the form of cash which was generated through illegal businesses. Police cases under several sections of various Indian laws have also been registered against Mr. Greed; however, police could not take any rigid action due to his connections. Mr. Greed has a son Mr. Cute who was residing in India during F.Y. 2015-16. He left for USA on 25th August 2016 to undergo training for a period of 4 years.

Mr. Honest (brother of Mr. Greed) has a daughter, Ms. Dolly pursuing higher studies in USA. Mr. Honest intends to:

(a) open a bank account in foreign currency in USA.
(b) remit money from India to his daughter in her account for studies.

Separately, Ms. Dolly has requested Mr. Honest to sponsor a chess tournament in USA which will involve remittance amounting to USD 95,000. Mr. Honest generally remits money through ABC Bank Ltd. after complying necessary formalities.

On the other hand, since Mr. Cute's interest lies in India, he intends to invest in India in following manner:

(a) Incorporating a company in India followed by infusion of capital in the said company.
(b) Buying an agricultural farm in his individual capacity. Above investments require funding which will be sought from Mr. Greed.

From the business of real estate, total wealth generated by Mr. Greed amounts to approx. Rs.500 Crores. The said amount was utilized by him in the following manner:

(a) Around Rs.100 crores were used for meeting certain cash expenses and paying bribe.
(b) Rs. 2.25 crores were transferred through hawala transaction to Mr. Cute.

Transferring money through hawala route was chosen by Mr. Greed since the money available with him in his bank account was not sufficient to remit legally under various provisions of FEMA, 1999. Therefore, he decided to strike a deal with Mr. Hawai, a hawala agent operating in India. Terms of the deal are as under:

- Mr. Greed will pay Rs. 2.25 crores + commission in cash to Mr. Hawai.
- Mr. Hawai, through his counterparts in USA, will pay equivalent USD to Mr. Cute against invoice for professional services dated 1st October 2017.

Mr. Greed and Mr. Honest are promoters and managing directors of M/s Cine World Ltd., a company engaged in the business of producing films in India. For a very large upcoming film project, M/s Cine World Ltd. has taken loan from ABC Bank Ltd. amounting to Rs. 250 crores after mortgaging all the assets of the company including rights related to the film. However, due to controversies surrounding the film, the Censor Board withheld the certification of the film. Even the Honorable High Court turned down plea of the producers that the film is not against the interest of the country or public at large.

Mr. Greed used all his contacts and wherever necessary, paid bribe for the said project. Even these efforts of Mr. Greed could not make his dream possible to release the film. Due to the circumstances, the film could not be released & M/s Cine World Ltd. had to suffer huge losses. Since, crew and the high profile cast were continuously following-up for the payment, Mr. Greed decided to make payment in cash available with him.

One of the disgruntled crew member filed a complaint against Mr. Greed in police station under Code of Criminal Procedure for its institution and investigation. The complaint was accompanied with the details of how Mr. Greed acquired massive amount of wealth and huge properties in his name and also in joint names. The accused person accumulated movable and immovable properties and assets not only in India but in abroad also. Those properties were acquired otherwise and were not included in their disclosed assets. Their criminal acts indicated misappropriation of public money. Accordingly, the complaint was registered under Indian Penal Code, 1860 and Prevention of Corruption Act, 1988.

Later on, the investigation was taken over by the C.B.I. while the C.B.I. was proceeding with the investigation, the ED on the basis of allegation made lodged Enforcement Case Information Report (ECIR) against Mr. Greed. Similarly, as per the said ECIR when complaint was filed under Sec 45 of the Prevention of Money Laundering Act, 2002, cognizance of the offence was taken against Mr. Greed under Sec 3 of the Prevention of Money Laundering Act, 2002, punishable under Sec 4 of the said Act.

Accordingly, an order was issued by the authorities to provisionally attach properties belonging to Mr. Greed. Mr. Greed now intends to challenge action taken against him under Prevention of Money Laundering Act, 2002 before the higher authorities.

ANSWER THE FOLLOWING QUESTIONS:

1. Which of the following is a capital account transaction under Foreign Exchange Management Act, 1999?
   (a) Investment in shares of company in India.
   (b) Payment of export commission.
   (c) Payment towards consultancy services.
   (d) None of the above
2. What is the limit under Liberalized Remittance Scheme?
   (a) USD 2,50,000 per financial year per person.
   (b) USD 2,50,000 per calendar year per family.
   (c) USD 2,50,000 per financial year per family.
   (d) USD 2,50,000 per calendar year per person.
3. Facility under Liberalized Remittance Scheme is available for_____
   (a) Studies abroad.
   (b) Opening of foreign currency account abroad with a bank.
   (c) Only (a)
   (d) Both (a) and (b)
4. Which of the following remittance will require prior approval of Government of India for drawal of foreign exchange under Foreign Exchange Management Act, 1999?
   (a) Payment related to 'call back services' of telephones.
   (b) Opening of foreign currency account abroad with a bank.
   (c) Remittance of prize money / sponsorship of sports activity abroad by a person other than International/ National/ State Level bodies, if the amount involved is USD 90,000.
   (d) None of the above.
5. Mr. Cute is a person resident in India for financial year_____ as per the provisions of Foreign Exchange Management Act, 1999.
   (a) 2016-17
   (b) 2017-18
   (c) 2018-19
   (d) None of the above
6. As per the provisions of Prevention of Money Laundering Act, 2002, person on whose behalf a transaction is being conducted is known as:
   (a) Client
   (b) Financial Institution
   (c) Beneficial Owner
   (d) Authorized Dealer

7. Under PMLA, 2002, adjudicating authority consists of following:
   (a) 3 persons including chairman
   (b) 4 persons including chairman
   (c) 2 persons one of whom can be appointed as a chairman
   (d) 5 persons including a member from Ministry of Law and Justice.
8. Among other things, what is the qualification of a person to be appointed as a Public Prosecutor before the Special Court under the provisions of PMLA, 2002?
   (a) Minimum 10 years of experience as an advocate
   (b) Minimum 5 years of experience as an advocate
   (c) Minimum 7 years of experience as an advocate
   (d) Minimum 15 years of experience as an advocate
9. PMLA, 2002 has an overriding effect on following laws:
   (a) Foreign Exchange Management Act, 1999
   (b) Companies Act, 2013
   (c) Transfer of Property Act, 1882
   (d) All of the above
10. Under Prevention of Money Laundering Act, 2002, property can be provisionally attached for____.
    (a) Not exceeding 60 days
    (b) Not exceeding 90 days
    (c) Not exceeding 180 days
    (d) Not exceeding 300 days
11. Answer the following in light of the provisions of the Foreign Exchange Management Act, 1999:
    (a) Advise Mr. Cute whether:
        I he can invest in M/s Exotic Homes Ltd. engaged in the business of building low budget homes.
        II he can buy agricultural farm in his individual capacity.
        III he can make payment through foreign currency notes.
    (b) For investing activities in India by Mr. Cute, he approached you on 1st May 2018 with a notice dated 27th January 2018 received by him from the office of Enforcement Directorate on 31st January 2018 directing him to pay penalty. Kindly advise Mr. Cute on timelines to pay the penalty and powers of the officers to recover the same. Mr. Cute has informed that he doesn't intend to file an appeal.

(c) On suspicion of non-compliance of the provisions of the Foreign Exchange Management Act, 1999 by ABC Bank Ltd., the Reserve Bank of India had sent a notice to the bank seeking certain information on the transactions carried out by Mr. Honest. However, lawyer of ABC Bank Ltd. had suggested not to provide any response to such notice since such notice is generally issued to every bank as a part of audit procedure and is routine in nature. Explain the powers of the Reserve Bank of India in case of non- compliance to notice.

12. Explain the following in light of the provisions of the Prevention of Money Laundering Act, 2002:
(a) Money Laundering does not mean just siphoning of funds. In light of this statement, explain the significance and aim of the Prevention of Money Laundering Act, 2002.
(b) Mr. Greed seeks your advice on the remedy available with him under the Act against the said attachment order.
(c) Properties confiscated under the Act shall be available for disposal by Ministry of Finance as and when necessary. Examine correctness of the statement.
(d) Notice issued to seek clarification on source of income for acquisition of a particular jointly owned property shall be given to the majority of the owners. Examine correctness of the statement.

ANSWERS TO CASE STUDY

1. (a) Investment in shares of company in India
2. (a) USD 2,50,000 per financial year per person
3. (d) Both (a) and (b) [i.e., Studies abroad and Opening of foreign cuurency account abroad with a bank
4. (d) None of the above
5. (a) 2016-17
6. (c) Beneficial Owner
7. (a) 3 persons including chairman
8. (c) Minimum 7 years of experience as an advocate
9. (d) All of the above [i.e., CA,2013 ; TOPA,1882; FEMA,1999]
10. (c) Not exceeding 180days
11. (a)

Under sub section (2) of Section 6, the RBI has issued the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. The Regulations specify the list of transactions, which are permissible in respect of persons resident in India in Schedule I and the classes of capital account transactions of persons resident outside India in Schedule II.

Further, on certain transactions, the RBI imposes prohibition. For instance,

- The person resident outside India is prohibited from making investments in India in any form, in any company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage;
- in real estate business, or construction of farm houses

Explanation: In 'real estate business' the term shall not include development of townships, construction of residential/commercial premises, etc.

Further, a person resident outside India who is a citizen of India may

(a) Acquire immovable property in India other than an agricultural property, plantation, or a farm house:
Provided that in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of:
(i) Funds received in India through normal banking channels by way of inward remittance from any place outside India or
(ii) Funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank of India.

Provided further that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by foreign currency notes or by other mode other than those specifically permitted by this clause.

In light of the above provisions, advice to Mr. Cute is as under:

(i) Yes, he can invest in M/s Exotic Homes Ltd. since the company is engaged in the business of development of townships.

(ii) No, he cannot buy agricultural farm in his individual capacity since it has been specifically prohibited.

(iii) No, he cannot make payment through foreign currency notes since it is specifically prohibited.

(b) Under Sec 14, subject to the provisions of Sec 19(2), if any person fails to make full payment of the penalty imposed on him u/s 13 within a period of 90 days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment under this section.

Further, as per section 14A, save as otherwise provided in this Act, the Adjudicating Authority may, by order in writing, authorize an officer of Enforcement not below the rank of Assistant Director to recover any arrears of penalty from any person who fails to make full payment of penalty imposed on him under section 13 within the period of ninety days from the date on which the notice for payment of such penalty is served on him.

In light of the above provisions, Mr. Cute is advised to pay the amount of penalty within 90 days. In case, if he doesn't pay the officer referred, to in Section 14A shall exercise all the like powers which are conferred on the income-tax authority in relation to recovery of tax under the Income-tax Act, 1961 and the procedure laid down under the Second Schedule of the said Act shall mutatis mutandis apply in relation to recovery of arrears of penalty under this Act.

(c) Under Section 12, the Reserve Bank may, at any time, cause an inspection to be made, by any officer of the Reserve Bank specially authorised in writing by the Reserve Bank in this behalf, of the business of any authorised person as may appear to it to be necessary / expedient for the purpose of:

(a) verifying the correctness of any statement, information or particulars furnished to the RBI;
(b) obtaining any information or particulars which such authorised person has failed to furnish on being called upon to do so;
(c) securing compliance with provisions of this Act or of any rules, regulations, directions or
(d) orders made there under.

It shall be the duty of every authorised person, and where such person is a company or a firm, every director, partner or other office of such company or firm as the case may be, to produce to any officer making an inspection under sub-section (1)

Such books, accounts and other document in his custody or power and to furnish any statement or information relating to the affairs of such person, company or firm as the said officer may require within such time and in such manner as the said officer may direct. Accordingly, advice given by the lawyer is not in line with requirements laid down under the provisions of the Foreign Exchange Management Act, 1999.

12. (a)

"Money Laundering" doesn't not mean just siphoning of fund. Money Laundering is a moving of illegally acquired cash through financial systems so that it appears to be legally acquired. Thus, money laundering is not just the siphoning of funds but it is the conversion of money which is illegally obtained.

Prevention of Money Laundering Act, 2002 has been enacted with aim for combating channelizing of money into illegal activities.

Significance and Aim of Prevention of Money Laundering Act, 2002:- The preamble to the Act provides that it aims to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto.

In order to further strengthen the existing legal framework and to effectively combat money laundering, terror financing and cross border economic offences, an Amendment Act, 2009 was passed. The new law seeks to check use of black money for financing terror activities.

Financial intermediaries like full-fledged money changers, money transfer service providers and credit card operators have also been brought under the ambit of the Act. Consequently, these intermediaries, as also casinos, have been brought under the reporting regime of the enforcement agencies. It also checks the misuse of promissory notes by FIIs, who would now be required to furnish all details of their source. The new law would check misuse of 'proceeds of crime' be it from sale of banned narcotic substances or breach of the Unlawful Activities (Prevention) Act.

The passage of the Prevention of Money Laundering (Amendment), 2009 have enabled India's entry into Financial Action Task Force (FATF), an inter-governmental body that has the mandate to combat money laundering and terror financing.

(b)
Section 25 of the Act, empowers the Central Government to establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authority and the authorities under this Act.

Section 26 deals with the rights and time frame to make an appeal to the Appellate Tribunal. Any person aggrieved by an order made by the Adjudicating Authority may prefer an appeal to the Appellate Tribunal within a period of 45 days from the date on which copy of the order is received by him. The appeal shall be in such form and be accompanied by such fee as may be prescribed. The Appellate Tribunal may extend the period if it is satisfied that there was sufficient cause for not filing it within the period of 45 days.

The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

The Act also provides further appeal. According to Section 42, any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of the order of the Appellate Tribunal.

In light of the above provisions of the Act, Mr. Greed is advised to prefer an appeal to Appellate Tribunal in the first instance.

(c)
Under Section 10, the Central Government may, by order published in the Official Gazette, appoint as many of its officers (not below the rank of a Joint Secretary to the Government of India) as it thinks fit, to perform the functions of an Administrator.

The Administrator appointed under sub-section (1) shall receive and manage the property in relation to which an order has been made under sub-section (6) of section 8 in such manner and subject to such conditions as may be prescribed.

The Administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is vested in the Central Government under section 9.

Accordingly, an administrator has to be appointed who shall deal with the property in the manner directed by the Central Government.

In view of above, the statement that the properties under the Act shall be available for disposal by Ministry of Finance as and when necessary, is correct.

(d)
Under Section 8, on receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, he may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government.

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person.

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property. In view of above, the statement is incorrect and the notice shall be served to all persons holding such property.

MTP/Aug 2018/Case Study-2

Speciality Vehicles Limited (SVL) (Competition Act, 2002 & IBC)

Speciality Vehicles Limited (SVL) is a manufacturer of passenger cars and commercial vehicles in India. It sells the cars through single brand dealerships across prominent cities. The dealerships are separate for passenger cars and commercial vehicles.

SVL is lagging behind the competitors in the passenger car segment due to its cost structure and is losing market share for the last 3 years. With no revival in sight, the company has decided to exit the passenger car segment and notified its dealers about shutdown of passenger car manufacturing and sales in India. The service centers for passenger cars will continue its operations for the next 3 years.

Perfect Vehicles Ltd. (PVL) is a passenger car dealer for SVL in Bhopal with an office cum showroom and no service center. PVL has bank loans from Bank X and Bank Y for Rs. 15 cr and, Rs. 10.5 cr respectively. Both the banks have pari-passu charge on the office premise cum showroom.

PVL has expressed its inability to repay its financial obligations to the bankers. One of the bankers, Bank X has filed an application for Insolvency Resolution Process (IRP) against PVL under IBC, 2016, which is admitted by the adjudicating authority (NCLT) and consequently appointed IRP

SVL has an interest free dealership security deposit of Rs. 2.25 cr since 2010 from PVL with a right to set-off against any receivables pending from PVL towards SVL. Mr. Right, the nephew of the promoter of PVL had given a loan of Rs. 0.75 cr to PVL in the last 3 months to pay the utility bills and office expenses. SVL in its claims has demanded Rs. 5.25 cr from PVL against pending receivables. PVL has not paid wages to the tune of Rs. 0.75 cr to its workmen and statutory employer contributions to the tune of Rs. 0.3 cr.

As per valuers' report, approximated realizable value of office cum showroom is Rs.18 cr. Value of furniture and equipment is Rs. 0.075 cr. The current receivables on books are Rs. 2.25 cr of which 50% is doubtful. PC has a general purpose' current account with Bank X having current balance of Rs. 0.225 cr.

After admission of the application of Bank X by NCLT, PVL approached one of the Insolvency Professional to know the applicability of IBC, Infrastructure of Insolvency and Bankruptcy and also the persons who cannot initiate CIRP.

PVL also sought opinion on the duties of its officers and employees.

Mr. Right has recently been appointed as one of the member in CCI by the Central Government for 5 years within the maximum limit of members to be appointed by the Central Government, where a case is pending against SVL for entering an agreement to limit, restrict or withhold the output or supply of cars or allocate area or market for the disposal or sale of cars, which was classified as anti-competitive agreement by the commission and initiated enquiry. Later in view of above, Mr. Right decides to resign from CCI.

Mr. Left, the brother of Mr. Right approached him to have his views on the nature of agreement which he proposes to enter to sell goods on condition that the prices to be charged on the resale by the purchasers shall be the prices stipulated by him and also on the number of days' notice is to be given to CCI while an enterprise proposes to enter into a combination, as per the Competition Act, 2002.

Mr. Left also approached the expert to know the procedure for investigation of combinations and the action by commission after investigation.

ANSWER THE FOLLOWING QUESTIONS:

1. SVL has a net claim of rupees _____ against PVL.
   (a) 5.25 cr
   (b) 3.00 cr
   (c) 18.00 cr
   (d) 28.50 cr
2. SVL is a/an _____ for its claims against PVL.
   (a) A financial creditor
   (b) An operational creditor
   (c) A financial as well as operational creditor
   (d) Corporate Guarantor
3. The committee of creditors will constitute of:
   (a) Banks X and Y
   (b) Banks X, Y and SVL
   (c) Banks X, Y, SVL, Nephew of the promoter
   (d) Banks X, Y, SVL, Nephew of the promoter, Workmen

4. Which of the following creditors / groups of creditors cannot reject a proposed resolution plan?
   (a) Bank X
   (b) SVL
   (c) Bank X and Y together
   (d) Bank Y
5. Who proposes the name of the new resolution professional, if the interim resolution professional appointed by NCLT referred in the case study, is being replaced by the Committee of Creditors?
   (a) Adjudicating Authority
   (b) Interim resolution professional
   (c) Insolvency and Bankruptcy Board of India
   (d) Committee of Creditors
6. Which of the following as per the Competition Act, 2002 refers to any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless its clearly stated that the prices lower than those prices may be charged?
   (a) exclusive distribution agreement
   (b) exclusive supply agreement
   (c) resale price maintenance
   (d) tie-in arrangement
7. What is the maximum number of members to be appointed by the Central Government in CCI, as referred in the case study as per the Competition Act, 2002?
   (a) 6
   (b) 4
   (c) 5
   (d) 7
8. How many number of days notice is to be given to CCI by Mr. Left while an enterprise proposes to enter into a combination, as per the Competition Act, 2002?
   (a) 15
   (b) 45
   (c) 7
   (d) 30
9. Which of the following as per the Competition Act, 2002 refers to any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of goods as referred in the case study?
   (a) exclusive supply agreement
   (b) refusal to deal
   (c) tie-in arrangement
   (d) exclusive distribution agreement
10. Mr. Right has decided to resign from CCI and therefore he has to submit notice to the:
   (a) Chairman of CCI
   (b) All other members of CCI
   (c) Chairman and all other members of CCI
   (d) Central Government
11. Referring the case study, answer the following as per the provisions of the IBC,2016:
   (a) To whom the IBC is applicable?
   (b) Who are involved in the Infrastructure of Insolvency and Bankruptcy Process under IBC?
   (c) Who cannot initiate CIRP?
   (d) What are duties of officers, employees, managers, etc. to report to the Resolution Professional? What are the consequences if they do not support?
   (e) What is Financial Debt?
12. Referring the facts provided in the case study, answer the following as per the provisions of the Competition Act, 2002:
   (a) What constitutes competition law and policy?
   (b) What is an anti-competitive agreement?
   (c) When the commission may initiate enquiry into anti-competitive agreements / abuse of dominance?
   (d) What will the commission do after investigation?
   (e) What is the procedure for investigation of combinations?

ANSWERS TO CASE STUDY-2

1. (b) 3.00 cr
2. (b) An operational creditor
3. (a) Banks X and Y
4. (b) SVL
5. (d) Committee of Creditors
6. (c) resale price maintenance
7. (a) 6
8. (d) 30
9. (d) exclusive distribution agreement
10. (d) Central Government
11. (a) The provisions of the IBC, 2016 are applicable to Individuals, Unlimited Partnership Firms, Limited Liability Partnerships and companies. The provisions relating to Corporate in the Code, i.e., Limited Liability Partnerships and Companies are notified and in force w.e.f. 1st December, 2016.

The provisions related to Individuals and Unlimited Partnership Firms – the Part III of IBC, 2016 are yet to be notified.

(b) The four pillars of supporting institutional infrastructure, to make the Insolvency and Bankruptcy Process work efficiently are:

a. The regulator - The Insolvency and Bankruptcy Board of India (IBBI)

b. Adjudicating Authority (AA):

i. National Company Law Tribunal (NCLT) - For Corporate, i.e., Companies and Limited Liability Partnerships

ii. National Company Law Appellate Tribunal (NCLAT) will act as Appellate Authority.

iii. Debt Recovery Tribunal (DRT) - For Individuals and Unlimited Partnership Firms

c. A private industry of Insolvency Professionals (IPs) with oversight by private Insolvency Professional Agencies (IPAs)

d. A private industry of Information Utilities (IU)

(c) Section 11 of the IBC, states that the following persons are not entitled to make an application to initiate CIRP:

a. A corporate debtor undergoing the CIRP

b. A corporate debtor having completed CIRP twelve months proceeding the date of application.

c. A corporate debtor or financial creditors who has violated any terms of the resolution plan which was approved twelve months before the date of making application.

d. A corporate debtor in respect of whom a liquidation order has been made.

Here, **Corporate debtor includes** a Corporate applicant in respect of such Corporate debtor.

(d) The officers and managers of the Corporate Debtor, shall report to Resolution Professional. They shall provide him all the documents or records as required by him in the course of his duties. Where any personnel or promoters of Corporate Debtor are not assisting or not co-operating Resolution Professional, he may file an application to Adjudicating Authority for necessary instructions. Then, Adjudicating Authority shall direct accordingly.

(e) As per section 5(8) of the IBC "Financial Debt" means, a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

a. Money borrowed against the payment of interest

b. Any amount raised by acceptance under any acceptance credit facility or its de materialized equivalent;

c. Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument.

d. the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

e. receivables sold or discounted other than any receivables sold on non recourse basis;

f. any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

g. any derivative transaction entered into in connection with protection against or benefit from price or rate fluctuations and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

h. any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

i. the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause.

12.

(a) Competition law and policy is defined as those Government measures that affect the behaviour of enterprises and structure of the industry with a view to promote efficiency and maximize welfare. There are two elements of such Government measures:-

- **a Competition Policy:** Set of policies, such as liberalized trade policy, relaxed FDI policy, de-regulation, etc., that enhances competition in the markets.
- **a Competition Law:** To prevent anti-competitive practices with minimal intervention.

(b) An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements **INCLUDE**, but not limited to a agreement to limit production and/or supply; a agreement to allocate markets; a agreement to fix price; a bid rigging or collusive bidding; a conditional purchase/sale (tie-in arrangement); a exclusive supply/distribution arrangement; a resale price maintenance; and a refusal to deal.

(c) The commission may initiate enquiry into anti-competitive agreement Act/ abuse of dominance on its own on the basis of information and knowledge in its possession, or On receipt of an information, or On receipt of a reference from the Central Government or a State Government or a statutory authority.

(d) After receipt of the investigation report from the Director General, the Commission may forward it to the concerned parties. If the investigation is on a reference from a statutory authority, the forwarding of report to the concerned authority is mandatory. If the report of the DG does not find any contravention of the Act, the Commission shall seek objections from the concerned parties.

After considering the objections received, if any, the Commission may accept the report of the DG, or require further investigation to be made by the DG or make inquiries itself.

In conclusion of the above board process, the Commission shall determine whether it is a case of anti-competitive agreement or abuse of dominant position or both and after hearing the concerned parties pass appropriate orders.

(e) If the Commission is of the opinion that a combination is likely to cause or has caused adverse effect on competition, it shall issue a show cause notice to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if Commission is of the prima facie opinion that the combination has or is likely to have appreciable adverse effect on competition, it may direct publication of details, inviting objections from the public and hear them, if considered appropriate. It may invite any person, likely to be affected by the combination, to file his objections. The Commission may also inquire whether the disclosure made in the notice is correct and combination is likely to have an adverse effect on competition.

MTP/Aug 2018/Case Study-3 = Practise Case study 1 ICAI

MTP/Oct 2019/Case Study-1
Same as CSD 43

MTP/Oct 2019/Case Study-2 (SIMILAR CSD-44)
Northwest Agro Produce Cooperative Society
(FEMA, Competition Act)

In northern and western part of the country production of sugarcane is reasonably good. But the large amount of pendency of the payments by sugar mills to sugarcane producers is cause of worry. Common platform is essential requirement to provide solution to this problem.

Northwest Agro Produce Cooperative Society was formed to ensure the timely collection of sale proceeds from sugar mills. Northwest Agro Produce Cooperative Society developed a charter, in form of memorandum for its members, to regulate and control supply, price, term of sales of sugar canes, collection of sale proceed and recovery if required. This memorandum is binding on all the members of society.

Northwest Agro Produce Cooperative Society extend the support to cane grower, by given them offer; to sell their entire farm produce of canes to society at mutually agreed price; which society will further sale to sugar mills. But farmer who avail this facility have to sell his entire farm produce to Northwest Agro Produce Cooperative Society, means farmer can't sale any portion of his farm produce in open market. In order to trade with the sugar mills, and deals with regulatory authorities, financial institution etc; Northwest Agro Produce Cooperative Society decided to promote Limited Liability Company named North West Agro Limited.

The extracts from latest audited financial statements of North West Agro Limited are as follows;

Sr.No	Particular	Amount (in Lakhs INR)
1	Proceed (Net of taxes) from sale of sugar canes	320000
2	Operating assets	72800
3	Paid –up share capital	48900
4	Net Profit	9600

With Passage of time North West Agro Limited became the big hit, for role it play as intermediary; in incredible transformation in process of sale of sugarcane by cane farmers. Mr. Vijendra Narang, who is CEO of North West Agro limited, heard about forward integration as method of expansion and growth strategy. Mr. Narang prepared a proposal, which is duly approved by board of directors and then by members of company to takeover Sun Sugar Ltd, by acquiring controlling stake from open market. Sun Sugar Limited is running sugar mills, with global presence.

Around 60% of sales by Sun Sugar Limited constitute exports of raw sugar, majorly to IRAN. One year back Sun Sugar Limited opened one branch office in IRAN, as IRAN starts buying sugar from India, in order to settle trade balance; because IRAN is blocked from the global financial system; including using U.S. dollars to transact its oil sales. On such branch office, during last financial year, annual recurring expenditure in foreign currency out of EEFC accounts; was equivalent to INRs 14000 lakhs.

For last financial year, turnover of Sun Sugar Limited was recorded at INRs 120000 lakhs which was INRs 10000 lakhs more than year earlier to last financial year; whereas operating assets as on reporting date were INRs 27000 lakhs. Paid–up share capital was INR 12600 lakhs. After acquisition both the entities were not merged, both kept respective separate identity.

Sun Sugar Limited has strong domestic network or tie-up with retail shops and stores through which they sale their sugar, under brand name 'Meetha', which constitute around 40% of sale. Such retail shops and stores are provided with instruction not to charge the price more then what is suggested by Sun Sugar Limited although lower prices can be charged and specific jurisdiction is given to each retailer for resale.

Mr. Nair who is head of marketing at North West Agro Limited, also look after marketing at Sun Sugar Limited, according to him; in order to acquire substantial market share (in term of new customers), Sun Sugar Limited has to sell sugar at the prices lower than cost.

Ignoring the resistance from the governing body of Sun Sugar Limited, new pricing policy implemented. Resultantly price decreased from INRs 40 per kg to INRs 35 per kg. But in order to restrict loss, on account of selling sugar at price lower than cost; Sun Sugar Limited ask to all the shopkeeper and stores, through whose counter they are sale their sugar produce, not to bill more than 2 kg of 'Meetha' sugar per purchase.

Northwest Agro Produce Cooperative Society promotes another company named South West Agro Limited, whose object clause includes; provide weather research and forecast reports, other necessary technical knowledge or guidance to members of parents society apart from conducting market research for North West Agro Limited.

Out market research conducted by South West Agro Limited, it was found that Moon Sugar Limited, hold major stake in retail of packed sugar, around 30% across the nation under brand name 'Aur' (Price of which is INRs 40 per Kilogram); which cause stiff competition among the players who sell packed sugar. Since acquisition of Sun Sugar Limited by North West Agro Limited, remains largely successful; hence showing trust in un-organic growth, a bear-hug letter sent to senior management of Moon Sugar Limited. For latest financial year, turnover of Moon Sugar Limited is recorded at INRs 280000 lakhs whereas operating assets are of INRs 56800 lakhs. Paid–up share capital is INR 36400 lakhs.

Since Moon Sugar Limited is already undisputed market leader hence refuse the bear hug offer. North West Agro Limited with help of South West Agro Limited performs hostile acquisition and both the companies acquires around 25.5% stake in voting rights each; by tender notice over the stock exchange. Governing body of Moon Sugar Limited restructured completely. Post acquisitions of Moon Sugar Limited, North West Agro Limited got the dominance over the market. Since new pricing policy introduced principle buyer of North West Agro Limited is multifold. Hence company decided to re-price their product, which is renamed also 'Aur Meetha'. New price is INRs 42 per Kilogram. To support the price rise, North West Agro Limited starts restricting supply.

North West Agro Limited also entered in memorandum of understanding with Star Ethanol Limited, which is $ 20 million (assets base) company for transfer of technology.

MULTIPLE CHOICE QUESTIONS (MCQS) [2 MARKS EACH]

1. Takeover (acquisition) of Sun Sugar limited by North West Sugar limited, will be considered as combination if
(a) Assets of enterprise created after merger is equal than INRs 1000 crores
(b) Turnover of enterprise created after merger is more than INRs 1000 crores
(c) Turnover of enterprise created after merger is more than INRs 3000 crores
(d) Assets of enterprise created after merger is more than INRs 3000 crores

2. South West Agro Limited and North West Agro Limited will be considered as group because, these are in capacity of
(a) Exercise 26% or more of the voting right of Moon Sugar Limited
(b) Appoint more than 50% of members of board of directors in the sun limited
(c) Control the management or affairs of the sun Limited
(d) All of above

3. Exchange Earners' Foreign Currency Account can be open by foreign exchange earner;
(a) Who are not resident in India
(b) Who are resident in India
(c) Which are situated in SEZ
(d) Person of Indian Origin, but residing outside India.

4. Decision of North West Agro Limited, on part of Sun Sugar Limited; not to sell more than 2 kg of sugar per purchase can be categorized as;
(a) Exclusive supply agreement
(b) Exclusive distribution agreement
(c) Refusal to deal
(d) None of the above

5. Exchange Earners' Foreign Currency Account can be open with
(a) Authorised Dealer - Category I
(b) Authorised Dealer - Category II
(c) Authorised Dealer - Category III
(d) Full Fledged Money Changers

DESCRIPTIVE QUESTIONS

1. Is Northwest Agro Produce Cooperative Society can be considered as 'Cartel'. (3 Marks)

2. Does North West Agro Limited hold dominance over market, if yes at what instances you feel it abuse its dominant position? (4 Marks)

3. Explain briefly regulatory aspects of combination in respect in light of case for North West Agro Limited and regulation thereof under Competition Act, 2002. (5 Marks)

4. Mention provisions regarding expenditure on 'maintaining office abroad' under FEMA, 1999 & related rules. Is expenditure done by Sun Sugar Limited is in violation thereto. (3 Marks)

ANSWERS TO MCQ

1. (c) Turnover of enterprise created after merger is more than INRs 3000 crores.
2. (d) All of above
3. (b) who are resident in India
4. (d) None of the above
5. (a) Authorised dealer - Category I

DESCRIPTIVE QUESTIONS

Answer 1

As per section 2(c) "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Although, Northwest Agro Produce Cooperative Society was formed to ensure the timely collection of sale proceeds from sugar mills. But Northwest Agro Produce Cooperative Society also developed a charter, in form of memorandum for its members, to regulate and control supply, price, term of sales of sugar canes (even though on behalf cane-growers), collection of sale proceed and recovery if required. This memorandum is binding on all the members of society. Hence Northwest Agro Produce Cooperative Society is 'Cartel' under Competition Act, 2002.

Answer 2

Yes, North West Agro Limited hold dominance, because as per explanation (a) to section 4 "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.

Instances of abuse of dominance

Predatory Pricing after acquisition of Sun Sugar Limited - North West Agro Ltd, acquired substantial network of retailer after takeover of sun sugar Limited, help of which they tried to penetrate in the market using predatory pricing [Sec 4(2)(a)(ii)]. North West Agro Ltd reduce the price of its sugar 'Meetha' from INRs 40 to 35 per kg, where as other player in market like Moon Sugar ltd selling sugar at INRs 40 per kh.

As per explanation (b) to section 4 "predatory price" means the sale of goods or provision of services, at a. price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

Increase the price after acquisition of Moon Sugar Limited – After hostile acquisition of Moon Sugar Limited, with help of another group company South West Agro Limited; North West Agro Limited raise the prices of its sugar 'Aur Meetha' from INRs 35 to 42 per kilogram; even Moon Sugar Limited, originally selling its sugar 'Aur' at INRs 40 per Kilogram.

Section 4(2)(b)(i) says there shall be an abuse of dominant position under sub-section (1) of section 4, if an enterprise or a group limits or restricts production of goods or market therefore.

Answer 3

Provision of related to combination detailed in section 5 of Competition Act ,2002

SN	Nature of Combination	Case Facts	Criteria	Is Combination
1	Acquisition by single acquirer but different goods (Section 5(a)(i))	North West Agro Limited Takeover Sun Sugar Limited	Joint Asset over INRs 1000 crores or Turnover over INRs 3000 crores	Yes, Joint turnover is INRs 4400 crs (3200+1200) which is more than INRs 3000 crs, whereas joint assets base is only INRs 998 crs
2	Acquisition by group with similar goods (Section 5(b)(ii)	North West Agro Ltd Acquired Moon Sugar Ltd, with help of another group company South West Agro Ltd	Group Asset over INRs 4000 crores or Turnover over INRs 12000 crores	No, Joint Asset base of group is only INRs 1566 crores and aggregate turnover is also INR 7200 Crores

3	Not considered as combination	MOU between North West Agro Limited and Star Ethanol Limited	Not eligible to be considered as combination	Not Applicable

Regulation of Combinations (Section 6)

No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

Any person or enterprise, who enter into a combination, give notice to the Commission, disclosing the details of the proposed combination, within thirty days of

(a) Approval of the proposal concerned with such merger or amalgamation by the board of directors, or

(b) Execution of any agreement acquiring of control

No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission or the Commission has passed orders whichever is earlier.

Answer 4

Vide Foreign Exchange Management (Current Account Transactions) Rules 2000, some restriction on current account foreign exchange transaction prescribed. A general permission is available for opening of Bank Account for the purpose of meeting the Branch Expenses abroad.

Authorised Dealer Category – I banks may allow remittance up to ten per cent of the average annual turnover during the last two financial years. But this restriction shall not be applicable if remittance to account maintained abroad, made out of the funds held in EEFC account.

In given case turnover for relevant 2 years was INRs 120000 lakhs and INRs 110000 lakhs (i.e. INRs 120000 lakhs - INRs 10000 lakhs). Average of which is INRs 115000 lakhs. Maximum permissible amount of branch recurring expenditure in case of normal account was 10% of INRs 115000 lakhs i.e., INRs 11500 lakhs. Expenditure incurred by Sun Sugar Limited in given case is INRs 14000 lakhs. But such expenditure will not be considered in violation of Foreign Exchange Management (Current Account Transactions) Rules 2000, because amount expended out of EEFC Account.

MTP/Oct 2019/Case Study-1
Same as CSD 39

MTP/Oct 2019/Case Study-4
(Same as CSD-31)

MTP/Oct 2019/Case Study-5
(Same as CSD-26)

MTP/May 2020/Case Study-1
(Same as CSD 33)

MTP/May 2020/Case Study-2
(Same as CSD – 46)

MTP/May 2020/Case Study-3
(Same as CSD -27)

MTP/May 2020/Case Study-4
(Same as CSD 32)

MTP/May 2020/Case Study-5
(Same as CSD 34)

MTP/Nov 2020/Case Study-1
(*Same as CSD-8)*

MTP/Nov 2020/Case Study-2
(*Same as CSD 16)*

MTP/Nov 2020/Case Study-3
(*Same as* CSD -17)

MTP/Nov 2020/Case Study-4
(Same as CSD 13)

MTP/Nov 2020/Case Study-5
(Same as CSD 14)

MTP/May 2021/Case Study-1
Mr. Aman Chawla
(IBC, FEMA, RERA, PBPTA)

Mr. Aman Chawla belongs to Delhi based business family and has ancestral roots in Kharar, a Town in the Sahibzada Ajit Singh Nagar (Mohali) district in the state of Punjab (around 15 KMs away from Chandigarh). Chawla family owns the chain of restaurants, snacks points, and Ice-Cream parlours across the nation. Few of these are owned properties, but a large number are leased properties. The holding company is Chawla Snacks and Refreshment Limited (CSRL). Mr. Aman is an electrical engineer, joined an MNC in the role of system engineer after college. But Mr. Aman is inspired by constructing the buildings, towers, landscapes, hence decided to quit the job to pursue his passion.

Despite the Chawla family owning a major stake in the business, the business model is unlike to autocratic monarchy. It is managed professionally and listed on the stock exchange. Family members (father, grandmother and elder brother of Mr. Aman) are part of the Board of Directors, whereas few other family members are also engaged with CSRL but in form of employment (or in a professional capacity).

Mr. Aman joined his brother-in-law, Mr. Vivek, in his construction business. Mr. Aman assists Mr. Vivek in ongoing projects, and one among them is Rishi Enclave whose centre of attraction is state of art yoga centre which will be one of its type in the world apart from the common area which is turned into with mesmerising landscapes. The project is located near Jolly Grant Airport on out-skirt of the holy town of Rishikesh. Rishi Enclave (Project) consists of 120 units of 2BHKs, 3BHKs (Flats and Floors), and Independent Houses or Villas in totality. The project is registered under the RERA. All 120 units' subscr ibed/booked by allottees except 2 Flats kept by Mr. Vivek (promoter).

Mr. Tirlochan Negi booked 3 floors one in his own name, another one in the name of his daughter in law and the 3rd one in name of his company. Mr. Dabral also booked a flat and a villa (both in his name). Rest all allottee booked one unit each. Soon allottees form a residential association. Considering the latest NGT decisions and amendments in policy about the environment (applicable for civil construction in hill or foothill area concerning the height of the building), certain structural changes relating to the height and common area landscape is required in sanctioned plan of the project. Mr. Vivek is of opinion that alteration in sanctioned plan enforced by changes in policy matter hence the approval of allottees is not required.

Mr. Aman recently visited Kharar after a long time to meet his friends Mr. Onkar Singh and Mr. Dipan Ahuja of early childhood. They all admitted that the town has developed substantially especially the townships and Skyscrapers as tri-city (Mohali, Chandigarh, Panchkula) turns into metropolitan & hub of service entities. The lifestyle of people also improves. Mr. Onkar is settled in Canada and holding Canadian passport and citizenship as his family migrate there when during his school. In Canada, he own a transport business. Currently, he is on visit to India to attend the marriage of a relative. Mr. Dipan Ahuja is a supplier of construction materials and planning to venture into the solar panel business under make in India drive, considering the enhancing role of solar energy for household and commercial uses. Mr. Dipan believes Mr. Aman (considering electrical engineering background) should join him in his solar panel venture.

The ancestral property of Mr. Onkar' family has been unoccupied for a long, hence turned into a mud house. Mr. Onkar offered Mr. Aman to develop residential apartments on such property after the name of his grand father 'Satnam Apartments'. A chunk of land on the backside of such property is also available for sale at a reasonable price because it has no connectivity. Mr. Aman found it a good idea to develop the residential apartments as backside land can be acquired at a cheaper rate than prevailing in the market. Mr. Onkar talked to his father [property inherited, hence registered in his name in land revenue records after the death of grandfather (who was resident in India) of Mr. Onkar] and ready to transfer (sale) the property for INRs 2.5 Crore. The Father of Mr. Onkar is a resident outside India who never registered as OCI. Mr. Aman after communicating with Mr. Vivek agreed to deal.

Mr. Aman heard about the importance of keeping capital low to generate more wealth and attain high ROI (Return on Investment). He decided to borrow money from a private investor from the States (US) based on showing growth prospect in his business to his investor. The investor was a good friend of Mr. Dipan and originally from Mohali named Mr. Tarun and settled in Philadelphia (Pennsylvania, US). Mr. Tarun agreed to invest US$1 Million in the said real estate project.

The money got transferred from an overseas branch in Philadelphia of some Indian bank (through banking channel) to the Kharar branch (Mohali, India). The Branch Manager in India, is the friend of an elder brother of Mr. Aman and was excited to get one project in Mohali and thus approved the investment without any opinion from any Finance Professional.

CSRL witnessed the bad jolts (of financial turbulence) as revenue vanished and reserves are socked to meet maintenance costs of properties & employee cost due to lock-down and afterword restrictions. The financial cost and lease rentals not only erode the working capital but also forces the CSRL to land into a debt trap situation wherefrom meeting financial obligations seems near to impossible. The only way left to management is restructuring of business hence Board decided to shut a few points and parlours (to reduce lease rental obligation, and free-up one-two owned properties so that sale proceed can be infused as working capital)

One of the properties sold by CSRL, acquired by Ms. Vijeta in name of her mother-in-law (as she is a senior citizen female – to bear less registration cost in form of stamp duty), consideration for which is paid out of the known sources of the Ms. Vijeta.

Despite the best efforts made by management at CSRL, still, the bottom line is in deep red, resulting in default in repayment of financial debts and such default continues since the 2nd quarter of Fiscal 2020-21.

Management gave assurance to financial creditors that soon it will overcome the solvency issue and they already took corrective measures. On 19th March, 2021, one of the financial creditors moved an application for initiation of CIRP whose outstanding claim was INRs 120 lakh.

On 26th Mar, 2021, another financial creditor filed an application to NCLT for initiation of CIRP against CSRL in their case amt of default was INRs 35 lakh & such default took place in the 3rd Quarter of 2020-21.

Answer the following Multiple-Choice Questions (10 Marks)

1. Regarding the state of art yoga centre and common area situated in Rishi Enclave, which of the following statement is correct;
   (a) Promoter will keep the possession and title both
   (b) Promoter may handover physical possession of these to the association of allottees or competent authority as per the local laws
   (c) In absence of any local law promoter shall hand over within thirty days after obtaining the occupancy certificate.
   (d) In absence of any local law promoter shall hand over within thirty days after obtaining the completion certificate.

2. State the legal position of mother-in-law of Ms. Vijeta as benamidar in the case study-
   (a) Yes, the mother-in-law of Ms. Vijeta is benamidar
   (b) No, the mother-in-law of Ms. Vijeta is not benamidar as she is covered under the exceptions stated
   (c) No, mother-in-law of Ms. Vijeta is not benamidar as consideration is paid out of the known source of Ms Vijeta
   (d) Both b and c above.

3. Which of the following statements is correct regarding the acquiring, holding, owning and transfer of property, in a case by the father of Mr. Onkar in India
   (a) Being a person resident outside India he can acquire, hold, own and transfer any immovable property in India, but with RBI permission only
   (b) Being a person resident outside India he can acquire, hold, own and transfer any immovable property in India, but only in joint ownership with any person resident in India
   (c) Being a person resident outside India he can acquire, hold, own and transfer any immovable property in India, if inherited by him from the person who was a resident of India
   (d) Being a person resident outside India he can acquire, hold, own and transfer any immovable property in India, if inherited by him when he himself was resident in India

4. Whether application moved on 19th March, 21 can be admitted by NCLT to initiate CIRP against CSRL-.
   (a) Yes, because CSRL made default in repayment of financial debts
   (b) Yes, because the amount of default is more than one crore
   (c) No, because management gave assurance to financial creditors that soon it will overcome the solvency issue and they already took corrective measures
   (d) No, because an application for initiation of CIRP shall not be filled.

5. Whether application moved on 26th March, 21 can be admitted by NCLT to initiate CIRP against CSRL.
   (a) Yes, because CSRL made default in repayment of financial debts
   (b) Yes, because the application for initiation of CIRP may be filled by the financial creditor as a period of suspension of section 7 is over.
   (c) No, because the amount of default is less than one crore
   (d) No, because default occurred during a period of suspension.

Descriptive Questions

6. Mr. Vivek is of opinion since the alteration in sanctioned plan enforced by changes in policy matter hence the approval of allottees is not required. Are the changes in sanctioned plan minor in nature? Evaluate the opinion of Mr. Vivek in the context of the provision contained in the RERA 2016? Support your answer with appropriate reason.

7. What would be your opinion related to the repatriation of funds in India as an Investment of US$1 million into the real estate project in Kharar (Mohali, India)?

8. Can the father of Mr. Onkar repatriate the sale proceed of ancestral property inherited by him to Canada from India? Elucidate in the light of the relevant provision of the applicable law, the mentioned legal issue.

Answer to MCQs.

1. (d)
2. (a)
3. (c)
4. (d)
5. (d)

Answer to descriptive questions

6. Section 14 of RERA (The Real Estate (Regulation and Development) Act 2016) provides the adherence to sanctioned plan and project specifications by the Promoter.

Sub-section 1 provides the proposed project shall be developed and completed by the promoter following the sanctioned plans, layout plans and specifications as approved by the competent authorities.

Sub-section 2 has an overriding effect and its clause (i) provide the promoter shall not make any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person who agrees to take one or more of the said apartment, plot or building, as the case may be.

Here it is worth noting that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

For this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

Since in the given case certain structural changes (in the sanctioned plan of the project) relating to height is required, hence the changes in sanctioned plan are not minor in nature.

Further Sub-section 2 Clause ii provides the promoter shall not make any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project w/o the previous written consent of at least 2/3rd of the allottees, other than the promoter, who have agreed to take apartments in such building.

It is worth noting here that for this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

In the given case all 120 units' subscribed/booked by allottees except 2 Flats kept by Mr. Vivek (promoter). Out of 118, Mr. Tirlochan Negi booked 3 floors one in his own name, another one in the name of his daughter in law and the third one in name of his company, whereas Mr. Dabral booked a 1flat and a villa (both in his name); rest all allottee booked one unit each. Hence the total number of allottee for purpose of section 14(2)(ii) is 115 (118-2-1) considering Mr Tirlochan (3) and Mr Dabral (2) as a single allottee each. At least 2/3 allottee shall be 77 (2/3rd of 115 – round up to next whole integer), whose previous written consent is required; before making changes to sanctioned plan.

Hence the opinion of Mr. Vivek in the context of the provision contained in RERA, 2016 is untenable and incorrect.

7. Investments are considered as capital account transactions, hence governed by section 6 of the Foreign Exchange Management Act, 1999 read with The Foreign Exchange Management (Permissible Capital Account Transactions) Regulations 2000 (herein-after regulations).

   Clause (b) of regulation 4 of such regulations describe the prohibitions. Although regulation 4 (b) (iv) provides no person resident outside India shall invest in India, in any form, in any company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage in real estate business. But explanation 1 provides a certain exclusion from real estate business, explanation read as 'for this regulation, 'real estate business shall not include development of townships, construction of residential/commercial premises, roads or bridges and real estate investment trust s (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014.

   Hence repatriation of funds in India as Investment into the real estate project (construction of residential apartments) in Kharar (Mohali, Kharar) can be seen as a permissible capital account transaction under clause (a) to schedule II of regulations.

8. As per clause (a) to regulation 8 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, a person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub -section.

   Whereas section 6(5) of the Foreign Exchange Management Act, 1999 provides a person resident outside India may hold, own, transfer or invest in any immovable property situated in India if such property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

   Since in the given case father of Mr. Onkar acquired the property through inheritance from his father who was resident in India, hence fall within the scope of section 6 (5). Therefore, with the permission of RBI, he can repatriate the sale proceed of ancestral property inherited by him to Canada from India.

MTP/May 2021/Case Study-2
Mr. David Pinto
(IBC, Competition, FEMA, RERA, PMLA, PBPTA)

Mr. David Pinto is a Goa-based businessman. He holds an Indian passport and usually resides in India, but occasionally used to visits other countries of the world for business and vacations. During the preceding financial year, he was out of India for 42 days. Mr. Pinto owns beach restaurants with water -sports facilities, resorts, spa centres, and floating restaurants apart from a fleet of boats and ferries in form of Travel Thrill Private Limited (TTPL). TTPL had a global turnover of INRs 2735 crore in the immediately preceding year with an asset base of worth INRs 960 crore in India. Mr. Pinto has marketing tie-ups with travel agents and leading tour and travel companies all across the globe. Mr. Pinto recently launched a web-based portal 'Fun Holidays' offering a wide variety of travel packages including stay and food. Fun Holidays become a big hit and buzz.

Singapore-based Thanjai Tours & Travels Pte Ltd. (TTTPL) targets TTPL to acquire and ready for a hostile one. Mr. Pinto along with other Board members of TTPL decided to attempt the reverse acquisition of TTTPL to defend the threat of their hostile acquisition. Finally, TTPL acquired control over TTTPL. Thanjai Tours & Travels Pte Ltd. had a turnover of US$ 3400 million in the immediately preceding year with an asset base of US$ 1200 million across the globe including assets worth INRs 80 crore in India.

TTPL received notice from the deputy commissioner of Income Tax regarding some suspicious and high value benami transactions. Hence the book of accounts called and detailed enquiry was initiated into the matter under the Prohibition of Benami Property Transaction Act, 1988. Mr. Pinto is of opinion that deputy commissioner of Income Tax has no jurisdiction to inquire into the matter under the PBPT Act, 1988.

Ms. Anna, the daughter of Mr. Pinto is architecture, stays in Georgia and holds NRI status. In India, there are many assets and properties vested in name of Ms. Anna, from which she earns the rental income. Ms. Anna willing to manage her Indian income through the use of a bank account, but is confused with NRE, NRO, FCNR, RFC Accounts, and their utility and implications.

Mr. Joe, the son of Mr. Pinto recently joined him in business and starts working on diversification. He identified the opportunity in the export of seafood, especially to European countries. Mr. Joe contacted a shipping company for an operational tie-up to reserve the space of two containers on the vessel moved on every Friday. After recording an initial good response for few days, Mr. Joe decided to form a company 'Silver Exports Private Limited' (SEPL) with overseas branches to expand the business. Despite the directors and managers warn Mr. Joe to consolidate rather than keep on expanding highlighting financial vulnerability, but Mr. Joe further decided to buy own ship named 'sliver-line' for logistic (because according to him the arrangement of shipping through the vessel, as discussed above is economical but inflexible) of seafood. The decision of purchasing a ship puts the burden on financial leverage. In the years, Mr. Joe realized his mistake because increased logistic and financial cost starts causing troubles.

The situation became worse when different countries announced lockdowns across the globe to prevent the widespread of COVID-19, including India. International trade and transport almost halted to nil. After lock down lifted, the finances of SEPL were really in bad shape. While reaching towards the end of F.Y 20202021, SEPL left with only two weeks of working capital (on the 20th March, 2021). Somehow SEPL is serving its debt.

On the evening of 22nd March, 2021 silver-line left the mormugao port for its destination in Europe through the Indian Ocean and the Mediterranean Sea via the Red Sea. On the morning of 23rd March, 2021, the Suez Canal was blocked after the grounding of Ever Given, a 20,000 TEU container ship, hence the silver-line stuck and forced (amid ambiguity) to take another route (circumnavigate the African continent) to its destination, which results in a huge increase in logistic cost and the SEPL made default again in meeting its debt obligation due on 30th March, 2021 as working capital turned negative. The amount regarding default that took place was 2.1 crore. One of the financial creditor with an outstanding of 42 lakh moved to NCLT for initiation of the Corporate Insolvency Resolution Process.

Ms. Rita, the wife of Ms. Joe who is also a director in the SEPL and designated as officer -in-charge and signing authority for legal filing, forex and export documentations. Custom officers identified Sliver –line engaged in illegal trans-shipment of psychotropic substance worth INRs 4- 4.5 crore. Captain of the ship, Ms. Rita, and One of the other directors (who is a senior citizen) of SEPL arrested under the Prevention of Money Laundering Act 2002. Ms. Rita argued that she was unaware of the matter and her arrest is without a warrant. Captain and Director also argued against their arrest stating the officer is not empowered to arrest them without a warrant and investigate without prior authorization from the Government.

Mr. Sadanand Yadav, father of Ms. Rita started his journey as a real estate agent around two decades ago and currently owning a construction business with the name 'Nand Developers and Infrastructures' (NDI). NDI recently launched another residential project 'Surya Enclave', developed near to Haniman Chauraha on Sahara Hospital Road in Viraj Khand, Gomti Nagar (Lucknow, UP). The project consists of 320 residential units with different dimensions and specifications. The project got an overwhelming response and all the unit was subscribed within a week of the start of the booking. Allocation was duly made and the allottee develops an informal association among themselves and it was decided that a residential society will be formed as and when projects reach the stage of completion.

Due to lockdown and afterward restrictions the construction work at Surya Enclave halted, since a large part of workforce (labour) are daily-based casual migrant workers who walked back to their villages and towns; hence delay in completion of the project as compared to sanctioned plan is expected. The financial cost and blocked working capital are causing trouble at NDI to manage its projects including Surya Enclave. Mr. Sadanand along with other directors of NDI thinks it's better to transfer the project to some other realtor or developer.

Mr. Dev Manohar is a business partner of the brother-in-law of Sadanand Yadav and a renowned landlord of the region. Mr. Sadanand who has political ambition also, willing to contest in the upcoming assembly election in the state. To arrange funds for the campaign and allied expenditures, Mr. Sadanand approached Mr. Dev to buy a piece of land he owns near to highway on the way to Kanpur. Mr. Dev ready to buy the plot, but considering the limit on landholding and land already owned by him in his own name, he instructed Vasika Navis (Deed Writer) to draft the deed for registration of the property in four equal part in name of him, his wife, his mother, and wife of his elder brother.

Multiple choice questions (2 Marks each for correct answer)

1. Ms. Rita, Captain of Ship, and Director (who is a senior citizen) approached the special court constituted under the PMLA, 2002 for bail. Explain the validity of bail applications.
   (a) Ms. Rita (being a woman) can get bail
   (b) Ms. Rita (being a woman) and Director (being a senior citizen) can get the bail
   (c) None of them get the bail as the amount involved in the offence is more than INRs one crore.
   (d) None of them get bail as the offence is non-bailable.

2. Who among the following is benamidar?
   i. Wife of Mr. Dev
   ii. Mother of Mr. Dev
   iii. Wife of the elder brother of Mr. Dev
   (a) ii only
   (b) iii only
   (c) Both ii and iii
   (d) None of i, ii, and iii

3. Regarding admissibility of application furnished by financial creditor to initiate the Corporate Insolvency Resolution Process in case of SEPL, which of the following statements is correct?
   (a) Since the default is caused by a bad financial position that arises due to COVID-19, hence suspension provision applies here.
   (b) Amount of default is less than the threshold limit for filing an application.
   (c) Default took place after the suspension clause expired, this is sufficient cause to admit the application
   (d) None of these.

4. Which of the following statements are correct requirements regarding the transfer of project 'Surya Enclave' in the case of NDI?
   i. Project can be transferred, after obtaining the consent from at least two-thirds of allottees
   ii. Project can be transferred, after obtaining the written approval from the authority.
   iii. Allocation or sale done by original or erstwhile promoters remain unaffected
   (a) i and ii only
   (b) ii and iii only
   (c) i and iii only
   (d) All i, ii, and iii

5. Who out of the following can act as initiating officer under the PBPT Act,1988?
   (i) Assistant Commissioner
   (ii) Joint Commissioner
   (iii) Deputy Commission
   (a) ii only
   (b) both ii and iii only
   (c) both i and iii only
   (d) All i, ii and iii

Descriptive Questions

6. Differentiate between NRE and NRO accounts while highlighting its purpose and implications, how the residential status of the person is relevant to them, and can Ms. Anna open and operate a joint NRO account with his father?

7. Does the acquisition of TTTPL by TTPL results in the formation of a combination under the Competition Act, 2002? Mention the thresholds. Is combination prohibited under the Competition Act 2002?

8. Ms. Rita argued that she was unaware of the matter and her arrest is without a warrant. Captain and Director also argued against their arrest stating the officer is not empowered to arrest them without a warrant and investigate without prior authorization from the government. Are their arguments legally tenable?

Answers to Case Study 2

1. (a)
2. (b)
3. (d)
4. (b)
5. (c)

Answer to descriptive questions

6. NRE account stands for Non-Resident External Account. This account facilitates non-resident to park their foreign earnings to transfer that to India.

   NRO account stands for Non-Resident Ordinary Account. This account also facilitates non-resident to manage their income (such as rent, dividend, pension, interest, etc.) that is earned in India.

Basis	NRE Account	NRO Account
Purpose	It is an account of an NRI to transfer foreign earnings to India	It is an account of an NRI to manage the income earned in India
Taxability	Interest earned is tax free	Interest earned is taxable
Repatriation	Can repatriate	Can repatriate the interest amount, the principle amount can be repatriated only up to USD 1 million in a financial year
Joint Account	Can be opened by two NRIs	Can be opened by an NRI along with an Indian citizen or another NRI
Deposits and Withdrawals	Can deposit in foreign currency, and withdraw in Indian currency	Can deposit in foreign as well as Indian currency, and withdraw in Indian currency
Exchange Rate Risk	prone to risk	Not prone to risk

Joint Account- NRE account can be jointly opened and operated by two NRIs only, whereas an NRO account can be opened by an NRI along with an Indian citizen or another NRI; hence M/s Anna can open and operate a joint NRO account with his father.

7. Section 5 of the Competition Act 2002 provides the thresholds beyond which an acquisition will result in combination. Vide notification number S.O. 675(E) dated 4th March 2016 the threshold (w.e.f. 4th March 2016) under section 5 shall be as tabled below;

Parties/enterprises after combination have		Enterprises Level	Group Level
Joint Assets	In India	Rs. 2,000 Cr	Rs. 8,000 Cr
Joint Turnover		Rs. 6,000 Cr	Rs. 24,000 Cr
Joint Total Assets	In India or Outside	US$ 1000 Million	US$ 4000 Million
Minimum Indian Component		Rs. 1000 Cr	Rs. 1000 Cr
Joint Total Turnover		US$ 3000 Million	US$ 12000 Million
Minimum Indian Component		Rs. 3000 Cr	Rs. 3000 Cr

In the given case TTPL had a global turnover of INRs 2735 crores in the immediately preceding year with an asset base of worth INRs 960 crores in India. Whereas TTTPL had a turnover of US$ 3400 million in the immediately preceding year with an asset base of US$ 1200 million across the globe including asset worth INRs 80 crores in India, this can be summarised as;

Joint Total Assets	In India or Outside	US$ 1200 Million + (INRs 960 Crores)
Including Indian Component		Rs. 1040 Cr (960+80)
Joint Total Turnover		US$ 3400 Million
Including Indian Component		Rs. 2735 Cr + (Revenue of TTTPL in India is not given)

Since the joint total assets are more than US$ 1000 million including asset in India more than INRs 1000 crores hence the acquisition of TTTPL by TTPL results in the formation of combination under Competition Act 2002.

No, there is not complete prohibition; but there is a restriction on the formation of combination under the Competition Act 2002. Section 6 of the Act provides no person or enterprise shall enter into a combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

8. Section 45 of the Prevention of Money Laundering Act 2002 (here-in-after act), has the title 'offence to be cognizable and non-bailable.

Through Finance (No. 2) Act 2019 an explanation is inserted in section 45 that the expression "Offences to be cognizable and non-bailable" shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, and accordingly, the officers authorised under this Act are empowered to arrest an accused without a warrant, subject to the fulfilment of conditions under section 19 and subject to the conditions enshrined under this section.

Further sub-section 1 to section 45 provides notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

Section 19(1) of the act provides If the Director, Deputy Director, Assistant Director, or any other officer authorised in this behalf by the Central Government by general or special order, has based on material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

It can be concluded that the officer is empowered to arrest without a warrant if the conditions entailed in section 19 and 45 are fulfilled. But he can't investigate unless authorised by the central government.

Hence the argument of Ms Rita, Captain of the ship, and Director that the officer is **not empowered to arrest them without a warrant is not legally tenable;** whereas the argument of the captain of the ship and Director that the officer is **not empowered to investigate** them without prior authorisation from the government is **legally tenable**.

Students are advised to note;

The second proviso to section 45 (1) of the act provided that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by the Director; or any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government. Cognizance of offence by the court (to initiate trial) shall not be confused with the cognizable nature of the offence for the arrest of the accused by designated authorities under section 19 of the Act.

MTP/May 2021/Case Study-3
Mr. Yogandra Prasad, Mr. Srinivasan, and Mr. Venkatesh Rao (Competition, FEMA, RERA, PMLA, PBPTA)

Mr. Yogandra Prasad, Mr. Srinivasan, and Mr. Venkatesh Rao started the business of manufacturing the saw machines around seven-eight years ago as business partners. Mr. Prasad is the only son in his Salem-based agriculture family. A decade back when Mr. Prasad completed his ITI diploma in mechanics, moved to Madurai for employment in a company that was engaged in manufacturing different machines and hand tools; because the size of a farm owned by Mr. Prasad's family not that big that it requires two -person to manage and Prasad's father performs the farm-related activities easily with the occasional support of Prasad's mother. There he met with Mr. Srinivasan who was an accountant in the company, has an additional charge of looking after the dealership-related stuff, and Mr. Rao was plant supervisor. Soon they become good friends. Mr. Srinivasan always stressed upon the starting of own-business; Mr. Prasad and Mr. Srinivasan were also inspired by his thought.

With help of the elder brother of Mr. Rao, who is based in Madurai only; they (all 3) established the workshop. Mr. Prasad and Mr. Rao started repairing the machines there in the evening or on holidays; Mr. Srinivasan also helped them in to look after the general management and client dealings. Soon they started getting more and more installation and repair requests from nearby, even one saw machine manufacturer outsourced the task of repairing the defective machine or those upon whom the warranty is invoked. They (all 3) quit the job and start spending full time in workshops and hire few workers as well. In a couple of years, they installed a manufacturing facility of saw machines and turned workshops into the plant and their informal partnership changed into the duly incorporated company (PRS Machine Limited).

Mr. Prasad looks after the production and operations, Mr. Rao looks after general management, HR, and control, Mr. Srinivasan looks after finance and marketing. Business resources were applied with utmost caution, like idle cash immediately invested in marketable securities, working capital optimized, production process streamlined and cash operating cycle (using floats) was minimized. The business was really doing well and able to acquire a substantial market share because it has a low cost of pr oduction. Due to the low cost of production PRS machine Limited (here-in-after PRS) able to offer deep discounts to its customer, especially first-time customers. The Standard portable saw machine of 16th Inches which PRS was able to manufacture under INRs 3500/- and sold for in a range of INRs 3800-4000, other competitors were able to manufacture the same in and around INRs 4000/-.

Out of rivalry, a business competitor uses its political nexus to annoy the management at PRS Machine Limited, through frivolous searches of the Prevention of Money Laundering Act 2002 and notices from the Enforcement Directorate. PRS faced notices from the Competition Commission of India as well.

In 2019, Mr. Prasad got married to the younger sister of Mr. Rao, Ms. Rukmani. They visited Europe after marriage. Mr. Prasad and Rukmani had few unspent Euros in the form of currency notes and coins with them, which they forgot to exchange at the airport.

To accelerate the growth (organic and inorganic) PRS need more fund and keeping the hurdle rate low is another target in front of management, hence it was decided to raise the fund through External Commercial Borrowings. Despite Mr. Srinivasan managed the finance function but not well -aware of the latest directions of the apex bank (money market regulator) on External Commercial Borrowings.

The floatation process has been completed in the week first of March, 2020. Lockdown announced in the fourth week of March, 2020, hindered the expansion projects in midways and idle funds (raised through ECB) is need to be parked domestically. Management is thinking to repay some of the existing loans as regular cash flow is barely enough to meet the needs and commitments of PRS.

Mr. Prasad booked a 4BHK flat in royal residency so that the entire family including his wife and parents migrate to Madurai. Prasad deposits 12% of the cost of the property with the promoter (Shiva Estate and Relators) in advance after entering the agreement to sell. Brochure carrying due date and amoun t of instalment handed over to Mr. Prasad along with receipt of deposit made by him. Mr. Prasad also becomes a member of the association of the allottees, the legal formation of the association is in process.

Mr. Prasad figured out that his father is getting older now and it may be difficult for him to manage farms, hence insisted his parent to shift with him. But his parents decided to stay back at Salem only because they wish to spend their remaining life in the house and village, where they spent a substantial part of life (post-marriage in the case of his mother). Father gave him (Mr. Prasad) INRs 50 lakh to register the property. Mr. Prasad registered the property in his own and his wife's name using such INRs 50 lakh as part of the consideration paid.

Although by the end of 3 quarter of 2020 the construction was expected to be completed and possession was planned to be given, but COVID-19 hit the schedule, and projects are running delay with 4-5 months. Considering this the association of allottees talked to representatives of Shiva Estate and Relators and demand interest on their money deposited with the promoter in form of advance and part payments. Promoter promises to complete the project at the earliest, pointing out pandemic as the only reason for delay. Further, he denies paying interest to allottees on money deposited with the promoter in form of advance and part payments. The period for which the registration granted to Shiva Estate and Relators under section 5 of the RERA 2016 also approaching to end.

Multiple Choice Questions (2 Marks each for correct answer)

1. Assess the correctness of following statements in view of provisions contained in the Prevention of Money Laundering Act 2002, regarding the offence of frivolous search without recording the reason in writing by authority or officer;
   i. Cognizance can be taken by the court at its own
   ii. Such authority or officer shall be punishable with both fine and imprisonment

   (a) Only i is correct
   (b) Only ii is correct
   (c) Both i and ii are correct
   (d) Both i and ii are incorrect

2. Mr. Prasad and Rukmani had few unspent Euros in the form of currency notes with them. These amounts can be retained with him:
   (a) For 120 days from the date of acquisition
   (b) For 120 days from the date of return to India
   (c) For 180 days from the date of acquisition
   (d) For 180 days from the date of return to India

3. Regarding parking of ECB proceeds domestically pick the correct statement out of the following;
   (a) In term deposit with AD Category I bank for 6 Months
   (b) In term deposit with AD Category I or II bank for 6 Months
   (c) In term deposit with AD Category I bank for 12 Months
   (d) In term deposit with AD Category I or II banks for 12 Months

4. Which of the following is correct regarding the deposit of advance for 4BHK under the RERA 2016:
   (a) Promoter shall not accept any deposit
   (b) Promoter may accept the deposit to any percentage
   (c) Promoter shall not accept any deposit unless entered into a written agreement for sale
   (d) Promoter is allowed to accept the deposit less than ten percent in any case

5. Whether the father of Mr. Prasad is benamidar?
   (a) Yes, because he is not among the person in whose name property is registered
   (b) Yes, because his daughter in law is also part owner of the property
   (c) No, because he provides money which is part of the total consideration
   (d) No, because the property is not held for the immediate or future benefit, direct or indirect, of him

Descriptive Questions

6. Is PRS abusing the dominance through predatory pricing of their product? What factor, commission shall consider while determining the existence of dominance? The cost determined under the regu lation is INRs 3800/-.

7. Mr. Srinivasan is not clear about end uses of ECB hence approached Mr. Kartik (you), a chartered accountant to know, whether
   (i) ECB can be availed of for making equity investment domestically or buying goodwill? Can ECB be availed of for making a contribution in an LLP?

   (ii) ECB raised and used for repayment of Rupee loans availed domestically for purposes other than capital expenditure? Will it make any difference if Rupee loans availed domestically for purposes of capital expenditure? Will it make any further difference if the loan is not availed domestically?

8. In light of provision contained in the Real Estate (Regulation and Development) Act, 2016, decide:
   (i) Can an unregistered allottees association can file a complaint with the authority?
   (ii) Can Shiva Estate and Realtors apply for an extension of registration for the project?

Answers to Case Study 3

1. (d)
2. (d)
3. (c)
4. (c)
5. (d)

Answer to descriptive questions

6. As per explanation (b) to section 4 of the Competition Act , 2002, the predatory price means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, to reduce competition or eliminate the competitors.

   In the given case it was mentioned that due to the low cost of production, PRS was able to offer a deep discount to its customer, especially first-time customers.

   The Standard portable saw machine of 16th Inches which PRS was able to manufacture under INRs 3500/- and sold for in a range of INRs 3800-4000, other competitors able to manufacture the same in and around INRs 4000/-

   Since the price offered by PRS is in the range of INRs 3800-4000 which is not less than the cost determined under the regulation is INRs 3800/- hence the **PRS is not abusing the dominance through predatory pricing of their product.**

   Further as per section 19 (4) of the Competition Act, 2002, The Commission while inquiring whether an enterprise enjoys a dominant position or not under section 4, shall have due regard to all or any of the following factors, namely:—

   (a) Market share of the enterprise;
   (b) Size and resources of the enterprise;
   (c) Size and importance of the competitors;
   (d) Economic power of the enterprise including commercial advantages over competitors;
   (e) Vertical integration of the enterprises or sale or service network of such enterprises;
   (f) Dependence of consumers on the enterprise;
   (g) Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
   (h) Entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
   (i) Countervailing buying power;
   (j) Market structure and size of market;
   (k) Social obligations and social costs;
   (l) Relative advantage by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
   (m) Any other factor which the Commission may consider relevant for the inquiry.

   Students are advised to note;
   Dominance is not prohibited, abuse of dominance is prohibited. Even in the given case, it seems that PRS holds dominance over the relevant market in the relevant product segment, it can't be inferred that it violates any of the provisions of the Competition Act 2002 regarding the prohibition of abuse of dominance.

7. Clause viii to **paragraph 4.2 of the master direction No.5 (dealing with External Commercial Borrowings) dated 26th March 2019,** contain the negative list, for which the ECB proceeds cannot be utilised.

   Further clause v to paragraph 4.2 of same directions, which deals with minimum average maturity period contains certain exception to negative list of end uses contained in clause viii.

   (i) As per item c in the negative list, equity investment is not permitted. Hence any form of equity investment be it direct or indirect (through the purchase of goodwill) is not permitted. Even ECB can't be availed of for making a contribution in an LLP.
   (ii) Reading both the clauses (v and viii) together it is observed that raising and use of ECB for repayment of Rupee loans is permitted in some cases.

   ECB can be raised and used for repayment of that Rupee loans which was availed domestically, for purposes both capital expenditure and other than capital expenditure; the only difference is minimum average maturity period i.e. 7 & 10 yrs in case of capital expenditure and other than capital expenditure respectively (provided ECB is not raised from foreign branches/subsidiaries of Indian banks).

   ECB can't be raised and used for repayment of other than domestically availed Rupee loans. It is worth here to note that ECB can also be raised and used with a minimum average maturity period of 5 years for repayment of Rupee loans.

8.

(i) No, an unregistered allottees association can file a complaint with the authority; although individual allottee can make a complaint in their individual capacity.

It is worth here to quote section 31 (1) of the Real Estate (Regulation and Development) Act 2016, it read as any aggrieved person may file a complaint with the Authority or the Adjudicating Officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder, against any promoter, allottee or real estate agent, as the case may be.

Further explanation to such sub-section provides person shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

Students are also advised to note
As per section 11 (4) (e) promoter shall enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable

(ii) As per **section 6** of the Real Estate (Regulation and Development) Act, 2016 the **registration granted under section 5 may be extended** by the Authority **on an application made by the promoter**, due to **force majeure** (a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project)

Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year

No application for extension of registration shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

Hence, **Shiva Estate and Realtors can make an application under section 6 for extension of registration.**

MTP/May 2021/Case Study-4
State Metro Rail Corporation
(IBC, Competition, FEMA, RERA, PBPTA)

State Metro Rail Corporation is responsible for the construction and smooth operation of the metro rail network in the states' capital. In the first phase, two lines (tracks) are in operation, North -South (Red Line) and East-West (Blue Line); on which train (with the length of 4 coaches) runs both ways. A tender notice was floated by State Metro Rail Corporation, for procurement of battery sets for metro coaches running in the state's capital, from the list of approved vendors across the globe. None of the global firms responds to tender considering logistic-related uncertainties due to the second wave of Covid-19. Only 8 firms from different parts of India submitted the response. The general manager found the rate quoted by most of the firms was the same per unit, on an all-inclusive basis. The quoted rate found 25% higher than, the rate at which procurement of similar battery sets (exactly same specifications) was done by National Capital's Metro Rail Corporation very recently. It is also observed that the quantity quoted by each of the firms was, far or less near to 20% of the total tender quantity.

The General Manager at State Metro Rail Corporation in presence of the Project Director talked to the Head of Legal Division regarding this, to express his suspicions over the possible cartelization among the bidders. A letter regarding this sent to Directors' office (State Metro Rail Corporation) seeking permission to lodge a complaint with the Competition Commission of India.

Metal and Casting Iron Limited (MCIL) is one of the largest suppliers to State Metro Rail Corporation, supplies a wide range of metals of different shapes and specifications. To lower down the cost of operation, MCIL decided to go for floating funds from the international market. Mr. Mukund Yadav, VP finance made a presentation in front of the Board of directors including the CEO, whereat he expressly favours the External Commercial Borrowings (ECBs) as a cheap and long-term source of finance, above others. In the next board meeting at MCIL, the board approves the decision to raise fund through ECBs in two tranches, out of which one shall be used for the repayment of rupee loans availed domestically. It was also decided that borrowing from foreign branches and subsidies of any sort of Indian financial institutions shall not be accepted. When it comes to deciding the duration of borrowing, there is a difference of opinion, regarding the minimum average maturity period (MAMP).

MCIL to establish itself as a global brand that carries a sustainable strategic vision and a promising value system, start sponsoring national and international sport, music, and cultural events. Recently it sponsored the Grammy awards. MCIL became a sponsor for the Man of Match Award for the 13th edition of the Indian Premier League (season 2020) hosted in the United Arab Emirates by the Emirates Cricket Board. The Board of Control for Cricket in India issued a letter of sponsorship in favour of MCIL. For a total of 32 league matches, USD 800,000 needs to be remitted by MCIL @ USD 25,000 for each match.

Way back in 2018, MCIL decided to diversify the business. Based on expert committee (of board members) report and multiple rounds of consultation with advisories firms, it decided to venture into the Real Estate sector. Another company was formed after the name of the founder of MCIL, 'Ramaanuj Construction Limited' (RCL) which is structured as a subsidiary to MCIL. To start with RCL acquire the few running (ongoing) projects from promoters and stated few others on their own. Since RCL did not own much experience in real estate, hence failed to deliver the project on time as scheduled in their majority of the project. This delay not only annoys the allottees but also causing a huge escalation in cost.

Some of the projects really stuck in bad shape. Association of allottees wrote to RCL and talked to representatives of RCL, except promises allottees are not getting anything concrete hence the association of allottee decides to file the complaint against the RCL to the state RERA authority. Authority issued the various instructions to RCL, including instruction to make afresh application for extension of registration for its ongoing projects which should be completed as of now (considering the schedule) otherwise. RCL fails to comply with the instructions and didn't make an application for extension of registration as currently under moratorium (as a result of actions taken under some other law, in force). RCL is charged with many offences under the Real Estate (Regulation and Development) 2016 and penalties are also imposed including imprisonment of directors in few cases.

Despite various actions and efforts by allottees things were not moving and finally, allottees decide to move an application under the IBC 2016 for initiation of CIRP against RCL to recover of advances deposited by them (against the allocation). They came to know that financial creditors already made the application for initiation of CIRP and a RP (Mr Raj) also appointed in the second week of April 2021.

Mr. Raj observed serious defaults that took place during the second and third quarter of 2020-2021 not only causing insolvency to RCL but results in loss to creditors and some of the losses are potential (due to such defaults). Mr Raj identified that directors of RCL knew that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of RCL, still, they indulged and did not exercise due diligence in minimizing the potential loss to the creditors of the corporate debtor.

Few employees and a couple of directors of RCL are probably part of some suspicious transactions, where RCL is also a participant in the capacity of either benamidar or beneficial owner. The initiating officer decided to inquire into the matter hence summoned them to attend his officer under section 19 and call upon the information under section 21 of the Prohibition of Benami Property Transactions Act, 1988. Some of the employees are scared (after summon served upon them) from the threat of legal proceeding and abstained, decided to make an excuse for remain absent. Whereas few out of those, who were present before the authority, failed to furnish information. Some others furnished the false information knowingly.

Multiple Choice Questions (2 Marks for each correct answer)

1. The prescribed Minimum Average Maturity Period (MAMP) is _____and _____in case of ECB raised for repayment of rupee loans availed domestically for capital expenditure and other than capital expenditure respectively.
   (a) 3 and 3 years respectively
   (b) 7 and 5 years respectively
   (c) 10 and 7 years respectively
   (d) 7 and 10 years respectively

2. What will the maximum penalty that may be levied by the Competition Commission of India, in case of cartelisation?
   (i) Three times of its profit for the last three preceding financial years
   (ii) Ten percent of the average of turnover for the last three preceding financial years.
   (iii) Three times of its profit for each year of the continuance of such agreement
   (iv) Ten percent of its turnover for each year of the continuance of such agreement
   (a) Higher of i or ii
   (b) Maximum upto ii only
   (c) Higher of iii or iv
   (d) Higher of all i, ii, iii or iv

3. Offences under the Real Estate (Regulation and Development) Act, 2016 are
   (a) Cognizable, Non-bailable, and Compoundable
   (b) Non-cognizable, Bailable, and Compoundable
   (c) Cognizable, Non-bailable, and Non-compoundable
   (d) Non-cognizable, Bailable, and Non-compoundable

4. Few among allottees take RCL to NCLT for initiation of Corporate Insolvency Resolution Process (CIRP) against it. Advance payment against allotment by allottees to RCL shall be considered as
   (a) Operational debt
   (b) Financial debt
   (c) None of the operational or financial debt, it is a mere advance
   (d) Financial debt, if overdue for more than one year

5. For a total of 32 league matches USD 800,000 need to be remitted. For remittance of prize money/sponsorship abroad, MCIL requires approval of
   (a) Ministry of Finance (Department of Economic Affairs)
   (b) Reserve Bank of India
   (c) Ministry of HRD (Department of Youth Affairs and Sports)
   (d) Ministry of External Affairs

Descriptive Questions

6. In the given case, can Mr. Raj took action against the directors of the corporate debtor for carrying out the business in a negligent way, which may be resulting in loss to a creditor, explain in light of provisions of IBC.

7. If State Metro Rail Corporation moved to Competition Commission of India, considering what factors commission will decide the nature is anti-competitive and has the appreciable adverse effect on competition. In your opinion 'is there anything anti-competitive'?

8. If any person fails to furnish information under the Prohibition of Benami Property Transaction Act, 1988 then what penalty can be imposed upon such person? Will it make any difference if there is reasonable cause, due to which person from whom the information is called, fail to furnish the information?

   What will be the penalty for giving false information? Will it make any difference if any false document is furnished?

Answers to Case Study 4

1. (d)
2. (c)
3. (b)
4. (b)
5. (c)

Answer to descriptive questions

6. Sub-section 3 inserted to section 66 of the Insolvency and Bankruptcy Code, 2016 (here-in-after the code) by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 dated 05.06.2020 (w.e.f 05.06.2020), which says notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of the corporate insolvency resolution process is suspended as per section 10A.

   Sub-section 2 to section 66 provides on an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if (a) before the insolvency commencement date, **such** director or partner **knew or ought to have known that the there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process** in respect of such corporate debtor; and (b) **such director** or partner **did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.**

   Here it worth noting that filing of the application for initiation of corporate insolvency resolution process of a corporate debtor under section 7, 9 and 10 of the Code was suspended (under section 10A), who made the default/s during the period from 25th March 2020 till 24th March 2021*. Proviso to section 10A provides that no application shall ever be filled for the defaults occurring during said period (from 25 th March 2020 till 24th March 2021).

   *Through SO 4638(E) dated 22nd Dec 2020, application of section 10A extended for another 3 months beyond 25th Dec 2020.

   Since the default occurred during the second and third quarter of 2020-2021 (falls in between the suspension period), hence resolution professional can't apply to adjudicating authority; due to the effect of section 66(3) of the IBC 2016.

7. As per section 19 (3) of the Competition Act, 2002, the Commission shall, while determining **whether an agreement has an appreciable adverse effect** on competition under section 3, have due regard to **all or any of the following factors**, namely

   (a) Creation of barriers to new entrants in the market;

   (b) Driving existing competitors out of the market;

   (c) Foreclosure of competition by hindering entry into the market;

   (d) Accrual of benefits to consumers;

   (e) Improvements in production or distribution of goods or provision of services; or

   (f) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

   Facts given in the case are very similar to facts of case **B. P. Khare, Principal Chief Engineer, South Eastern Railway vs. M/s Orissa Concrete and Allied Industries Ltd. and Ors.,** wherein A tender notice was floated by South Eastern Railway for procurement of Anti-Theft Elastic Rail Clips with Circlips from RDSO approved firms. Responses were submitted by 29 firms, the rate quoted by most of the firms was @ 66.50 (all-inclusive). The quantity quoted by each of the firms was far less than 50% of the total tender quantity. It is also alleged that the quoted rate was about 10% higher than the neighbouring Railways' last purchase rate.

   Commission prima-facie noted that the rate was inclusive of freight. Bidders were located across the country, the cost of freight for supplying the product from different parts of the coun try could not have been the same hence identical rates, indicative of meeting of minds.

   The Director-General during scrutiny of the case found that all the 29 firms have quoted identical bids which were in the range of Rs.66.49 to Rs.66.51. Further bid documents revealed that the 19 firms, 4 firms, and 2 firms respectively had similar handwriting in which the prices were quoted in their respective bid documents. 17 bids are supported by a cover letter and the format of the cover letter was the same in all such 17 cases.

Commission held that conduct of parties was amounting to bid-rigging. Commission issued cease and desist order.

It is worth mentioning here that as per **explanation to sub-section 3 to section 3, bid-rigging** means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

Since the facts in the given case strongly indicate collusive bidding, such as the rate quoted by most of the firms was the same per unit; and on an all-inclusive basis despite they from different part of India (how the price can be same, at least the different amount of the freight will result in the difference of price quoted). The quoted rate is about 25% higher than, the rate at which procurement of similar battery sets (exactly same specifications) was done by National Capital's Metro Rail Corporation very recently (means by collusion they wish to gain in term of charging a high price). It is also observed that the quantity quoted by each of the firms was far or less near to 20% of the total tender quantity (so that all gets the opportunity to deliver the product and make money).

Hence such collusive understanding (meeting of minds) among the bidder, followed by an act of bid-rigging; falls under the scope of the horizontal anti-competitive agreement.

Students are advised to note

A **cease and desist order** is issued when a court, tribunal, or quasi-judicial authority intend to direct someone to **stop engaging in illegal activity and not to restart it.**

8. As per sub-section 1 to section 54A of the Prohibition of Benami Property Transact ion Act 1988, **any person who fails to furnish the information** as required under section 21 (or comply with summons issued under section 19(1) shall be liable to pay the penalty of 25000/- for each such failure.

Sub-section 2 to section 54A provides such penalty shall be imposed by the authority who called for the information. Further sub-section 3 provides such penalty shall be imposed only after the opportunity of being heard given. Proviso to section 54A acts as a safeguard from the imposition of penalty in cases, where good and sufficient information prevented the person from furnishing the information.

Further, as per section 54 of the act, any person who is required to furnish information under this Act **knowingly gives false information** to any authority or **furnishes any false document** in any proceeding under this Act, **shall be punishable** with **rigorous imprisonment** for a term which **shall not be less than six months** but which may **extend to five years** and shall also be **liable to fine which may extend to ten percent of the fair market value of the property.**

MTP/May 2021/Case Study-5
Tamil-Nadu based Krishnan family
(IBC, Competition, PMLA, FEMA, RERA, PBPTA)

Tamil-Nadu based Krishnan family owns cotton farms (where cotton is grown, both as a Kharif and as a Rabi crop), and operates as Hindu Undivided Family. Mr. Raghuvaram Krishnan (Karta of HUF) is the 4th generation that engaged in growing and marketing cotton, the 5th & 6th generation also actively participating in operations. Premium quality cotton is produced in Krishnan's farms, hence exported to many countries of Europe and the Middle-east apart from sale in the Indian market for domestic, industrial & surgical use. Mr. Raghuvaram Krishnan currently out of the country to attend the farming workshop.

Krishnan family supplied raw cotton to Kurl-Well Enterprises Limited (KWEL) which KWEL used for mattresses and pillows. The financial health of KWEL was under the dark clouds since 2016. In the last month of 2019, after considering an application of the financial creditors of KWEL, the Corporate Insolvency Resolution Process has been initiated by National Company Law Tribunal (NCLT) and a moratorium was ordered. Krishnan family being operational creditor, under the impression that IBC 2016 is discriminatory and unfair to an operational creditor as compared to the financial creditor.

Mr. Nariman Izaz who is one of the directors at KWEL has been given a personal guarantee against the borrowings of KWEL. He is of view that after the declaration of moratorium under section 14 of IBC, legal action against him is barred too. Ms. Jaya Subramanian is another director and who has given a loan of INRs 80 Lakh to KWEL, which remained outstanding when the CIRP was ordered.

Krishnan family got a long-term forward procurement order from Dignity Surgical Products Limited (DSPL) for its proposed factory. The price offered by DSPL is premium than prevailing in the market. In response to the financial newspaper, DSPL clarifies the intent to ensure smooth supply and procure only high-quality cotton (monitoring during cotton grown in farms), because it wishes to offer the best quality pure surgical cotton (sterilized & free from bacteria) to its customers. DSPL is a famous brand for surgical products and currently owned nearly 18% shares of the relevant market.

DSPL registered tremendous growth in the recent past, with organic and inorganic means. It currently conducting due diligence to make an agreement of acquiring a stake in Alvira Naturals and Surgical Limited (ANSL), which has import agreements and tie-up with foreign vendors from whom it procures necessary raw material to manufacture double-layer N-95 marks and oximeter. The directors of both the companies decided that both the companies shall operate independently after the acquisition. It is also decided that part of the consideration will be paid in cash and a larger part in stocks.

The consultancy and advisory firm hired by DSPL estimates that the value of DSPL will be doubled, whereas the EPS(earning per share) will improve significantly, P/E(price to earning ratio) expected to decline. After the acquisition, the market share of both the company putting together will be around 32% of the relevant market. Since this information found satisfactory, hence DSPL and ANSL enter into an agreement to give effect to acquisition. The advisory firm suggests that since the threshold prescribed in section 5 of the Competition Act 2002 has crossed, hence a notice needs to be furnished to the Competition Commission of India (CCI) in the form as may be specified.

Soon after the acquisition, on 24/Jun/2020, ANSL placed an import order worth US$ 248,000 to manufacture oximeter & N-95 masks. Entire order received through a single shipment on 3rd July, 2020.

It was found by the authority under the Prohibition of Benami Property Transaction Act, 1988, that the Krishnan family illegally helps the DSPL to acquire the agricultural land for its factory. Since there are certain restrictions on acquiring agricultural land for industrial purposes; hence DSPL acquired the land in n ame of the Krishnan family and above mentioned long-term forward procurement order is only a way to oblige back.

Authority issue the notice to HUF to clear their role in acquiring, holding, or aid in acquiring and holding the property. After considering the information and records furnished in front of the authority, it is easily concluded that some of the property held in name of HUF and its members are meant for benefits of DSPL and Consideration was also paid by funds provided by DSPL. Authority desires to confiscate the property so held benami.

The youngest grandson (Mr. Murli) of Raghuvaram Krishnan moved to the States (US) in 2008 for his graduation, which he completed in 2011. Afterward that he did master there and since then he was engaged in research on the 7 essential plant micro-nutrient elements boron (B), zinc (Zn), manganese (Mn), iron (Fe), copper (Cu), molybdenum (Mo), chlorine (Cl).

His research helps in proving that these micro –nutrients constitute in total less than 1% of the dry weight of most plants, basically, he tries to identify the correct amount of Micro-nutrients which shall be used by farmers in agriculture according to different topography and environment. He holds an Indian passport. He completed his doctorate there.

Mr. Murli decided to come back to India. After returning back, he joined ICAR (Indian Council of Agricultural Research) as assistant director and deputed for a joint program with UN, posted at Rajaji Bhawan office of ICAR at Besant Nagar, Chennai. He booked a flat for himself there in Chennai at Ramaniyam Advaitham. He was told by promoter 'Ramaniyam Real Estate Builders' that he (Murli) shall participate in the formation of an association of the allottees. He has to pay 8% as a deposit after signing the agreement to sell.

Mr. Murli in order to transfer the deposit money to the promoter and open a salary account for him visited SBI's Adyar Branch at Kasturba Nagar, Chennai. There he came to know that, Aadhaar card is needed to open a bank account and to perform bank transaction (which he don't possess as he moved out of India when a law requiring Aadhaar was not promulgated and he is back in India just a month back). Bank denied Mr. Murli to transact in the absence of furnishing the Aadhaar Card as proof of ident ity.

Multiple Choice Question (2 Marks for each correct answer)

1. Under the Prohibition of Benami Property Transaction Act, 1988, if an order in respect of any property has been passed holding such property to be a benami property then which authority among followings can pass the order of confiscation?
   (a) Initiating Authority
   (b) Adjudicating Authority
   (c) Administrator
   (d) Approving Authority
2. Under the Real Estate (Regulation and Development) Act 2016, in absence of local law the association of allottees shall be formed within a period of three months from the-
   (a) Issue of the completion certificate.
   (b) Issue of the occupancy certificate.
   (c) Majority of allottees having booked their plot/apartment or building, as the case may be.
   (d) Majority of allottees occupied their plot or apartment or building, as the case may be.
3. In the given case, which one out of the following mentioned forms shall be filed under section 6 of the Competition Act 2002 with the Competition Commission of India?
   (a) Form I
   (b) Form II
   (c) Form III
   (d) Form IV
4. Notice in case of Krishnan Family (HUF) under the Prohibition of Benami Property Transaction Act 1988, can be served on-
   (a) Karta only
   (b) Karta or any male member of HUF
   (c) Karta, but if Karta is not available (due to any reason) then to any other member of HUF
   (d) Karta or any member of HUF
5. As a financial creditor, whether Ms. Jaya can be a part of the Committee of Creditors (CoC) after she submitted her claim in 'Form C'.
   (a) Yes, she can be a part of the CoC as she had given a loan to KWEL
   (b) Yes, she can be a part of the CoC, if Interim Resolution Professional permitted her despite the fact that she was a director of KWEL.
   (c) Yes, she can be a part of the CoC, if Interim Resolution Professional sought permission of a minimum of 75% of the shareholders of the company carrying voting rights.
   (d) No, she is a director of KWEL, hence can't be a part of the CoC. Descriptive Questions
6. Is the Insolvency and Bankruptcy Code, 2016 (IBC) unconstitutional in the manner it is discriminatory and unfair to an operational creditor as compared to the financial creditor?
7. Can the bank deny Mr. Murli to transact in the absence of furnishing the Aadhaar Card as proof of identity? What remedy is left with Mr. Murli for purpose of verification by the bank?
8. Is the credence of Mr. Nariman Izaz valid? Support your opinion in detail.
9. Till what date, remittances against imports should be completed by ASNL?

Answers to Case Study 5

1. (b)
2. (c)
3. (b)
4. (d)
5. (d)
6. Based upon the judgment pronounced in the case of **Swiss Ribbons Private Limited & Anr. Vs. Union of India & Ors.** Insolvency and Bankruptcy Code, 2016 (IBC) is constitutional in entirety and not discriminatory and unfair to an operational creditor as compared to the financial creditor.

   The court held that financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code. Court also held that the excessive power given to the Committee of Creditors (CoCs) is controlled through approval/rejection of the plan with the large majority (rather a simple majority) and NCLT and thereafter NCLAT can set aside the arbitrary decisions of CoCs.

   The court held that since there is a difference in the relative importance of two types of debts when it comes to objects sought to be achieved by the insolvency code, hence article 14 of the Constitution of India (equality before the law) does not get infracted.

7. As per sub-section 1 to section 11A of the Prevention of Money Laundering Act 2002, every reporting entity shall verify the identity of its clients and the beneficial owner, by—
   - Authentication under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 if the reporting entity is a banking company; or
   - Offline verification under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016; or
   - **Use of a passport issued under section 4 of the Passports Act, 1967;** or
   - Use of any other officially valid document or modes of identification as may be notified by the Central Government in this behalf.

   Further as per sub-section 3 to section 11A of the Prevention of Money Laundering Act 2002, the **use of modes of the identification under sub-section (1) shall be a voluntary choice of every client or beneficial owner who is sought to be identified and no client or the beneficial owner shall be denied services for not having an Aadhaar number.**

   No, the bank shall not deny Mr. Murli to transact in the absence of furnishing an Aadhaar Card as ID.

   Since Mr. Murli holds an **Indian passport** (which is obviously issued under section 4 of The Passport Act 1967), hence **can use his passport as proof of his identity, for purpose verification of identity at the bank**.

8. Mr. Nariman Izaz, hold credence that section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) would apply to the personal guarantor as well, as a result of which proceedings against the personal guarantor and his property would have to stay if moratorium declared.

   Clause (b) section 14 (3) of the IBC, 2016, read as the provisions of sub-section (1) shall not apply to a surety in a contract of guarantee to a corporate debtor. It important here to note that sub-section (1) gave power to adjudicating authority to declare a moratorium.

   The **credence of Mr. Nariman Izaz seems invalid** in light of the pronouncement given by the apex court in Civil Appeal No. 3595 of 2018, **State Bank of India vs. V. Ramakrishnan**. The apex court consider the following facts importantly –
   - Report of Insolvency Law Committee dated 26.03.2018 clarified that the **period of moratorium under section 14 is not applicable to personal guarantors,**
   - Amendment made to the provision of section 14 (substituted vide act 26 of 2018 enforced w.r.e.f. 6th June 2018) that clearly states that the moratorium period envisaged in **section 14 is not applicable to a personal guarantor to a corporate debtor.**

   Since, Sec 14 (moratorium) of the IBC is not applicable to the personal guarantor, hence the credence of Mr. Nariman Izaz (that after the declaration of moratorium u/s 14, legal action against him is barred too) is not valid.

Students are also advised to note;

Since in the civil appeal quoted above, question in front of the apex court is much border than what we are asked to answer here for academic purposes; hence court also observed and record following in its order (not that much relevant for the answer, but important to note for better understanding)

The Hon'ble Supreme Court first considers the fact that different provisions of the IBC are applicable to the insolvency of different categories of persons. Section 96 and 101 of the IBC provide for separate provision for a moratorium for the personal guarantor. Whereas section 14 deals with corporates

Court also observed that different provisions of law brought into effect on different dates and some of the provisions were not yet enforced (on the date of the judgment). Provisions pertaining to sections 96 and 101 have not been brought into force.

9. As per para B.5.1 (i) of the 'Master Direction on Import of Goods and Services' dated 1st January 2016 (as amended from time to time), in terms of the extant regulations, remittances against imports should be completed by not later than six months from the date of shipment, except in cases where amounts are withheld towards the guarantee of performance, etc.

   Vide A.P. (DIR Series) Circular No.33 dated 22nd May 2020, in view of the disruptions due to the outbreak of COVID-19 pandemic, with effect from 22nd May 2020, the time period for completion of remittances against normal imports (except in cases where amounts are withheld towards the guarantee of performance, etc.) **has been extended** from **six months to twelve months from the date of shipment** for such imports made **on or before 31st July 2020**.

   Since the entire order was received through a single shipment on 3rd July 2020, hence the 12 months shall be completed on 2nd July 2021. So the remittances against imports should be completed by ASNL **within 2nd July 2021**.

MTP/Nov 2021/Case Study-1
Jain Bikes Ltd. (JBL)
(IBC, Competition Act)

Jain Bikes Ltd. (JBL) is engaged in the business of manufacturing and selling of motor cycles. Its registered office and corporate office, both are in Chandigarh. It has captured the market area of almost North India. It covers the whole Rajasthan, Punjab, Haryana, Himachal Pradesh, Jammu and Kashmir, Uttarakhand, Uttar Pradesh, Delhi and Chandigarh. JBL has appointed its sole distributors in almost in every district of the states of North India.

JBL have its own terms and conditions for granting of distributorship. It dictates the following conditions:

- Security Deposits with the company: Rs. 10 lakh.
- Space for showroom (own or rental): 10000 Sq. feet
- Space for workshop: 2400 Sq feet
- Two Trained Engineers (training shall be provided by the JBL at the cost of distributor)
- Monthly sales target of bikes:
  - for Tier 1 Cities: 1000 (minimum)
  - for Tier 2 Cities: 700 (minimum)
  - for Tier 3 Cities: 500 (minimum)
- Each of the distributor shall provide 3 free servicing of the bikes.
- Each distributor shall not sale any of the vehicles of other companies / make.
- Each distributor shall keep in reserve at least 100 bikes in its showroom to meet the sudden rise in the demand.
- Distributor shall sale the vehicles at the pre-determine price, fixed by the company, neither up, nor down.

Under the JBL group, there are following group companies:
- JBL General Insurance Company Ltd.
- JBL Finance Company Ltd.
- JBL Tubes and Tyres Ltd.
- JBL Marketing Ltd.

The JBL General Insurance Company Ltd. provides the comprehensive insurance on the bikes, purchased by the customers. JBL Finance Company Ltd. is a NBFC and it provides finance to customers. JBL has made it mandatory for the customers to avail finance from its NBFC and buy insurance policy only from its group insurance company.

The company's bike is a monopoly product. Bike costs around Rs. 75,000. It have 175 cc engine and is rough and tough in running on any road. It gives 50 km average. However, its spare parts are costly and parts made by the JBL can only be used in it. The Avg life of the vehicle is estimated for 3 lakh km run / 10 years.

The company also provide the road side assistance, provided the customer gets the renewal of insurance only from its group company.

Rohan is one of a distributor of JBL, having its showroom in Jaipur. He is selling the bikes of JBL for the last 5 years. His yearly turnover of sale of bikes is 50,000. Recently, the JBL put some more stringent conditions on distributors, who are having their showrooms in the State Capital City. The JBL advised all such distributors to deposit additional security amount of Rs. 20 lakh. The yearly sales targets were increased by 10% of the last FY' sales figures. The company also insisted that each and every customer should avail the loan facility from the group NBFC Company. Without finance, no bike should be sold. Further buying of the insurance policy from its group company is also mandatory.

The JBL insisted that all walk-in customers in the showroom, must be asked for their name, mobile number, e-mail id and address and prepare a data bank and send it to the company. The JBL through its group company, JBL Marketing Ltd. will approach the customers as listed in the data bank and will call on and often to the prospective clients and to pursue them to buy the company's product. Each distributor is supposed to create such data bank of at least 5000 prospective customers in a month.

The JBL also put a condition on the distributors that if any of customer of their showroom, who has availed loan from its group NBFC, and not paying the EMI should contact the concerned defaulter and will assist in recovery of the loan. If any such customer's loan account becomes non-performing, it shall be the responsibility of the distributor to make good the losses on account of NPA to the JBL Company.

Rohan was very annoyed with the dictatorship of the company. It was not possible for him to make the recovery from the defaulters and make good the losses to the company. Further, for every month, sending the data to the company is also difficulty. Many of the people have complained to the distributor that the marketing and recovery persons on and often and that too on odd times, visits to the residential address of the defaulting borrowers and harassing them.

Aggrieved with the attitude of JBL, Rohan wanted to file a case against the company alleging the following points:

- The JBL had already security deposit of Rs. 10 lakh at the time of taking distributorship and again asked to deposit addition security deposit of Rs. 20 lakh, resulting a total deposit of Rs. 30 lakh on which no interest is payable by the company.
- The JBL has insisted to assist in the recovery from the defaulters and if the loan with its Group NBFC of JBL is not liquidated, the distributor shall have to make good the losses.
- The distributors are also under stress to sale the vehicles only through loan and also there is compulsion to buy insurance from the JBL group company, which, many a times, the customers have objected to it. There are many customers who do not want to avail the loan, but due to the pre-condition, they are either reluctant to buy the bike or are forced to purchase the bike on loan
- Providing of the data bank every month to the JBL is a cumbersome task and the company harasses the persons listed in the data bank, by calling them on and often.
- There is exclusive supply agreement on the part of the distributors. They cannot sale the spare parts and other peripherals of other's make.

Based on the captioned facts, answer the following questions:

Answer the following Multiple-Choice Questions (10 Marks)

(1) Where Rohan can file case against the JBL:
(a) Consumer Court
(b) National Company Law Tribunal
(c) Competition Commission of India (CCI)
(d) Insolvency and Bankruptcy Board of India (IBBI)

(2) Which provision of the Competition Act, 2002 shall be applicable in this case:
(a) Anti-competitive agreements - Section 3
(b) Abuse of dominant position- Section 4
(c) Combination-Section 5
(d) Some parts of Section 3 and 4, both

(3) Selling of bike along with compulsion to buy insurance from the group insurance company and that too on finance / loan, are an example of:
(a) Refusal to deal
(b) Resale price maintenance
(c) Tie in arrangement
(d) Exclusive distribution agreement

(4) Normally every company, while giving the distributorship, put some reasonable conditions. Which among the following may be treated as reasonable conditions:
(a) Customers to purchase bike only through loan from its Group NBFC Company
(b) Buy compulsory insurance from its Group Insurance Company
(c) To sale the bike at predetermined price fixed by the JBL
(d) Create a data bank of 5000 customers on monthly basis and send it to JNL

(5) The prime responsibility of making recovery of the EMI from the borrowers is of:
(a) The Lender (JBL Finance Company Ltd.)
(b) The Bike manufacturer (Jain Bikes Ltd -JBL)
(c) The Distributor (Rohan)
(d) JBL General Insurance Company Ltd.

Descriptive Questions

(6) Any agreement which requires a purchaser of goods, as a condition of such purchase, to purchase some other goods, normally prevails in the business world. Would you treat this condition as an anti-competitive agreement?

(7) Which agreements entered between the two parties shall be presumed to have an appreciate adverse effect on competition?

Answer to MCQs.

1. (c)
2. (d)
3. (c)
4. (c)
5. (a)

Answer to descriptive questions

6. The purpose behind the enactment of the Competition Act, 2002 was to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.

Healthy competition brings many good things. It curtails the monopoly, improving the quality of the goods and services, competitive prices and continuous innovations to improve the quality.

Anti-competitive agreement

Section 3(1) provides that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, **which causes or is likely to cause an appreciable adverse effect on competition within India.**

As per Sub-section (2), any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

In the given case, the JBL is almost enjoying the monopolistic conditions. Besides the selling of the bike, it has put several conditions on the persons who are having its dealership. These conditions are not reasonable conditions. It prevents the entry of other insurance companies to provide the insurance coverage on the bikes, by simply putting a condition on the buyers of bike to buy insurance policy only from its Group Insurance company.

Further the JBL has also prevented the entry of other finance companies / NBFCs/ Banks who can provide the loan facility to the buyers of the bike. JBL have put conditions that no cash sale of the bike will be allowed and the buyer have been forced to avail loan from its Group NBFC company.

Section 3(4) provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-

(a) tie-in arrangement;
(b) exclusive supply agreement;
(c) exclusive distribution agreement;
(d) refusal to deal;
(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Meaning of Tie-in arrangement:
The explanation (a) to this sub-section defines the meaning of tie-in arrangements. It provides an inclusive definition (not exclusive). "Tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. Such type of conditions which are not reasonable, can be put in the category of tie -in arrangement.

What conditions are reasonable
The conditions which may be put under the banner of reasonable conditions have been described under section 3(5) of the Act. It provides that nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

   a. the Copyright Act, 1957 (14 of 1957);
   b. the Patents Act, 1970 (39 of 1970);
   c. the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
   d. the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
   e. the Designs Act, 2000 (16 of 2000);
   f. the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000).

In the given case, since the JBL has put very unreasonable condition on the distributor, so it is treated as **tie-in arrangements**.

7. Section 3(3) of the Competition Act, 2002 (the Act) lists out some of the agreements which are presumed to have an appreciable adverse effect on competition. This section provides that -

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition.

It is to be mentioned here the above instances mentioned in the Act have been presumed to have an appreciable adverse effect on competition and there is no need to prove it.

However, the agreements which have been entered into by way of joint ventures shall not be presumed to have an appreciable adverse effect on competition, if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Determination of Appreciable Adverse Effect on Competition

Section 19(3) of the Act provides that the Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—
(a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market;
(d) accrual of benefits to consumers;
(e) improvements in production or distribution of goods or provision of services;
(f) promotion of technical, scientific and economic development by means of production or
(g) distribution of goods or provision of services.

In the given case, the JBL have entered into the agreement with dealers/ distributors that no bike shall be sold in cash. The Bikes shall be sold only if the customer avails loan from its Group Finance Company and shall have to buy insurance cover on the bike only from the Group Insurance Company. These two major conditions restrict the entry of other insurance companies and finance companies to sale insurance /distribute loan facility particularly to the bike segment manufactured by the JBL.

MTP/Nov 2021/Case Study-2
Ms. Drishel Patel
(Competition, FEMA)

Ms. Drishel Patel is a young dynamic IT professional and currently resides in America. She holds the NRI status. Ms. Drishel works for Blip LLC, which has a wholly own subsidiary Blip India Private Limited (here-in-after referred to as Blip). Blip deals in the mobile operating system. Blips' operating system 'Diordna' is widely popular among the mobile phone manufacturers in India. Blip also offers proprietary applications and services (Such as Blip Maps, Blip Internet Explorer, and Blip Tube, etc.). Blips Mobile Services (BMS) is a bundled suite of Blips' applications and services and such apps and services are not available in isolation. In trade parlance, the mobile OS is different from OS designed for desktop as they have additional handheld use features. 80% of mobile phone, which are in use has Diordna as an operating system.

If a mobile manufacturer wants to manufacture a 'bare" Diordna mobile, it needs to only pass technical tests and accept the Diordna License Agreement; but in bare Diordna mobile manufacturer are not permitted to include any of BMS such as Blip Maps, Blip Internet Explorer, Blip Tube. If a manufacturer wants to manufacture a mobile having Diordna with pre-installed BMS, he has to enter into two additional agreements with Blip i.e. Mobile Application Distribution Agreement and Anti Fragmentation Agreement. BMS couldn't be availed directly by the end-users, in case it is not pre-installed.

Ms. Drishel got married to Mr. Joe Harris around a year back. The marriage took place with a traditional saptapadi ceremony in the backyard of Harris family's resident where only close relatives were present. Marriage was registered 6 months later due to a widely observed lockdown to prevent the widespread of COVID-19.

Indian traditions have a deep-rooted impact on William's family because the grandmother of Joe is from India. Joe's grandfather is also influenced by Indian culture, hence willing to migrate to India along with Joe's grandmother to spend the rest of their life. Considering this in the month of January 2021, Drishel and Joe acquired a luxurious apartment in joint name in India; so that Joe's grandparent can stay there comfortably. Half of the consideration was paid by Ms. Drishel out of the Non-Resident Account maintained by her, and the remaining half by Joe through proper banking channel, and too in the manner prescribed. To identify the flat and fulfill the legal requirement for registration of the same Ms. Drishel took the help of his elder cousin Mr. Arya Patel, who is permanently residing in India.

Mr. Arya along with two of his friends owns a cement manufacturing company in India called 'Strong Cement Private Limited' (SCPL). The SCPL supplies cement to various builders and retail consumers through a network of stockiest and retailers. An understanding has been reached among the manufacturers of cement to control the price and supply of cement, but the understanding is not in writing and it is also not intended to be enforced by legal proceedings.

Rock Solid Private Limited (RSPL) is the substantial supplier of clay, slate, blast furnace slag, silica sand which are essential raw materials of cement, and a shortage of same observed in the market. Mr. Arya on behalf of SCPL has executed a supply agreement with RSPL on 20th October 2020 wherein it is provided that RSPL will not supply these raw materials to any other cement manufacturer, against this the purchase commitment has been made from SCPL for all their (RSPL) output at price mentioned in such agreement.

Solid Cement Limited (SCL) who is another cement manufacturer is not happy with the RSPL, because RSPL not supplied the slate and silica power to SCL against the PO (Purchase Order) placed by SCL dated 18th October 2020, hence board of directors of SCL is considering taking legal remedy against RSPL in the capacity of the consumer. SCL borne loss on account of the stock-out situation emerged from the non-availability of raw material. It was found that only half of the consideration paid and 30 days credit was available for making payment of the remaining balance, regarding which payment promise is made by SCL.

Mr. Alok who is co-owner of Mr. Arya in SCPL conducts the market study and concluded that the RMC segment has favourable opportunities because currently competition is relatively less in RMC and RMC based block segments. Moreover, RMC based block has wide acceptance as an economical replacement of the brick-based structure. Hence SCPL must diversify into the RMC segment. Mr. Arya expresses his concerns over the availability of funds for the same. Mr. Anil the third member of SCPL, advices both the co-owners to float capital through the capital market. After numerous rounds of discussions, SCPL decided to go for public issue and listing of its equity shares, largely for business expansion, initially with setting up a new large scale RMC plant.

Mrs. Patel, the Mother of Ms. Drishel, who also resides with her daughter and son-in-law in states and holds NRI status, acquired two immovable properties (one farmhouse for residential purposes and another an agricultural land, because she studies botany during her master and willing to develop botanical garden there) in their native place situated near to Rajkot district of Gujarat in India in the year 2020-2021 for total consideration equivalent to USD 4,70,000. She made payment for the same out of her non-resident account.

Multiple choice questions (2 Marks each for correct answer)

1. Whether the understanding reached among the manufacturers of cement be termed as an agreement
   (a) No, because it is not in writing
   (b) No, because it is also not intended to be enforced by legal proceedings
   (c) No, because it is not in writing and also not intended to be enforced by legal proceedings
   (d) Yes

2. The agreement is executed among SCPL and RSPL on 20th October 2020, can be categories as
   (a) Exclusive supply agreement
   (b) Tie-in arrangement
   (c) Refuse to deal agreement
   (d) None of these

3. Can SCL assume the position of the consumer for the purpose of competition laws?
   (a) No, because only half of the consideration paid by SCL
   (b) No, because SCL is not buying slate and silica sand for personal use or direct resale
   (c) No, because only an individual can be a consumer
   (d) Yes

4. Which of the following statements is correct regarding the acquisition of immovable property in India by Mrs. Patel?
   (a) Mrs. Patel not allowed to acquire any sort of immovable property in India
   (b) Mrs. Patel not allowed to acquire farmhouse and agricultural land in India
   (c) Mrs. Patel may acquire the farmhouse, but not agricultural land in India
   (d) Mrs. Patel may acquire both the farmhouse and agricultural land in India

5. SCPL decided to go for public issue and listing of its equity shares, largely for business expansion, initially with setting up a new large scale RMC plant. In the context of shares, which one of the following statements is correct under the Competition Act, 2002?
   (a) Shares can't be considered as "goods" because nothing has to do with manufacturing, processing, or mining.
   (b) Shares shall be considered as "goods" only if fully paid-up.
   (c) Shares shall be considered as "goods" after the application made for shares since application monies are paid for the acquisition of shares.
   (d) Shares shall be considered as "goods" after allotment.

Descriptive Questions

6. Decide, whether Blip has dominance and does it abused its dominant position? Support your decision with legal backing.

7. Can Mr. Joe acquire immovable property in India, independently? Is the acquisition of a flat by Drishel and Joe, jointly as per the provisions of the Foreign Exchange Management Act and relevant regulations made thereunder? Can Joe acquire another property which is agricultural land, in joint ownership with Drishel for investment purposes?

Answers to Case Study 2

1. (d)
2. (c)
3. (d)
4. (b)
5. (d)

Answer to descriptive questions

6. Facts in the given case are more or less similar to the case (No. 39 of 2018, Competition Commission of India dated 16.04.2019) of Umar Javeed and Google LLC, wherein legal issue also about dominance and its abuse and act of Google found in violation of Section 4(2) of the Competition Act, 2002.

   In the said case, CCI observed to form a prima facie view about the alleged abusive conduct, it would be first appropriate to define the relevant market and to determine the dominance of accused enterprise therein if any. In the present case, it is clearly mentioned that mobile OS due to additional handheld use features are different from OS designed for desktop hence all OS for other devices such as desktop or laptop shall be excluded from the relevant market. Blip appears to be dominant in the relevant market as 80% of mobile phones, which are in use have Diordna as the operating system.

The signing of the Mobile Application Distribution Agreement and Anti Fragmentation Agreement is a pre-condition for mobile manufacturers to pre-install BMS (while using Diordna as OS. Further, BMS is also a bundled suite of Blips' applications and services. In this manner Blip reduced the ability of device manufacturers to develop viable alternatives with selected applications and services out of the BMS suite, hence dis-incentivize them. Thereby restricting technical development to the prejudice of consumers in violation of Section 4 of the Competition Act, 2002.

While reading Section 4 with Section 32 of the Act, it is important to note that the conduct of Blip to tie or bundle applications and services is an attempt to eliminate effective competition from the market. There exists an element of coercion as the mobile manufacturers are coerced to purchase the BMS suite altogether which results in consumer harm through a reduction in choice of products.

7. As per regulation 6 of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, **a person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India**, who is a spouse of a **Non-Resident Indian or an Overseas Citizen of India** may acquire **one immovable property** (other than agricultural land/ farmhouse/ plantation property), **jointly with his/ her NRI/ OCI spouse**, subject to following conditions

   (i) The consideration for the transfer, shall be made out of funds received in India through banking channels by way of inward remittance from any place outside India or funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank;

   (ii) No payment for any transfer of immovable property shall be made either by travellers' cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause;

   (iii) The marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property ;

   (iv) The non-resident spouse is not otherwise prohibited from such acquisition.

   No, Mr. Joe (a person resident outside India, not being a Non-Resident Indian or an Overseas

   Citizen of India) can't acquire immovable property in India, independently

   No, the acquisition of a flat by Drishel and Joe, jointly is not aligned (hence legally invalid, and amount to violation) to the provisions of FEMA and relevant regulations made thereunder, because **marriage has been registered and subsisted for a continuous period of fewer than two years** immediately preceding the acquisition of such property.

   No, Joe can't acquire another property being agricultural land in joint ownership with Drishel for investment purposes because;

   i. The acquisition of agricultural land, farmhouse, and plantation property is specifically prohibited; and

   ii. The time since the marriage took place and subsisted is less than two years; and

   iii. There is a maximum ceiling limit of owning one property

MTP/Nov 2021/Case Study-3
Ronak Builders Pvt. Ltd
(IBC, RERA)

Ronak Builders Pvt. Ltd. (RBL) is engaged in the business of land development, site planning, construction and selling of residential and commercial complexes. After enactment of the Real Estate (Regulation and Development) Act, 2016 (RERD), every project launched by the RBL was registered with the Real Estate Regulatory Authority (RERA). RBL has earned a good reputation in the real estate market and is a trusted name, as it complies the provisions of REDA.

RBL in January, 2017 planned to launch a new real estate project in Panvel, Navi Mumbai. It got registration of the project with the RERA. RBL after doing all the legal formalities relating to the construction of flats prepared some sample flats of 3BHK. The name of this complex was kept as Ronak Heights. It will be of G+20 story building with 15 sections and will have all the modern facilities like, Jim, Swimming Pool, Separate Sports area for Children, Senior Citizen's Lobby, Temple and a Conference Hall. The number of flats in the complex will be 315.

After preparing sample flats, RBL started doing advertising and marketing of the project. The cost of the each flat was fixed for Rs. 80 lakh, which was payable as under:

At the time of booking	:	Rs. 10 lakh
At the time of Registering	:	Rs. 20 lakh
After completing of 5th Floor	:	Rs. 10 lakh
After completing of 8th Floor	:	Rs. 10 lakh
After completing of 11th Floor	:	Rs. 10 lakh
After completing of 15th Floor	:	Rs. 10 lakh
After completing of 20th Floor	:	Rs. 10 lakh
Total	:	Rs. 80 lakh

The possession of the flat will be given to the allottees in the month of December, 2020. Just after making the advertisements, all the flats were booked. The booking amount was collected from all the 315 allottees. The legal documents and stamp papers of each of the flat was prepared and collected Rs 30 lakh each from the allottees.

Thereafter, the work of construction went on full swing. It completed the construction upto 20th floor and collected all the remaining amount due i.e. Rs. 50 lakh each from the allottees. The construction of 20th floor was completed by the end of June 2019 and the allottees were expecting to get the allotment of the flat by the due date i.e. December 2020. However, the furnishing and finishing, installation of electric and sanitary work etc. all of sudden stopped and no construction related activity was going on after Sept 2019.

Some of the allottees who resides nearby Panvel area used to go at the location, on and often to observe the progress of the work. When the work stopped they approached to the RBL and enquired about the development. The RBL ensured that due to upcoming festival time the labours have gone to their native places and after the end of Diwali, the work will resume again.

However, the work, as promised by the RBL could not be started. Many of the allottees contacted at the RBL's office to know the status, but got no satisfactory replies. Ultimately the dead line of giving possession of the flats, which was pre-determined as December 2020, crossed.

Meanwhile it came to the knowledge of some of the allottees that RBL has transferred this real estate project to a third party named Ganpati Constructions Ltd (GCL) without obtaining the consent of the allottees.

This transfer was objected by the allottees and threated to move to RERA and to take other legal recourse, if the RBL is not taking back the completion of the work. After a prolonged discussions held with the officials of the RBL and GCL and the representatives of the allottees, the RBL agreed that all the liabilities pertaining to this real estate project shall be of RBL only and GCL will only do the incomplete work as a sub-contractor.

Some 100 allottees of the flat, demanded their money back from RBL on account of non-completion of the project in time. The RBL requested all such allottees to remain in the project, but the allottees were adamant and were not turning back. As a result, the promoter had to pay off the amount raised from such allottees along with the interest including the compensation as per the provisions contained in the RERD.

However, the remaining 215 (315-100 = 215) allottees desired to stay with the project till the completion and possession but demanded from the promoter to compensate them by paying interest since they are suffering for not providing the flat and had to pay the rent to their present landlord in which they are residing. RBL agreed to their demand.

The site was completed by the end of April 2021. All the remaining allottees were given the possession of the flats.

Based on the captioned facts, answer the following questions:

Multiple Choice Questions (2 Marks each for correct answer)

(1) In the given case, the promoter transferred his rights and liabilities to a third party. Can he do so:
   (a) The promoter cannot transfer his rights and liabilities to a third party
   (b) The promoter can transfer his rights and liabilities to a third party
   (c) The promoter can transfer his rights and liabilities to a third party after obtaining prior written consent of at least 10% of allottees
   (d) The promoter can transfer his rights and liabilities to a third party after obtaining prior written consent from two-third allottees and without the prior written approval of the Authority.

(2) In the given case, RBL obtained the booking amount from the prospective allottees a sum of Rs. 10 lakh. Is it justified:
   (a) RBL can receive any amt as a commitment from the prospective allottees towards the booking of flat
   (b) RBL cannot received any amount at the time of booking of the flat
   (c) RBL cannot accept a sum more than 10% of the cost of the flat. The cost of flat is Rs 80 lakh, so he cannot accept more that Rs. 8 lakh
   (d) RBL cannot accept a sum more than 20% of the cost of the flat. The cost of flat is Rs 80 lakh, so he can accept upto Rs. 16 lakh, while he had actually accepted only Rs, 10 lakh which is permissible

(3) Were the 215 allottees correct in demanding from the promoter to compensate them to pay interest since they are suffering for not providing the flat and had to pay the rent to their present landlord in which they are residing. Choose the correct option as per the provisions of the Real Estate (Regulation and Development) Act, 2016:
   (a) Yes, these allottees shall be given interest for every month of delay, till the handing over of the possession
   (b) These allottees shall not be given any interest
   (c) These allottees shall be given the notional rent of the flat till the handing over of the possession
   (d) These allottees shall be given special discount at the time giving of possession

(4) Can the allottees of the flat, file an application for initiation of Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (IBC):
   (a) No, the allottees can not file CIRP under IBC
   (b) The allottees can file CIRP if the NCLT permits as a special case
   (c) The allottees can file CIRP under IBC provided the number of allottees are not less than 100 under the same real estate or 10% of the total number of allottees, whichever is less
   (d) The RERD was specifically enacted to regulate the real estate business and to safeguard the interest of the home buyers, so the allottees can seek remedies by filing an application before the RERA.

(5) As per the Insolvency and Bankruptcy Code, 2013, in the given case scenario, the amount that was raised by the promoter from the allottees for Ronak Heights, shall be deemed to be an amount of the nature:
   (a) Advance received against booking of flat
   (b) Commercial effect of borrowing
   (c) Consideration for agreement to sale flat
   (d) Reservation of flat against money

Descriptive Questions

(6) The Real Estate (Regulation and Development) Act, 2016 (RERD) was enacted to regularise the unregulated real estate business. Substantiate your answer in light of the given case.

(7) Where the possession of the flat is delayed as per the agreed terms, what recourse is available before the allottees under the IBC and RERD?

Answers to Case Study 3

1. (d)
2. (c)
3. (a)
4. (c)
5. (b)

Answer to descriptive questions

6. The real estate business before the enactment of the RERD was highly unregulated. The builders were dictating their own terms and conditions and the home buyers were helpless, since taking legal recourse takes much more time. The common person was not able to understand the real estate business jugglery like common area, floor area, wall area, carpet area, parking- covered parking- open parking etc.

   The home buyers were also not provided with the copies of the sanctioned plan, lay out of the flats, the quality of the materials to be used and most important the date of possession, which was the practice on the part of the builders to linger on and sometimes, it passes through 5, 7 or even 10 years from the promised date of possession.

   However, after the enactment of the RERD the promoter is duty bound to first get the project registered with RERA. The promoter has to make disclosures of all the relevant information as per the Act. Some of the provisions of the Act, are mentioned here below, which advocates in favour of the statement that the RERD has regularised the un-regulated real estate business.

   Act deals with the matter relating to the registration of real estate project and registration of real estate agents. It consists of section 3 to 10, which discusses over the following issues:

   - Section 3. Prior registration of real estate project with Real Estate Regulatory Authority.
   - Section 4. Application for registration of real estate projects.
   - Section 5. Grant of registration.
   - Section 6. Extension of registration.
   - Section 7. Revocation of registration.
   - Section 8. Obligation of Authority consequent upon lapse of or on revocation of registration.
   - Section 9. Registration of real estate agents.
   - Section 10. Functions of real estate agents

   Act also defines the matter relating to the functions and duties of promoter being covered under section 11 to 18, which elaborate on the following points:

   - Section 11. Functions and duties of promoter.
   - Section 12. Obligations of promoter regarding veracity of the advertisement or prospectus.
   - Section 13. No deposit or advance to be taken by promoter without first entering into agreement for sale.
   - Section 14. Adherence to sanctioned plans and project specifications by the promoter.
   - Section 15. Obligations of promoter in case of transfer of a real estate project to a third party.
   - Section 16. Obligations of promoter regarding insurance of real estate project.
   - Section 17. Transfer of title.
   - Section 18. Return of amount and compensation.

   Some of the benefits that the allottees will have due to Insolvency and Bankruptcy Code are:

   1. In the given case, RBL has taken the booking amount more than that prescribed under the Act. The Act provides that booking amount shall not be more than 10% of the cost of the flat.
   2. Further RBL has delayed in handing over the possession of flats. Some of the allottees have demanded the refund of the amount along with interest and compensation, which RBL had to passed on to them.
   3. Further the remaining allotees intended to stay till the possession of the flats, but in this case also RBL has to pay the monthly interest for every month of delay, till the handing over of the possession.
   4. Rights of the allottees

   The rights given to the allottees have been described under Chapter IV of the RERD. Sub-section (1) to (5) of section 19 provides the rights attached to the allottees, which are as under:

   (1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.

   (2) The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.

(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (l) of sub-section (2) of section 4.

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

(5) The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.

This all happened only to due to the enactment of the Act. Prior to the enactment the home allottees were not entitled to get any amount from the builder nor any interest and compensation.

Thus, it is right to say that the enactment of this Act has regularised the un-regulated real estate business.

7. Under the provisions of IBC

Explanation (i) to Section 5(8)(f) of the Insolvency and Bankruptcy Code, 2016 provides that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.

Thus, the allottees are treated as financial creditors. Further the second proviso to section 7(1) provides that the financial creditors who are allottees under a real estate project, an application for initiating CIRP against the corporate debtor shall be filed-

- jointly by not less than 100 of such allottees under the same real estate project; or
- not less than 10% of the total number of such allottees under the same real estate project,

whichever is less.

In the given case the total number of allottees are 315. Thus, not less than 100 number of allottees or 10% of 315 (say 32 after rounding off), whichever is less, means at least 32 allottees together can initiate CIRP against RBL.

Under the provisions of RERD

Section 18 of the RERD deals with the return of amount and compensation. It provides that -

If the promoter fails to complete or is unable to give possession of an apartment, plot or building, —

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

The language of the above section bears the sentence “without prejudice to any other remedy available”, it means that if any other action/ remedy is available in other Act, will not affect the remedy provided to the allottees under the Insolvency and Bankruptcy Code, 2016. Thus, it is very much clear the allottees can take the advantages of RERD as well as of the IBC.

Where the allottee does not intend to withdraw

The proviso to section 18 of the Insolvency and Bankruptcy Code, 2016, provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

MTP/May 2021/Case Study-4
State Metro Rail Corporation
(RERA)

Alta Modern Builders Ltd (AMBL) is a builder and have built many residential complexes and shopping malls in Mumbai, Pune, Bangalore and Chennai.

AMBL was established initially as a private sector company in 1980. As the business grew up, it was converted into Public Ltd. in 2005. It have its registered office and corporate office in Versova, Mumbai.

In the year 2017, it purchased a land near Kurla, Mumbai admeasuring of 50,000 sq feet and developed and took approval from the competent authority for construction of flats. The AMBL has plan to construct 500 residential flats in that area consisting of 2 BHK and 3 BHK. The cost of the flat was kept as Rs. 99 lakh.

The AMBL constructed some sample flats and started giving advertisements of the flats. The registration of this real estate project with RERA was pending and before registration it booked and taken the deposit amount of Rs. 10 lakh from each of the 300 allottees.

Some of the real estate agents who seen the advertisement of booking of the flats by the AMBL approached the builder. The negotiations were made between the agents and the AMBL that, AMBL will pay Rs. 1,00,000 to each of the real estate agent, if he brings in any prospective buyer to book the flat, and through his efforts the flat is booked.

Ganpati Estate Agent was one of such real estate agent, who brought in 50 prospective home buyers with the builder and all have booked the flats. Ganpati Estate Agent has not got registration with RERA as an agent. The AMBL paid Rs. 50 lakh to this agent.

The RERA officials of the Mumbai, Maharashtra came to know that AMBL has received the amount without getting itself registered with the RERA. The RERA officials imposed penalty on the AMBL. Further during the course of investigation of books of the AMBL, the RERA official came to know that one Ganpati Estate Agent, who brought in 50 customers, was also not registered with the RERA. It called on the explanation of Ganpati Estate Agent and when no satisfactory reply was received, imposed a penalty on the agent, for not getting registered with the RERA.

The AMBL after paying the penalty immediately registered the project with RERA and created its web-page on the website of the RERA and put in all the relevant information as mentioned in the RERD. While displaying such information, the AMBL submitted some false information of its web-page, so that by reading this, more customers can be attracted. The false information was about the carpet area, free parking for one car for one flat and providing of the modern amenities in the complex, such as school up to the age of 5th class, sports club house, conference hall etc.

Actually, the AMBL has falsely represented for free parking. It was not free parking of a car but of two wheeler only. The carpet area as mentioned at the web-page of the RERA, was actually captured by the surrounding walls. When the complaints were lodged by some of the allottees with RERA that there are differences between, what has been displayed on the web-page of AMBL at the website of the RERA and what documents have been provided to allottees. The RERA officials again investigated the matter and imposed file on the company.

The AMBL who was doing business of real estate since 1980 did not took seriously even after the enactment of the RERD. It thought that noting has changed and the terms and conditions of the builder will prevail as was being done previously. However, after the enactment of the RERD, the Regulator RERA is there and the promoter have to adhere to the compliances as prescribed under the Act.

Based on the captioned facts, answer the following questions:

Multiple Choice Questions (2 Marks for each correct answer)

1. the given case, the promoter has booked some of the flats prior to registration of real estate project with the Real Estate Regulatory Authority (RERA). What penalty can be imposed on the promoter by the RERA:
   (a) The penalty may extend up to 5% of the estimated cost of the real estate project as determined by the Authority
   (b) The penalty may extend up to 10% of the estimated cost of the real estate project as determined by the Authority
   (c) The penalty may extend up to 12% of the estimated cost of the real estate project as determined by

the Authority
(d) The penalty may extend up to 15% of the estimated cost of the real estate project as determined by the Authority

2. The promoter while submitting the application for registration of real estate project under section 4 of the RERD submitted false information that he have the legal title to the land, but in fact at the time of application for registration, he was not having such clear title. What penalty can be imposed on the promoter:
   (a) The promoter shall be liable to a penalty which may extend up to 1% of the estimated cost of the real estate project, as determined by the Authority.
   (b) The promoter shall be liable to a penalty which may extend up to 3% of the estimated cost of the real estate project, as determined by the Authority
   (c) The promoter shall be liable to a penalty which may extend up to 5% of the estimated cost of the real estate project, as determined by the Authority
   (d) The promoter shall be liable to a penalty which may extend up to 7% of the estimated cost of the real estate project, as determined by the Authority

3. What is the time limit within which the promoter shall execute a registered conveyance deed in favour of the allottee, in the absence of any local law:
   (a) Within one month form the date of issue of occupancy certificate
   (b) Within two months form the date of issue of occupancy certificate
   (c) Within three months form the date of issue of occupancy certificate
   (d) Within six months form the date of issue of occupancy certificate

4. What is the time limit within which the allottee shall take physical possession of the apartment:
   (a) Within a period of one month of the occupancy certificate
   (b) Within a period of two months of the occupancy certificate
   (c) Within a period of three months of the occupancy certificate
   (d) Within a period of four months of the occupancy certificate

5. In the given case, the real estate agent, who was not registered with the RERA shall bear the penalty of ___for every day during which such default continues, which may extend up to five per cent. of the cost of the apartment:
   (a) Rs. 5000/-
   (b) Rs. 7000/-
   (c) Rs 10000/-
   (d) Rs. 15000/-

Descriptive Questions

6. Real Estate Agent is a person who merely assist any person in sale / purchase of flat in any apartment and also provides 'To-let' services to the flat owners / tenants. He have no role in developing of land, getting approval of the site plan, registering and constructing the apartments. He have no role to play in the Real Estate (Regulation and Development) Act, 2016. Comment on the statement. (6 Marks)

7. The post RERD era have put stringent compliance norms on the part of the promoter to ensure the provisions of the RERD. State the compliances which are to be adhered by the promoter in terms of the RERD.

Answers to Case Study 4

1. (b)
2. (c)
3. (c)
4. (b)
5. (c)

Answer to descriptive questions

6. The statement mentioned in the question is not correct. In fact, apart from the promoter, the real estate agent have also been put under the RERD to obtain prior registration and have cast certain duty of him.

   Section 9 of the Act deals with the registration of real estate agents. Its sub-section (1) provides that no real estate agent shall facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real es tate project or part of it, being the part of the real estate project registered under section 3, being sold by the promoter in any planning area, without obtaining registration under this section.

   Further, sub-section (7) provides that where any real estate agent who has been granted registration under this Act commits breach of any of the conditions thereof or any other terms and conditions specified under this Act or any rules or regulations made thereunder, or where the Authority is satisfied that such registration has been secured by the real estate agent through misrepresentation or fraud, the Authority may, without prejudice to any other provisions under this Act, revoke the registration or suspend the same for such period as it thinks fit.

Further Sec 10 of the Act deals with the functions of the real estate agents & provides that Every real estate agent registered under section 9 shall-

(a) not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority;

(b) maintain and preserve such books of account, records and documents as may be prescribed;

(c) not involve himself in any unfair trade practices, namely:—

(i) the practice of making any statement, whether orally or in writing or by visible representation which—

a. falsely represents that the services are of a particular standard or grade;

b. represents that the promoter or himself has approval or affiliation which such promoter or himself does not have;

c. makes a false or misleading representation concerning the services;

(ii) permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.

(d) facilitate the possession of all the information and documents, as the allottee, is entitled to, at the time of booking of any plot, apartment or building, as the case may be;

(e) discharge such other functions as may be prescribed.

Thus, from reading of section 9 and 10, it is clear that the real estate agent is required to get the registration with RERA and cast duty on such agent to adhere the provisions of RERD failing which penal provisions are attracted as specified in section 62. This section deals with the penalty for non - registration and contravention under section 9 and 10 and provides that if any real estate agent fails to comply with or contravenes the provisions of section 9 or section 10, he shall be liable to a penalty of ten thousand rupees for every day during which such default continues, which may cumulatively extend up to five per cent. of the cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority.

7. Yes, it is true to say that post era of RERD have tighten the promoters. Earlier, the promoters were not having the transparency in dealing with the home buyers and often the possession of flats were delayed.

The functions and duties of the promoter have been mentioned in Chapter III of the RERD consisting of section 11 to 18. A brief overview of the aforesaid sections are as under:

Section 11: Functions and duties of promoter

1. The promoter after getting the login id and password has to create his web page on the website of the RERA and enter all details of the proposed project in all the f ields as provided, for public viewing, including:
   (a) details of the registration granted by the Authority;
   (b) quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;
   (c) quarterly up-to-date the list of number of garages booked;
   (d) quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;
   (e) quarterly up-to-date status of the project; and
   (f) such other information and documents as may be specified by the regulations made by the Authority.
2. The advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.
3. The promoter, at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:-

(a) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;

(b) the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

4. The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

(b) be responsible to **obtain the completion certificate or the occupancy certificate**, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be.

(c) be responsible to **obtain the lease certificate**, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;

(d) **be responsible for providing and maintaining the essential services**, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;

(e) **enable the formation of an association or society** or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable:

Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;

(f) **execute a registered conveyance deed** of the apartment/plot/building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided u/s 17 of this Act;

(g) **pay all outgoings until he transfers the physical possession** of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefore by such authority or person;

(h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;

5. The promoter may cancel the allotment only in terms of the agreement for sale:

Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause.

6. The promoter shall prepare and maintain all such other details as may be specified, from time to time, by regulations made by the Authority.

In addition to the functions and duties mentioned in section 11, few more sections of Chapter II highlight the compliance to be adhered by the promoter. These are:

- Section 12. Obligations of promoter regarding veracity of the advertisement or prospectus.
- Section 13. No deposit or advance to be taken by promoter without first entering into agreement for sale
- Section 14. Adherence to sanctioned plans and project specifications by the promoter
- Section 15. Obligations of promoter in case of transfer of a real estate project to a third party
- Section 16. Obligations of promoter regarding insurance of real estate project
- Section 17. Transfer of title
- Section 18. Return of amount and compensation

In the given, the promoter has not complied with the provisions of RERD and was therefore penalised.

MTP/Nov 2021/Case Study-5
Sun Private Limited (SPL)
(FEMA)

Sun Private Limited (SPL) is a fully integrated operation from taking a 3D model as input to the design and manufacturing of tools to the manufacturing of finished products. The Company is also into Engineering Services with headquarters in Mumbai, India managed and run mainly by the promoters Mr. S (Managing Director), Mr. T (Director), and Mr. U (Director). All three are Indian residents.

SPL has a marketing office with warehouse facility Sun Trading Spolka Z.O.O (STS) in Poland, fully owned and controlled by it, to cater to the demands of European customers. LTS has been established with the permission of the Reserve Bank of India, duly complying with the required statutory formalities.

On 1st January 2020, SPL, shipped some engineering products with a CIF value of EUR 265,000 to STS; the cost of the products is EUR 250,000, Insurance EUR 3,000, and Freight EUR 12,000. Also, some of the products worth CIF GBP 126,000 were shipped to one of the customers in the UK on the same date. The total value of Exports of SPL during the calendar year 2020 from various customers from different countries was USD 12 Million.

SPL during the normal course of business also entered into a Supply (Export) Agreement with one of its customers Royal Group (RG) in the UK for the supply of two machines, a total export value estimated to be CIF GBP 4 Million.

As per the terms of supply:

a. Two Machines, as specified, worth about CIF GBP 2 Million each are to be exported by SPL to RG.
b. Exact value of each of the Machinery can be ascertained only after the export to the UK since some more processes are involved during installation and commissioning.
c. An advance of GBP 1 Million is to be remitted to India by RG to SPL for the purchase or import of critical components required for the manufacture of the said machines.
d. Interest shall be payable on Advance payment by SPL to RG up to the date of the bill of lading of the first shipment.
e. The first Machinery is to be supplied within 15 months from the date of receipt of advance payment in India and the second one within a period not exceeding 27 months.

Accordingly, as per the terms of supply, a sum of GBP 1 Million was received by SPL from RG on 1st July 2021 as an advance towards exports through the State Bank of India. The First machinery was supplied on time and the relevant export declaration was furnished to the specified authority in a specified manner. Other export formalities were duly complied with.

SPL also established a marketing office in Dubai, UAE - Sun Emirates LLC (SEL) for conducting normal business activities of the Indian entity, to cater to the requirements of customers from the Middle East. For promoting business in the Middle East Region, SPL sponsored a T20 Cricket match in Dubai International Cricket stadium and approached the SBI for remittance of USD 250,000 towards sponsorship Fees.

SPL is holding certain properties in the form of some residential flats in UAE ready for sale. Prestige Real Estate LLC (PREL) is a well-reputed real estate agent in UAE and has experience in marketing, advertising, and selling real estate property. While on travel to Dubai, Mr. S and T, on behalf of SPL entered into an Agency Agreement PREL for the sale of properties in UAE. As per the Agreement

a. PL grants PREL the exclusive rights to sell all the residential flats in UAE.
b. Any and all offers and negotiations in regards to the said properties shall be conducted by PREL
c. PREL shall do everything possible to entertain and vet offers made. It is the Agent's sole purpose to sell the properties and as so shall be permitted to employ additional Brokers to assist in the selling and advertising process.
d. Any offers considered valid should be reported to the Seller within 2 days and it shall be at the discretion of SPL to accept or decline.
e. SPL agreed to remit PREL a flat commission of certain % of the final sale price, on a case- to-case basis.

PREL is also authorized to sell one of the commercial plots owned by SPL in India on similar terms as stated above. For one of the plots owned by SPL in Pune, PREL finds a buyer from UAE. Because of the efforts of PREL, such a plot could be sold at USD 400,000. PREL transferred USD 400,000 to India, as sale proceeds. As per the Agreement, USD 22,000 is to be transferred as Commission to PREL.

Mr. U wants to remit USD 250,000 under the LRS to buy lottery tickets abroad making use of his business connections.

Multiple Choice Question (2 Marks for each correct answer)

1. For one of the plots owned by SPL in Pune, PREL find a buyer from UAE. Because of the efforts of PREL, such a plot could be sold at USD 400,000. PREL transferred USD 400,000 to India, as sale proceeds. As per the Agreement, USD 22,000 is to be transferred as Commission to PREL. In the context of commission which of the following statements is correct:
(a) Without any pre-approval from the Reserve Bank of India upto USD 100,000 or 5% of the amount remitted, whichever is higher, can be transferred as a commission by SPL to PREL
(b) Without any pre-approval from the Reserve Bank of India any amount upto USD 25,000 or 5% of the amount remitted, whichever is higher can be transferred as a commission by SPL to PREL
(c) Without any pre-approval from the Reserve Bank of India only USD 20,000 can be transferred as a commission by SPL to PREL in the given case.
(d) Without any pre-approval from the Reserve Bank of India upto USD 50,000 or 5% of the amount remitted, whichever is lesser, can be transferred as a commission by SPL to PREL.

2. The First machinery was supplied on time and the relevant Export Declaration was furnished to the specified authority in a specified manner. In the context of the Export Declaration, which one of the following statements is not correct?
(a) Export of goods can be made without furnishing the specified Declaration when goods are imported free of cost on a re-export basis;
(b) Export of goods can be made without furnishing the specified Declaration when goods are sent outside India for testing subject to re-import into India.
(c) Export of goods can be made w/o furnishing the specified Declaration when defective goods are sent outside India for repairs at an agreed price with the supplier outside, subject to re-import into India.
(d) Export of goods can be made without furnishing the specified Declaration in case of unaccompanied personal effects of travelers.

3. STS (Sun Trading Spolka Z.O.O) in Poland in the stated case shall be treated as:
(a) Person resident outside India
(b) Person resident in India
(c) Person not ordinary resident in India
(d) No relevance to LTS of residential status with reference to Indian laws

4. For promoting business in the Middle East Region, SPL sponsored a T20 cricket match in Dubai International Cricket stadium and approached the State Bank of India for remittance of USD 250,000 towards sponsorship Fees.
(a) SBI can remit USD 250,000 towards cricket sponsorship without any limits and any pre-approval.
(b) SBI can remit USD 250,000 with the approval from Reserve Bank of India.
(c) SBI can remit USD 250,000 with prior approval from the appropriate ministry of the GOI.
(d) Remittance by State Bank of India of USD 250,000 towards T20 cricket sponsorship in Dubai is a transaction for which remittance of foreign exchange is prohibited.

5. Mr. U wants to remit USD 250,000 under the Liberalized Remittance Scheme (LRS) to buy lottery tickets abroad making use of his business connections.
(a) Remittance to buy lottery tickets abroad is a prohibited item under LRS
(b) Remittance of more than USD 100,000 for buy lottery tickets abroad is prohibited under LRS
(c) Remittance upto USD 250,000 per FY is permitted to buy lottery tickets abroad under LRS
(d) Remittance only upto USD 150,000 per FY is permitted to buy lottery tickets abroad under LRS

Answers to Case Study 4

1. (b)
2. (c)
3. (b)
4. (c)
5. (a)

Answer to descriptive questions

6.

A. Regulation 9 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 deals with the period within which the export value of goods is to be realized. It is provided in Sub Regulation 9 (1) (a) that that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorized dealer as soon as it is realized and in any case within fifteen months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of shipment of goods.

It is further provided that RBI, or subject to the directions issued by that bank on this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the said period.

Since in the given case, STS is a warehouse facility of SPL established with the permission of RBI in Poland and the goods were shipped and/or exported on 1st January 2020, EUR 265,000 is expected to be realized within the next 15 months i.e. by March 31st, 2021, unless the period is further extended as above. It is the full value of export i.e. CIF value (EUR 265,000) is to be realized within the period stipulated in Regulation 9.

B. Regulation 9 of the Foreign Management (Export of Goods & Services) Regulations, 2015 deals with the period within which export value of goods to be realized. As per sub-regulation 9 (1), the amount representing the full export value of goods / software/ services exported shall be realized and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of export,

It is further provided that the Reserve Bank, or subject to the directions issued by that Bank on this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the said period.

Since in the given case, the goods were shipped and/or exported on 1st January 2020, GBP 126,000 is expected to be realized within the next 9 months i.e. by September 30th, 2020, unless the period is further extended as above. It is the full value of export i.e. GBP 126,000 is to be realized within the period stipulated.

C. Regulation 9 of the Foreign Management (Export of Goods & Services) Regulations, 2015 deals with the period within which export value of goods to be realized. As per Regulation 9 (2) (a) Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realized and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of export.

It is further provided that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the said period.

Since in the given case, the goods were shipped and/or exported on 1st January 2020, EUR 265,000 is expected to be realized within the next 9 months i.e. by September 30th, 2020, unless the period is further extended as above. It is the full value of export i.e. CIF value (EUR 265,000 is to be realized within the period stipulated.

7. According to section 6 (4) of the Foreign Exchange Management Act, 1999 (here-in-after referred to as the Act) read with regulation 5 of Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015,

(1) A person resident in India may acquire immovable property outside India;

(a) By way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the Act, or referred to in clause (b) of regulation 4;

(b) By way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (foreign currency accounts by a person resident in India) Regulations, 2015;

(c) Jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India;

(2) A person resident in India may acquire immovable property outside India, by way of inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.

(3) A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

These are the possible ways by which these properties might have been legally acquired by SPL in UAE.

MTP/May 2022/Case Study-1
Mr. Surjit
(RERA, FEMA, PMLA, PBPTA)

Mr. Surjit, aged 52 years and a neuro surgeon by professional, went to USA for the first time on 15th February, 2021, for assisting in the operation of nervous system of his nephew, Mr. Ashok, who was unable to travel to India. His period of stay in USA was for an uncertain period as it was dependent on the recovery by Mr. Ashok.

During his stay in USA, he contracted with a local furniture dealer on 5th April, 2021 and imported furniture worth $ 130,000 for a new tenement home bought by him in New Delhi.

Mr. Ashok was able to recover fast and so, Mr. Surjit was able to leave for India on 20th April, 2021. At the time of leaving, Mr. Ashok gave $ 6,000 currency notes as well as ₹ 80,000 as a gift to Mr. Surjit and his family for helping him in his tough times.

Mr. Surjit used letter of credit drawn from SBI bank for the purpose of making payment in respect of the imported furniture but provided false declaration in the customs regarding the type of imports made because of which there was invasion of duty of ₹ 25,00,000. However, such an act was unrevealed by the Customs Authority & Mr. Surjit was held punishable for such an offence u/s 135 of the Customs Act, 1962.

The Director under the Prevention of Money Laundering Act, 2002, got information of such an act by Mr. Surjit and accordingly on the basis of such information, the Director after recording the reasons in writing, passed an order of provisional attachment of the imported furniture for a maximum period as prescribed on 25th June, 2021. The Director then on 5th July, 2021 filed a complaint with the Adjudicating Authority against Mr. Surjit and the said Authority served a show cause notice to Mr. Surjit on 10th July, 2021, as to why the imported furniture should not be declared as a property involved in money laundering.

Mr. Surjit duly replied to such notice. The Adjudicating Authority heard Mr. Surjit as well as the Director and after taking into account all relevant materials, passed an order confirming the provisional attachment of the imported furniture on 30th September, 2021. Mr. Surjit aggrieved by the same filed an appeal with the Appellate Tribunal on 30th October, 2021.

During the appellate proceedings, the Tribunal requisitioned from the Customs Authority, the records pertaining to Mr. Surjit and after considering all facts, passed an order in favour of Mr. Surjit. Aggrieved by the same, the Director filed an appeal with the High Court which was based on factual grounds.

Further, during the F.Y. 2021-22, Mr. Surjit had used his two international debit cards, one associated with his Resident Foreign Currency Account and other associated with his SBI Bank Account for making payment of $ 80,000 and $ 195,000, respectively for certain prescribed current account transactions. As per Mr. Surjit, the payment of $ 195,000 pertained to remitting foreign exchange for the purpose of his daughter's education in the University of Chicago, USA but the said University had provided an estimation fees certificate of only $ 35,000.

The father of Mr. Surjit, who had recently passed away, intended Mr. Surjit to buy a home from the wil l money he inherited and donate it to an orphanage and accordingly, Mr. Surjit had bought the said tenement home in New Delhi in the name of his childhood friend, Mr. Mangal who is a trustee of an orphanage, so that, later on it can be easily transferred to the orphanage. However, the Initiating Officer under the PBPT Act, 1988 initiated an inquiry in respect of such tenement home and during the inquiry issued a show cause notice to Mr. Surjit and Mr. Mangal that why the tenement home should be not treated as benami property.

Mr. Surjit had bought an apartment in the real estate project named 'Nivas' by SPL (P) Ltd. in the city of Greater Noida, the completion of time which got extended by 3 months on an application made by SPL (P) Ltd. for the same with the authority under RERA due to occurring of certain riots in the said city. Earlier, also the authority under RERA had granted extension of time in completion of 'Nivas' by 2 months, after recording the reasons in writing. Accordingly, Mr. Surjit and his family has decided to stay in the said tenement home till the time their newly bought apartment in the Greater Noida got ready for physical possession.

Multiple choice questions

1. Whether the Authority under RERA can be rightly said to have granted extension of time in completion of 'Nivas' and in case if SPL (P) Ltd. again makes an application for extension of time, then how much maximum time can be granted by Authority under RERA, once again?
   (a) No, as opportunity of being heard should have been given to SPL (P) Ltd. and the Authority under RERA can again grant extension of time for 1 year.

(b) No, as riots in the city cannot be considered as 'force majeure' and the Authority under RERA can again grant extension of time to SPL (P) Ltd. for maximum 1 year.
(c) Yes, as it appears that there is no default on the part of SPL (P) Ltd. and the Authority under RERA can again grant extension of time to SPL (P) Ltd. for maximum 7 months.
(d) Yes, as it is upon the discretion of the Authority under RERA to grant of extension of time and it can again grant extension of time to SPL (P) Ltd. for maximum 6 months.

2. How much excess Indian currency can be said to have been brought by Mr. Surjit into India from USA and whether any declaration needs to be given in case of the USD currency notes brought into India by Mr. Surjit to the Custom Authorities?
(a) Mr. Surjit has brought in excess ₹55,000 in India and in case of USD currency notes brought into India, he is not required to provide declaration to Custom Authorities but to the Authorised Dealer.
(b) Mr. Surjit has brought such amount of Indian currency which is within the limits in India and in case of USD currency notes brought into India, he is not required to provide declaration to the Custom Authorities.
(c) Mr. Surjit has brought in excess ₹ 30,000 in India and in case of USD currency notes brought into India, he is not required to provide declaration to Custom Authorities but to the Authorised Dealer.
(d) Mr. Surjit has brought in excess ₹ 55,000 in India and in case of USD currency notes brought into India, he needs to provide declaration to the Custom Authorities.

3. What shall be duty of director on confirming the attachment order by the Adjudicating Authority and till what maximum time period such order should have continued if Mr. Surjit had not filed appeal against the same and there were no proceedings pending before the Special Court under the Prevention of Money Laundering Act, 2002 in case of Mr. Surjit?
(a) The director shall forthwith take the possession of the imported furniture of Mr. Surjit on confirming the attachment order by the Adjudicating Authority and such order should have continued till the date of 29th March, 2022.
(b) The director shall forthwith make an application to the Special Court to take the possession of the imported furniture of Mr. Surjit on confirming the attachment order by the Adjudicating Authority and such order should have continued till the date of 22nd December, 2021.
(c) The director shall initiate investigation unless stayed by court on confirming the attachment order by the Adjudicating Authority & such order should have continued till the date of 29th March, 2022.
(d) The director shall forthwith take the possession of the imported furniture of Mr. Surjit on confirming the attachment order by the Adjudicating Authority and such order should have continued till the date of 30th September, 2022.

4. Whether the Appellate Tribunal was having the authority to requisition the records pertaining to Mr. Surjit from the Customs Authority and whether the appeal filed by the Director can be entertained by the High court?
(a) Yes, as the Appellate Tribunal has the same powers as are vested in a civil court under the Code of Criminal Procedure, 1973 for such matter and the appeal filed by the Director can be entertained by the High court.
(b) Yes, as the Appellate Tribunal shall not be bound by the procedure laid down under the Code of Civil Procedure, 1908 for such matter and the appeal filed by the Director cannot be entertained by the High court.
(c) Yes, as the Appellate Tribunal has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 for such matter and the appeal filed by the Director can be entertained by the High court.
(d) No, as the Appellate Tribunal has the power to only requisition any public record and the appeal filed by the Director can be entertained by the High court.

5. Whether the Initiating Officer under the Prohibition of Benami Property Transactions Act, 1988 had the authority to initiate inquiry in respect of the tenement home and whether such inquiry can be continued after the issue of show cause notice by the Initiating Officer?
(a) Yes, provided the Initiating Officer had obtained previous sanction of the 'competent authority' as explained, and such inquiry shall be deemed to cease on issue of SCN by the Initiating Officer.
(b) Yes, provided the Initiating Officer had obtained previous approval of the Approving Authority and such inquiry shall be deemed to cease on issue of show cause notice by the Initiating Officer.
(c) Yes, provided the Initiating Officer had obtained previous sanction of the Adjudicating Authority and such inquiry can be continued on previous approval of the Approving Authority after issue of show cause notice by the Initiating Officer.
(d) Yes, provided the Initiating Officer had obtained previous approval of the Approving Authority and

such inquiry can be continued on previous approval of the Approving Authority after issue of show cause notice by the Initiating Officer.

II. Descriptive Questions

6. Whether the Director under the Prevention of Money Laundering Act, 2002, can be considered to have been properly passed the order of provisional attachment of the imported furniture by Mr. Surjit?

7.

(i) What shall be the residential status of Mr. Surjit for F.Y. 2020-21 as per FEMA, 1999?

(ii) Whether Mr. Surjit has properly availed the foreign exchange facility under the Liberalised Remittance Scheme (LRS) during F.Y. 2021-22 and if not, what could be the amount of penalty that could be levied upon him for contravention of the same?

8. Whether the tenement house bought in New Delhi by Mr. Surjit in the name of Mr. Mangal can be considered as a benami transaction?

Answers to Multiple Choice Questions

1. (c)
2. (d)
3. (d)
4. (c)
5. (b)

Answers to Multiple Choice Questions

Answer 6

Legal Position

Evasion of duty or prohibitions as per Section 135 of the Customs Act, 1962 is a Scheduled Offence under the Prevention of Money Laundering Act, 2002 as per Paragraph 12 of Part A of the Scheduled Offences.

Section 2(1)(u) defines "proceeds of crime" as any property derived or obtained, direct ly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

As per Section 5 of the Prevention of Money Laundering Act, 2002:

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

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

Such director/ any other officer may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

Condition for attachment: Provided that no such order of attachment shall be made unless, in relation to the scheduled offence:

- a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or
- a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or
- a similar report or complaint has been made or filed under the corresponding law of any other country.

Exception to the aforesaid conditions:-

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

Given Case & Analysis

Mr. Surjit provided false declaration in the customs regarding the type of imports made because of which there was invasion of customs duty of ₹ 25,00,000. Such act was unrevealed by the Customs authority and Mr. Surjit was held punishable for such an offence under section 135 of the Customs Act, 1962.

Thus, Mr. Surjit has committed a Scheduled Offence as aforesaid and he was in possession of the proceeds of crime i.e. the imported furniture.

As it was a Scheduled Offence, the Director could have only attached such furniture if the any of the aforesaid conditions were satisfied but there is an exception that in case if Director on the basis of material in his possession, has reasons to believe that if the property involved in money -laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

Thus, the Director under the Prevention of Money Laundering Act, 2002, can be considered to have been properly passed the order of provisional attachment of the imported furniture by Mr. Surjit provided he was having reasons to believe that on the basis of material in his possession that the non-attachment of the imported furniture was likely to frustrate any proceeding under this Act.

Answer 7

(i) As per Section 2(v) of the FEMA, 1999, "Person resident in India", inter-alia, means: a person residing in India for more than 182 days during the course of the preceding financial year but does not include a person who has gone out of India or who stays outside India, in either case—
(a) for or on taking up employment outside India, or
(b) for carrying on outside India a business or vocation outside India, or
(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period.

Implication of the term **'intention to stay outside India'**:- If a person goes outside India in such circumstances that his period of stay outside India is not certain, it cannot be said that he has intention to stay outside India for an uncertain period.

It is given that Mr. Surjit went to USA for the first time on 15th February, 2021, for assisting in the operation of nervous system of his nephew, Mr. Ashok, who was unable to travel to India. So, he would have resided in India for more than 182 days during the course of the preceding financial year 2019-20.

Further it is given that his period of stay in USA was for an uncertain period as it was dependent on the recovery by Mr. Ashok who was able to recover fast and so, Mr. Surjit was able to leave for India 20th April, 2021.

Now here, it cannot be said that Mr. Surjit had intention to stay outside India for an uncertain period as in the given circumstances his stay outside India dependent on the recovery of his nephew, Mr. Ashok.

Thus, the residential status of Mr. Surjit for F.Y. 2020-21 as per FEMA, 1999 would be **person resident in India**.

(ii) Under the Liberalised Remittance Scheme (LRS), all resident individuals, including minors, are allowed to freely draw and remit up to USD 250,000 per financial year (April – March) for any permissible current or capital account transaction or a combination of both.

AD Category I banks and AD Category II, may release foreign exchange up to USD 2,50,000 or its equivalent to resident individuals for studies abroad without insisting on any estimate from the foreign University. However, AD Category I bank and AD Category II may allow remittances (without seeking prior approval of the RBI) > USD 2,50,000 based on the estimate received from the institution abroad.

'Drawal ' means drawal of foreign exchange from an authorised person and includes opening of Letter of Credit or use of International Credit Card or International Debit Card or ATM card or any other thing by whatever name called which has the effect of creating foreign exchange liability.

No approval is required where any remittance has to be made from an RFC account.

Given Case & Analysis:

During the F.Y. 2021-22, Mr. Surjit imported furniture from USA worth $ 1,30,000 for a new tenement home bought by him in New Delhi for which he used letter of credit drawn from SBI bank for the purpose of making payment.

Besides, Mr. Surjit had used his two international debit cards, one associated with his Resident Foreign Currency Account and other associated with his SBI bank account for making payment of $ 80,000 and $1,95,000, respectively, for certain prescribed current account transactions. As per Mr. Surjit, the payment of $1,95,000 pertained to remitting foreign exchange for the purpose of his daughter's education in the University of Chicago, USA but the said University had provided an estimation fees certificate of only $ 35,000.

Thus, during the F.Y. 2021-22, Mr. Surjit has drawn $ 1,30,000 + $ 80,000 + $ 1,95,000 = $ 4,05,000 which would be reduced by $ 80,000 (as drawn from RFC account) and $ 35,000 (estimation fees certificate by University of Chicago, USA) = $ 2,90,000.

Thus, Mr. Surjit has drawn $ 40,000 in excess of the prescribed limit of $ 2,50,000 for which penalty leviable would be upto three times of the sum involved, as it is quantifiable and if it is a continuing offence, further penalty upto ₹ 5,000 per day after first day as per Section 13 of the FEMA, 1999.

Penalty that could be levied upon Mr. Surjit = $ 40,000 × 3 = $ 1,20,000 equivalent in Indian rupees.

Answer 8

As per Section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, "Benami transaction", inter-alia, means a transaction or an arrangement where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person.

In the matter of *Bhim Singh & Anr vs Kan Singh (And Vice Versa) 1980 AIR 727, 1980 SCR (2) 628,* the Hon'ble Supreme Court of India, observed as given below –

The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus:

(a) The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction;

(b) if it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary;

(c) the true character of the transaction is governed by the intention of the person who has contributed the purchase money; and

(d) the question as to what his intention was has to be decided on
   (i) the basis of the surrounding circumstances,
   (ii) the relationship of the parties,
   (iii) the motives governing their action in bringing about the transaction and
   (iv) their subsequent conduct etc.

All the four factors stated above may have to be considered cumulatively (O P Sharma vs. Rajendra Prasad Shewda & Ors. (CA 8609-8610 of 2009) (SC).

Given Case & Analysis:

Here, prima facie it appears that it is a benami transaction as Mr. Surjit has paid the consideration money for purchase of the tenement house bought in New Delhi but it has been registered in the name of Mr. Mangal who is his child hood friend.

The tenement house bought in New Delhi by Mr. Surjit in the name of Mr. Mangal can be considered as a benami transaction.

However, consideration needs to be given to the four factors as discussed above in the case law, to the given situation as follows:

Factors	Given case
The basis of the surrounding circumstances	The father of Mr. Surjit, who had recently passed away, intended Mr. Surjit to buy the said home from the will money he inherited and donate it to an orphanage
The relationship of the parties	Mr. Surjit and Mr. Mangal, both are child hood friends and Mr. Mangal is a trustee of an orphanage.
The motives governing their action in bringing about the transaction	Mr. Surjit had bought the said tenement home in the name of, Mr. Mangal so that, later on it can be easily transferred to the orphanage.
Their subsequent conduct	It is not given in question but however it is given that Mr. Surjit and his family has decided to stay in the said tenement home till the time their newly bought apartment in the Greater Noida gets ready for physical possession which shows that the home was not meant for their personal residence or other purpose and in future will be given to the orphanage.

Thus, on unrevealing the true character of the transaction as above, it can be concluded that it is not a benami transaction.

MTP/May 2022/Case Study-2
Mr. Tansen Malhotra
(Competition Act, PBPTA, RERA)

Mr. Tansen Malhotra is the chairman and founder of Malhotra Group which consists of five companies engaged in the sectors of hospitality, medical devises, media & entertainment, property management & redevelopment and tourism, respectively.

Due to the reason of Covid-19 hospitality industry boomed and in order to expand its market share, after finalizing deal with the shareholders of Life & Care Hospital Ltd, a resolution was passed by the board of Malhotra Hospital Ltd. on 15th Jun, 2021 for acquiring 49% equity shares in Life & Care Hospital Ltd.

In that relation, following information is produced from the audited financial statements of Malhotra Group Companies and Life & Care Hospital Ltd., respectively, for year ended on 31 st March, 2021:

Particulars	Malhotra Group	Life & Care Hospital Ltd.
Assets (in India)	₹ 8000 crore	₹ 400 crore
Turnover	₹ 23000 crore	₹ 950 crore

Malhotra Hospital Ltd. and Life & Care Hospital Ltd. gave notice of such combination to the Competition Commission of India on 20th August, 2021, respectively. The commission on receipt of such notice formed a prima-facie opinion about adverse effect of such combination on the competition and issued show cause notices which was received by Malhotra Hospital Ltd. and Life & Care Hospital Ltd. on 5 th September, 2021, respectively.

After considering response from both the parties received, the commission called for a report from the Director General, for the discussion of which and some other matters, a meeting was held by the commission which was attended by 5 members.

The chairperson of the commission was affected by Covid-19 and he was unable to attend the meeting, so the senior-most member presided at the meeting. For a particular matter, there was of equality of votes amongst the members.

One matter that was discussed in the said meeting was relating to the ongoing investigation in respect of a cartel by the Director General wherein one of the parties to the said cartel had made full disclosure about such cartel with the CCI which was vital to its findings. However, later it was founded by CCI that such disclosure contained false evidences submitted by the said party.

The chairperson was adversely affected by Covid-19 because of which he became incapable of acting as a member of the commission and was ordered to be removed by the Central Government. The Central Government then referred to the Selection Committee on 15th October, 2021, for recommending names of persons for filling up the vacancy in the office of chairman of the CCI. The said Committee on 12th December, 2021, recommended 2 names for filing up the said vacancy.

Meanwhile, the CCI after following the due procedure passed an order for combination of both the parties i.e. Malhotra Hospital Ltd. and Life & Care Hospital Ltd. However, aggrieved by the same, Long Life Hospital Ltd. instituted a suit with the City Civil Court against the said order of combination. In the sa id suit, apart from other grounds, it also alleged that the CCI did not invite any person or member of the public, affected or likely to be affected by the said combination to file written objections against it at the time when the details of such combination were published in the newspapers by the said parties.

Before 18 months, the authority under RERA had passed an order against Malhotra Estate Ltd. in which there was a mistake in calculating the interest amount payable to the allottees by the promoter which was apparent from the record, so, the said allottees filed an application for rectifying the same on 12th November, 2021.

However, Malhotra Estate Ltd. had filed an appeal against the said order with the Appellate Tribunal and the decision pronounced by the said Tribunal was against it. Hence, against the said decision, it filed an appeal with the High Court of Gujarat as Malhotra Estate Ltd.'s head office was situated in Gujarat.

But the said appeal was filed after the expiry of 60 days from the date of decision of Appalled Tribunal. However, the real estate project in relation to which decision was given by the Appellate Tribunal was situated in Bombay.

Malhotra Estate Ltd. paid rent for a property used by it to the daughter in law of Mr. Tansen Malhotra, Mrs. Urmila Malhotra as the said property had been purchased by Mr. Tansen in the name of Mrs. Urmila.

However, the said rent money was transferred by Mrs. Urmila in cash to Mr. Tansen, which was not accounted by him.

Proceedings under the Prohibition of Benami Property Transactions Act, 1988, were initiated in respect of such property whereby the case was referred by the Initiating Officer to the Adjudicating Authority. Mr. Tansen by exercise of his personal influence made a private arrangement with the said Adjudicating Authority because of which the case was settled by it by passing an order in favour of Mr. Tansen in exchange of some gratification money.

Multiple choice questions

1. Due to what reason it can be said that combination has taken place between Malhotra Hospital Ltd. (Malhotra Group) and Life & Care Hospital Ltd. as per the provisions of the Competition Act, 2002?
   (a) Malhotra Hospital Ltd. has acquired equity shares in excess by 23% in Life & Care Hospital Ltd. and also the assets of Life & Care Hospital Ltd. are excess in value by ₹ 50 crores, from prescribed limits of exemption, respectively, due to which combination has taken place between them.
   (b) The assets of Life & Care Hospital Ltd. are excess in value by ₹ 50 crores, from prescribed limit of exemption, due to which combination has taken place between them.
   (c) The assets of Life & Care Hospital Ltd. are excess in value by ₹ 50 crores and also the joint assets of Malhotra Group and Life & Care Hospital Ltd. are excess in value by ₹ 400 crores, from prescribed limits of exemption, respectively, due to which combination has taken place between them.
   (d) Malhotra Hospital Ltd. has acquired equity shares in excess by 23% in Life & Care Hospital Ltd. from prescribed limit of exemption, due to which combination has taken place between them.

2. How many members of CCI in excess attended the meeting from the required quorum and how many further name(s) could have been recommended by the Selection Committee for filing up the vacancy in the office of chairman of the CCI?
   (a) One member of CCI in excess attended the meeting from the required quorum and further three more names could have been recommended by the Selection Committee.
   (b) Three members of CCI in excess attended the meeting from the required quorum and further three more names could have been recommended by the Selection Committee.
   (c) No member(s) of CCI in excess attended the meeting from the required quorum and further one more name could have been recommended by the Selection Committee.
   (d) Two members of CCI in excess attended the meeting from the required quorum and further one more name could have been recommended by the Selection Committee.

3. Whether notice for the combination was filed properly by the parties with CCI and till what last date CCI needs to pass an order for such combination?
   (a) No, the notice for the combination was filed by the parties with the CCI beyond the prescribed time limit and CCI needs to pass an order for such combination by 11th January, 2022.
   (b) Yes, the notice for the combination was filed properly by the parties with the CCI and the CCI needs to pass an order for such combination by 18th March, 2022.
   (c) No, the notice for the combination was filed by the parties with the CCI beyond the prescribed time limit and the CCI needs to pass an order for such combination by 16th February, 2022.
   (d) Yes, the notice for the combination was filed properly by the parties with the CCI and the CCI needs to pass an order for such combination by 11th January, 2022.

4. How much further time was available with allottees for filing the rectification application with the authority under RERA if they could not have filed the same on 12th November, 2021 and whether the appeal filed by the Malhotra Estate Ltd. can be entertained by the High court of Gujarat?
   (a) The said allottees were having further time of 30 months to file the rectification application with the authority under RERA and the said appeal can be entertained by the High court of Gujarat if sufficient cause is shown for not filing the appeal within 60 days.
   (b) The said allottees were having further time of 42 months to file the rectification application with the authority under RERA and the said appeal cannot be entertained by the High court of Gujarat as it is not having jurisdiction for the same.
   (c) The said allottees were having further time of 6 months to file the rectification application with the authority under RERA and the said appeal can be entertained by the High court of Gujarat if sufficient cause is shown for not filing the appeal within 60 days.
   (d) The said allottees were having further time of 6 months to file the rectification application with the authority under RERA and the said appeal cannot be entertained by the High court of Gujarat as it is not having jurisdiction for the same.

5. Whether the property that had been purchased by Mr. Tansen in the name of Mrs. Urmila can be considered as 'benami transaction' if the rent money was kept by Mrs. Urmila with herself only?
   (a) Yes
   (b) No
   (c) Partially Yes, partially No
   (d) Can't say in absence of adequate facts

II. Descriptive Questions

6. What penalty may be imposed upon the cartel member who made disclosure with the CCI?

7.
   (i) Whether the suit instituted by Long Life Hospital Ltd. can be entertained by the City Civil Court?
   (ii) Irrespective of the fact whether such suit can be entertained by the City Civil Court or not, whether the allegation made by Long Life Hospital Ltd. against CCI can be considered as valid?

8. What decision would be taken by the authority under RERA in respect of the application received from the allottees and till what time such decision needs to be communicated by the authority under RERA to such allottees?

9.
   (i) What action can be taken against such biased order passed by the Adjudicating Authority under the Prohibition of Benami Property Transactions Act, 1988?
   (ii) Under what other statue(s), the private arrangement made by Mr. Tansen with the Adjudicating Authority can be considered as an offence?

Answers to Multiple choice questions

1. (a)
2. (d)
3. (b)
4. (d)
5. (b)

Answers to Descriptive Questions

Answer 6

Legal Position

As per Section 46 of the Competition Act, 2002, the commission may impose a lesser penalty (than otherwise leviable under this Act, Rules or Regulations) as it may deem fit, on any producer, seller, distributor, trader or service provider who is included in any such cartel which is alleged to have violated section 3, but subject to following conditions:

Condition 1 - If Commission is satisfied that such producer, seller, distributor, trader, or service provider, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital.

Condition 2 - Such disclosure shall be made before the report of investigation by director general under section 26(3).

Condition 3 – Such producer, seller, distributor, trader, or service provider shall continue to cooperate with the Commission till the completion of the proceedings before the Commission.

Any such producer, seller, distributor, trader, or service provider shall be tried for an offence (for which lesser penalty charged earlier) and liable to pay penalty as normal (if the lesser penalty didn't charge), if Commission is satisfied that; it

- failed to comply with the condition on which the lesser penalty was imposed; or
- had given false evidence; or
- the disclosure made is not vital

As per Section 27 of the Competition Act, 2002, in case any agreement referred to in section 3 has been entered into by a cartel, the commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.

Given Case & Analysis

The CCI might have imposed a lesser penalty upon the said cartel member provided if it had satisfied the aforesaid conditions and not provided any false evidences.

However, as such cartel member had provided false evidences to the CCI, it would be liable to pay penalty as normal as per the provisions of Section 27, as aforesaid.

Answer 7

(i) As per Section 61 of the Competition Act, 2002, no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter for which Commission or Appellate Tribunal is empowered under this Act.

In the given case, Long Life Hospital Ltd. had the option to file an appeal against the said order of combination with the Appellate Tribunal.

Thus, as the Appellate Tribunal had been empowered by the provisions of the Competition Act, 2002 to handle said matter, the suit instituted by Long Life Hospital Ltd. cannot be entertained by the City Civil Court.

(ii) As per Section 29 of the Competition Act, 2002, the Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published.

On reading of the said provisions, it can be understood that it is optional to the CCI to invite any written objections from persons affected by the combination and not mandatory.

So, the allegation made by Long Life Hospital Ltd. against CCI cannot be considered as valid as it was not mandatory for CCI to invite for written objections against the said combination between Malhotra Hospital Ltd. and Life & Care Hospital Ltd.

Answer 8

Legal Position

As per Section 39 of the Real Estate (Regulation And Development) Act, 2016, the Authority may, at any time within a period of two years from the date of the order made under this Act, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties.

However, no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

The Authority shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

As per Section 29 of the Real Estate (Regulation And Development) Act, 2016, the questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

It is provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the applica tion within that period.

Given Case & Analysis

A rectification application has been filed by the allottees against an order passed by the authority under RERA for a mistake apparent from the record on timely basis i.e. within 2 years.

However, as Malhotra Estate Ltd. had filed an appeal against the said order with the Appellate Tribunal and further with High Court against the decision of Appellate Tribunal, no amendment can be made in the said order by the authority under RERA.

Accordingly, the said application of the allottees would be rejected by the authority under RERA and such decision needs to be communicated by the authority under RERA to such allottees within 60 days from 12th November, 2021 i.e. by 11th January, 2022.

However, if the Authority could not dispose of the said application by 11th January, 2022, it shall record its reasons in writing for not disposing of the application within that period.

Answer 9

(i) As per Section 46 of the Prohibition of Benami Property Transactions Act, 1988, any person, including the Initiating Officer, aggrieved by an order of the Adjudicating Authority may prefer an appeal in such form and along with such fees, as may be prescribed, to the Appellate Tribunal against the order passed by the Adjudicating Authority under Section 26, within a period of fortyfive days from the date of the order.

The Initiating Officer can file an appeal with the Appellate Tribunal against the said order passed by the Adjudicating Authority in favour of Mr. Tansen within the time period as aforesaid.

(ii) **Legal Position**

As per Section 44 of the Prohibition of Benami Property Transactions Act, 1988, the Chairperson, Members and other officers and employees of the Appellate Tribunal, the Adjudicating Authority, Approving Authority, Initiating Officer, Administrator and the officers subordinate to all of them shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code, 1860.

Bribing a public servant by exercise of personal influence is an offence as per Section 7A and Section 8 of the Prevention of Corruption Act, 1988 and also is a Scheduled Offence as per Paragraph 8 of Part A of the Schedule to the Prevention of Money Laundering Act, 2002.

Given Case and Analysis

Here, the Adjudicating Authority shall be deemed to be public servant as per Section 44 of the Prohibition of Benami Property Transactions Act, 1988.

Mr. Tansen by exercise of his personal influence made a private arrangement with such Adjudicating Authority because of which the case was settled in favour of Mr. Tansen in exchange of some gratification money. This can be considered as bribing a public servant by exercise of personal influence by Mr. Tansen which can be considered as an offence under the provisions of the Prevention of Corruption Act, 1988 and the Prevention of Money Laundering Act, 2002, respectively, as aforesaid.

MTP/May 2022/Case Study-3
Ms. Gurdeep Kaur
(IBC, RERA, PBPTA, PMLA, FEMA)

Ms. Gurdeep Kaur served the Imperial Bank for 34 years, prior to her retirement from the post of Chief Manager. She joined the bank as a Probationary Officer. Ms. Gurdeep decided to buy a house in her hometown using the fund out of her retirement benefits and the remaining amount she invested in Sovereign Gold Bond. The house was bought at home-town in the joint name of Ms. Gurdeep and her mother, whereas the registration charges and stamp duty were paid by her father.

Though Ms. Gurdeep largely engaged in Investment Banking and Credit Operations during her tenure at Bank, she also played a pivotal role in the establishment of a training academy for the staff of the bank and successfully implemented the training program for all the officer and clerical staff during the computerization and then during the transaction phase to CBS (core banking solution). After her retirement from the bank, she continued to serve as a trainer (as honorary service) at the training academy of Imperial Bank, apart from conducting guest lectures at academic and professional institutions.

Dr. Manoranjan Bharti who is Director at the University School of Business (USB) of a top-notch private university located in Mohali (Punjab), co-chair one of the guest lecture with Ms. Gurdeep. Dr. Bharti is impressed by the understanding that Ms. Gurdeep possesses in the domain of Investment Banking and the use of IT Solutions in banking operations, hence he offered Ms. Gurdeep to join the USB as Programme Director for MBA in Investment Banking and Fintech Solutions. Ms. Gurdeep gracefully accepted the proposal and decide to relocate to Mohali.

After residing in a rental apartment for a few months, Ms. Gurdeep decided to book the 3BHK flat in Aero City Apartments in Mohali. The construction is in full swing. The Aero City is being developed by Aero Developers and Realtor Private Limited (ADRPL) and the project is duly registered under the Real Estate (Regulation and Development) Act, 2016 by State Real Estate Regulatory Authority. 3BHK flats are available in different set - ups with constructed areas ranging from 1410 to 2010 square feet. The price of a 3BHK flat is ranging from ₹ 70.3 to 90.5 lakhs depending upon the constructed area. Ms. Gurdeep booked a flat whose price is negotiated at ₹ 80.4 lakhs. She paid ₹ 12 lakhs as advance at the time of booking the advance, the agreement to sell was also signed on the same day.

Such ₹ 12 lakhs she borrowed from her younger brother Mr. Satbir Singh because all her funds were invested in either gold fund (during lock-in-period) or the house purchased in home town recently. To make the balance payments of the purchase consideration for the flat, Ms. Gurdeep decided to sell the house she bought in her hometown. Ms. Gurdeep sold the house and use the part of sale proceeds for payment to ADRPL. Flat registered in name of Ms. Gurdeep. The balance amount which is equal to somewhat USD 280,000, she gave to her younger brother Mr. Satbir Singh. This USD 280,000 includes a return of ₹ 12 lakhs which was borrowed by Ms. Gurdeep. Mr. Satbir in turn, remits the entire amount (USD 280,000) to his son during fiscal 2022-23, who is studying abroad through an authorized agent without prior permission of RBI. The University fee for the same year was only USD 40,000.

Mr. Satbir Singh is Insolvency Resolution Professional and is currently engaged as a resolution professional of Cool Tex Industries (CTI) for executing the Corporate Insolvency Resolution Process (CIRP). Mr. Satbir is arguing that officers of the corporate debtor don't assist him in the preparation of the information memorandum. Mr. Satbir also alleges that concerned officers of the corporate debtor don't disclose all the details of the property of the corporate debtor, and details of transactions thereof and also failed to delive r all books and papers in their control or custody belonging to the corporate debtor and which he is required to deliver; hence penalty shall be imposed upon them for misconduct in course of CIRP.

Recently an FIR was lodged against the officers and directors of Imperial bank, being suspected of indulging in money laundering transactions and failing to adherence the provision of the Prevention of the Money Laundering Act 2002. The name of Ms. Gurdeep is also specified in the report along with another chief manager Mr. Srinivasan Iyer. Mr. Iyer is still serving the bank but is suspended from the service till the inquiry is complete. Ms. Gurdeep got the bail from the session court.

Mr. Iyer also moved an application under Section 439 of CrPC read with Section 45 of the Prevention of Money Laundering Act, 2002 seeking release on bail in an offence registered against him. The Sessions Court, by an order, allowed the bail application of Mr. Iyer on medical grounds by taking note of the first proviso to Section 45 (1) of the Prevention of Money Laundering Act, 2002; without discussing the merits of the allegations made against him.

The Directorate of Enforcement challenged the order of session court in the High Court. The High Court

disposed of the application filed by the Directorate of Enforcement by keeping the order granting bail to the petitioner in abeyance and after a detailed consideration of the report of the medical board (consti tuted at the order of the High Court to examine Mr. Iyer), the High Court was of the considered view that Mr. Iyer was not entitled to grant of permanent bail. However, temporary bail for six months was granted to enable Mr. Iyer to receive treatment for his ailments.

Imperial Bank is enforcing the security interest as per provisions of sections 12 and 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The imperial bank decided to sell some of such immovable secured assets recently. In one such case, the purchaser pays 23% of the amount of the sale price, in addition to earnest money paid earlier (equal to 5% of the sale price) as a deposit to the authorized officer conducting the sale.

Multiple choice questions

1. In context to the allegations made by Mr. Satbir against officers of the corporate debtor, which of the following grounds are not valid grounds of misconduct in course of CIRP?
   I Officer of the corporate debtor failed to deliver to the resolution professional all books and papers in their control or custody belonging to the corporate debtor.
   II Officer of the corporate debtor does not disclose to the resolution professional all the details of the property of the corporate debtor.
   III Officer of the corporate debtor does not assist the resolution professional in the preparation of the information memorandum.

   (a) I and II only
   (b) III only
   (c) All of the ground I, II, and III
   (d) II and III only

2. Which of the following statements is correct regarding the sale of immovable secured asset property by imperial bank stated herein the facts of the case;
   (a) Purchaser made a default because 1/3rd of the purchase price shall be deposited.
   (b) Purchaser made a default because 25% of the purchase price shall be deposited excluding the earnest money.
   (c) Purchaser doesn't make a default, because 25% of the purchase price shall be deposited including the earnest money.
   (d) Purchaser doesn't make a default, because 20% of the purchase price shall be deposited.

3. In light of applicable provisions of law relating to foreign exchange, which of the following statements is correct in regard to remittance made by Mr. Satbir of an amount equivalent to USD 280,000 to his son during fiscal 2022-23;
   (a) Mr. Satbir doesn't violate any legal provision
   (b) Mr. Satbir violates the law, there will be a penalty of up to USD 30,000
   (c) Mr. Satbir violates the law, there will be a penalty of up to USD 90,000
   (d) Mr. Satbir violates the law, there will be a penalty of up to USD 240,000

4. Under the Real Estate (Regulation and Development) Act 2016, while making an application for registration of the project, the Aero Developers and Realtor Private Limited (ADRPL) shall state _____of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas appurtenant with the apartment, if any;
   (a) the number and the carpet area
   (b) the number, type, and the carpet area
   (c) the number and the floor area
   (d) the number and the constructed area

5. In regard to a house bought in her hometown, identify the nature of the transaction and also identify who is benamidar
   (a) Transaction is benami and Ms. Gurdeep is benamidar
   (b) Transaction is benami and the mother of Ms. Gurdeep is benamidar
   (c) Transaction is benami and both the parent of Ms. Gurdeep are benamidar
   (d) Transaction is not benami, hence there is no benamidar

II. Descriptive Questions

6. The Counsel for Mr. Iyer, has contended that the High Court committed a serious error in interfering with the order passed by the Sessions Court, without taking into consideration the first proviso to Section 45(1) of the Prevention of Money Laundering Act, 2002.

The matter moves to the Hon'ble Apex Court. The Counsel submitted that the medical record which was placed before the High Court clearly shows that Mr. Iyer has to be under constant treatment aside from the several procedures he has to undergo, including spinal surgery.

On the other hand, the Additional Solicitor General referred to the medical record relied upon by Mr. Iyer and argued that the surgical interventions required are all minor and the petitioner is not entitled to be released on permanent bail.

You are required to advice;
(i) Whether High Court committed any error by interfering with the order passed by the session court?
(ii) Can bail application be granted on medical grounds by taking note of first proviso to Section 45(1) of the Prevention of Money Laundering Act, 2002, without discussing the merits of the allegations made?

7. What shall be the amount of Advance for 3BHK that Aero Developers and Realtor Private Limited (ADRPL) can accept from Ms. Gurdeep?

   Are there any conditions involved in accepting and utilizing the money received as an advance?

   Also, state the penalties under the Real Estate (Regulation and Development) Act 2016 for breaching such conditions.

   Assess the facts stated in the case in the light of the legal provisions quoted in the answer.

8. Advice, whether the transaction of booking the 3BHK flat by Ms. Gurdeep by borrowing the money from her younger brother Mr. Satbir is benami?

Answers to Multiple choice questions

1. (b)
2. (c)
3. (c)
4. (b)
5. (d)

Answers to Descriptive Questions

Answer 6

Facts given in the case are similar to the facts of Sachin Joshi vs Directorate of Enforcement (Supreme Court of India, Petition(s) for Special Leave to Appeal (Criminal) No(s). 4482/2021, 28th September 2021).

(i) Hon'ble apex court after considering the submissions made by both sides and the material on record, is of opinion that there is no error committed by the High Court in interfering with the order passed by the Sessions Court. However, taking note of the submissions (similar to those stated in the given case) made by counsel for the petitioner about the treatment of the petitioner (Mr. Iyer in the given case), the Supreme Court doubled the period of temporary bail (conditional bail for specific purpose). The bail granted by Supreme Court is also subject to the conditions that were imposed by the High Court in its Order.

(ii) The offence under the Prevention of Money Laundering Act, 2002 are non-bailable in nature hence bail is not a matter of right of the accused. The court shall apply judicial mind while granting/rejecting the bail application under CrPC, apart from considering the specific provisions stated under any special statues.

The bail should not be granted on the medical ground only, without discussing the merits of the allegations made. Undoubtedly medical ground may be one of considerable factor. It depends upon case to case basis.

It is worth noting here that section 45 (2) of the Prevention of Money Laundering Act, 2002 provides that the limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

Answer 7

As per section 13 of the Real Estate (Regulation and Development) Act 2016, a promoter shall not accept a sum more than ten percent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering in to a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

Hence in the present case, the maximum advance that can be charged by ADRPL from Ms. Gurdeep is ₹ 8.04 lakhs

Further, as per section 4 (2) (l) (D) of the Real Estate (Regulation and Development) Act 2016, seventy percent of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose. Provided that the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage o f completion of the project.

The same is applicable in the case of advance money or application fee as well, hence ADRPL shall deposit seventy percent of the advance or booking fee also in a separate account.

As per section 60 of the Real Estate (Regulation and Development) Act 2016, if any promoter provides false information or contravenes the provisions of section 4, he shall be liable to a penalty that may extend up to five percent of the estimated cost of the real estate project, as determined by the Authority. Hence if ADRPL fails to deposit seventy percent of the advance or booking fee also in a separate account then liable to penalties stated under section 60.

Whereas for accepting the advance or booking/application fee of more than ten percent of the cost of the apartment, the penalty specified under section 61 shall be levied.

Section 61 provides, if any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five percent of the estimated cost of the real estate project as determined by the Authority.

Answer 8

Benami transaction is defined under clause 9 to section 2 of the Prohibition of Benami Property Transactions Act 1988. Benami transaction means a transaction or an arrangement **where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person;** and the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

It is important to consider that Mr. Satbir will neither get any immediate nor future benefit, neither direct nor indirect benefit from such flat as he resides in Delhi and flat is in Mohali, further such flat is selfoccupied by Ms. Gurdeep.

It is also important to consider the apex court judgment in the landmark case **'Pawan Kumar Gupta vs. Rochiram Nagdeo',** AIR 1999 SC 1823. The word **provided** used in section 2 (9) (A) **shall not be constructed** narrowly. So even if the purchaser had availed himself of the help rendered by his father for making up the sale consideration that would not make the sale deed a Benami transaction so as to push it into the forbidden area envisaged in section 3(1) of the act. Court also took the example of a purchaser of land, who might have availed himself of the loan facility from the bank to make up the purchase money.

It is worth noting that money given to Ms. Gurdeep by Mr. Satbir is in form of borrowing, which is duly repaid by Ms. Gurdeep.

Hence amount borrowed by Ms. Gurdeep from his younger brother Mr. Satbir to pay advance or booking deposit shall not make push transactions into the forbidden area; **hence the transaction is not a Benami transaction**.

MTP/May 2022/Case Study-4
The foundation of Zenith Holdings
(IBC, RERA, FEMA, PMLA, SARFAESI, Competition Act)

The foundation of Zenith Holdings was laid by the late sh. Durga Dutt Agnihotri along with his brother-in-law, Mr. Parshottam Nadar around six decades ago, earlier they were into steel and cement manufacturing only but later when children of both families joins the different business verticals, Zenith Group spread its business interests into Pharmaceuticals, Real Estate, and Motors. Zenith Group has a presence in all parts of India with a few liaison offices and drug stores (pharmaceutical drugs) in foreign as well.

The motor business of Zenith Group performed nearly a dozen of M&A transactions in the last decade. It deals in Motor Vehicles and Spare Parts. Recently, Zenith Motor Limited finalise the acquisition of 60% of the equity stake in Blitz Motor Corp (BMC) and 100% stake in Mobil Motors and Parts Limited (MMPL). The integration with BMC is horizontal in nature and results in a total share of 18% of the relevant market, whereas the combination with MMPL is vertical Integration and results in a 22% share of the relevant market. The document for acquisition is executed on 18.03.2022 and 30.03.2022 in the case of BMC and MMPL respectively.

The elder daughter of Mr. Nadar who looks after the Pharmaceutical and Real estate business actively, recently set up a university after her father's name wherein specialized courses in Pharma Scienc es, Civil Construction, and Architect Sciences are offered. She also establish a company that is an SME concern (registered under the Micro, Small, and Medium Enterprises Development Act, 2006) that deals in the manufacturing and sale of Dhoop and Agarbattis, etc. to ensure employment for spouses of workers working in their real estate and construction businesses.

Though the university is doing well. But SME concern is struggling amid financial crisis even after a series of efforts such SME concern failed to take off and finally became debt-ridden venture. It is decided that an application for initiation of the Pre-packaged Insolvency Resolution Process for such SME concern shall be made. One of the secured creditors enforced security interest in regard to one of the properties of such SME concern under section 13 (1) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Such secured creditor issued a notice under section 13(2). SME Concern has objected to this and is willing to raise the objections and make representation.

Zenith Group has attained the recognition of society and established itself as an ethical and responsible corporate citizen. It complies with the legal provisions both in words and spirits, hence never required to pay any penalty or fine; except once i.e. under the Real Estate (Regulation and Development) Act, 2016 for non - compliance by Zenith Realtor Limited (ZRL). Such penalty was levied by the Appellate Authority in the context of a residential project undertaken in Haryana. In the same non-compliance case, another allottee of residential apartments developed by ZRL is willing to seek legal remedy under the Consumer Protection Act, 2019 in addition to one provided under the RERA 2016.

Mr. Vinayak Agnihotri, the only grandson of late sh. Durga Dutt Agnihotri returned to India after completing his master's in Hotel Management from Ecole Hoteliere de Lausanne (EHL) situated in Switzerland. Although he joined the family business but wanted to establish a hotel chain. He buys a Casino in Goa, and soon after he buys a floating restaurant with a pub and bar. He is planning to hire a Cruz ship to offer vocation and party packages. Mr. Vinayak Agnihotri knew that owning and operating a casino business may harm the reputation of other businesses, hence he register the assets of the Casino business in an anonymous name. He is also neither director nor employee of such a business, he controls the business through his trustworthy friends.

Two friends of Mr. Vinayak, out of those who manage his casino and restaurant business has evil intention and are willing to make money quickly. They get involved in illegal and unethical transactions, say hawala, drug dealing, etc. because they too often come across the persons who are deep into these at Cruz or restaurant parties. Even some foreign nationals are also involved in their intrigue cabal.

One among such friends was caught red-handed. From his possession of drugs, foreign currency (beyond the quantum allowed) and gold jewellery, and bullion recovered. Drugs are way more than the commercial quantity allowed to carry and trade, even if he doesn't hold any commercial license in that regard. He failed to explain the sources of foreign currency, jewellery and bullion too. An FIR was lodged against him for violating the provision of different statutes and taken into custody. Article found from him were also confiscated under provisions of different acts including the Prevention of Money Laundering Act, 2002. A penalty under section 13 of the Foreign Exchange Management Act, 1999 was also imposed upon him which he failed to pay paying.

Since agencies are doing an investigation to reveal all the evil minds, hence in process of investigation it was also discovered that person who has the title of owner of the casino, is the younger brother of his driver, who is employed as a mason in ZRL and bribed as well as forced to be part of Benami transaction. An order of confiscation in respect of casinos is passed thereafter under the Prohibition of Benami Property Transactions Act, 1988.

Multiple choice questions

1. For filling of an application for initiating the Pre-packaged Insolvency Resolution Process, approval from financial creditors is required. Identify the correct statement out of following in the context of SME concern that deals in the manufacturing and sale of Dhoop and Agarbattis;
   (a) corporate debtor shall obtain approval from its financial creditors, representing not less than sixty-six percent in value of the financial debt due to such creditors
   (b) corporate debtor shall obtain approval from its financial creditors, not being its related parties, representing not less than sixty-six percent in value of the financial debt due to such creditors
   (c) corporate debtor shall obtain approval from its financial creditors, not being its related parties, representing not less than sixty-six percent of the financial creditors in numbers
   (d) corporate debtor shall obtain approval from its financial creditors, representing not less than sixty - six percent of the financial creditors in numbers

2. The penalty paid to ZRL under the Real Estate (Regulation and Development) Act, 2016 shall be credited to;
   (a) Consolidated Fund of India.
   (b) Account specified by the State Government
   (c) Real Estate Regulatory Fund
   (d) Any of these at the order of authority who impose a penalty

3. Regarding failure to make payment of the penalty imposed under section 13 of the Foreign Exchange Management Act, 1999, which of the following statements are/is incorrect;
   I Adjudicating Authority may, by order in writing, authorise an officer of Enforcement not below the rank of Assistant Director to recover any arrears of penalty
   II Order of recovery shall be issued if the person upon whom penalty is imposed failed to make full payment within a period of sixty days from the date on which the notice for payment of such penalty is served on him.
   III Such authorised officer of enforcement has all the like power which are conferred on the land revenue collector.

   (a) I only
   (b) III only
   (c) II and III only
   (d) I and III only

4. In respect of an order of confiscation of Casino, the administrator shall proceed to take possession by serving a notice in writing and allowing _____ days to surrender or deliver possession in favour of him.
   (a) Five days
   (b) Seven days
   (c) Ten days
   (d) Fifteen days

5. The articles/property confiscated under the Prevention of Money-Laundering Act 2002, includes foreign currency, jewellery, and bullion. For safe custody same shall be deposited at;
   I Government Treasury
   II Branch of the Reserve Bank of India
   III Branch of the State Bank of India

   (a) At I only
   (b) At either I or II, but not at III
   (c) At either I or III, but not at II
   (d) At any among I, II, and III

Descriptive questions

6. With reference to two acquisitions performed by Zenith Motor Limited (ZML) notices under section 6(2) of the Competition Act 2002 are required to be served to the Competition Commission of India to seek its approval under section 31(1) of the Act. You are required to advise ZML, on the manner (timing and form) of serving notice for both the combination arrangements (with BMC and MMPL)?

7. Can SME concern rather than responding to notice served under section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by a secured creditor, seek legal remedy from High Court (writ petition) or Supreme Court (special leave petition)? Will it make any difference if it responded to the notice and then seek a parallel legal remedy from High Court or Supreme Court? Advice.

8. Whether an allottee seeks legal remedy under both the statutes, the Real Estate (Regulation and Development) Act, 2016 and the Consumer Protection Act, 2019, or does the former hold primacy over the latter?

Answers to Multiple choice questions

1. (b)
2. (b)
3. (c)
4. (b)
5. (d)

Answers to Descriptive Questions

Answer 6

The need and procedure of servicing notice of combination is described under section 6 (2) of the Competition Act 2002 read with the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (hereinafter referred as to the regulations).

Section 6 (2) of the Competition Act 2002 requires the ZML to **serve the notice by 17.04.2022 and 29.04.2022 in the case of BMC and MMPL respectively** i.e. within 30 days from the date of executing the document of acquisition.

Further sub-regulation 2 to regulation 5 of the regulations the notice under sub-section(2) of section 6 of the Competition Act 2002, shall ordinarily be filed in Form I as specified in schedule II to these regulations, duly filled in and accompanied by evidence of payment of requisite fee by the parties to the combination

But sub-regulation 3, which has an overriding effect over sub-regulation (2) provides without prejudice to the provisions of sub-regulation (5), the parties to the combination may, at their option, give notice in Form II, as specified in schedule II to these regulations, preferably in the instances where

(a) the parties to the combination are engaged in production, supply, distribution, storage, sale, or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services and the combined market share of the parties to the combination after such combination is more than fifteen percent (15%) in the relevant market;

(b) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade-in goods or provision of services, and their individual or combined market share is more than twenty –five percent (25%) in the relevant market.

As per the facts given in the case, the integration with BMC is horizontal in nature and results in a total share of 18% of the relevant market, whereas the combination with MMPL is vertical Integration and results in a 22% share of the relevant market. Hence **notice under section 6(2) preferably shall be served in Form II and Form I in the case of BMC and MMPL respectively.**

Answer 7

The similar issue was addressed by the hon'ble apex court in the case of **Devi Ispat Ltd. vs. State Bank of India & Ors**. In the stated case the bank issued a notice to Devi Ispat under Section 13(2) of the SARFAESI Act demanding payment of the outstanding liabilities dues and interest. Devi Ispat reacted by filing a writ petition in the Calcutta High Court challenging, inter alia, the declaration of its being an NPA and for setting aside the previous letters issued by the Bank. The Calcutta High Court dismissed the writ petition on the ground that the company had an alternative statutory remedy under section 13(3A) of the SARFAESI Act, to make a representation against the letter issued under section 13(2) thereof.

The Appellant filed an appeal against that order, meanwhile appellant also made representation to the bank under section 13(3A) but the same was rejected. Division Bench dismissed the appellant's appeal. The Supreme Court held that since the appellant had availed statutory remedy by making representation to the bank, hence there was no reason to interfere with the impugned order and, therefore, the special leave petition was too dismissed.

Hence it is advisable for the SMC concern to raise objections and make representations in response to the notice served under section 13(2). Such representations shall be made very carefully because in case of rejection of such representations by a secured creditor, then only communication from the end of a secured creditor is required made under section 13 (3A) and such communication shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 ofthe Court of District Judge under section 17A.

Extra Reading

It is worth noting here to consider 13 (3A) for more clarity. Section 13 (3A) provides if, on receipt of the notice, the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within 15 days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

Further proviso to section 13 (3A) provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

Answer 8

The facts stated herein are similar to those in **IREO Grace Realtech Pvt. Ltd. Vis Abhishek Khanna & Others** (Civil Appeal No. 5785 of 2019). Through its order dated 11th January 2021 the Supreme Court decided that the Consumer Protection Act, 1986 was enacted to protect the interests of consumers, and provide a remedy for better protection of the interests of consumers, including the right to seek redressal against unfair trade practices or unscrupulous exploitation. The order also makes reference to the recent judgment delivered in **M/s Imperia Structures Ltd. vs. Anil Patni & Anr** (2020) 10 SCC 783, wherein it was held that **remedies under the Consumer Protection Act were in addition to the remedies available under special statutes.**

Section 79 of the Real Estate (Regulation and Development) Act, 2016, provided no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Further section 88 provides that, the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force; to ensure application of other laws not barred.

Hence the absence of a bar under Section 79 to the initiation of proceedings before a forum that is not a civil court, read with Section 88 makes the position clear.

MTP/May 2022/Case Study-5
Mr. Vijay Kapur
(PMLA, RERA, FEMA, PBPTA, SARFAESI, Competition Act)

Mr. Vijay Kapur is working as Zonal Head of recovery cell in a reputed public sector bank. The state of Haryana, Punjab, and the region of NCT falls under his zone. This role was assigned to Mr. Vijay recently, considering his better understanding of the provisions of the DRTs, SARFAESI, and IBC. Mr. Vijay decided to review each case and the progress that has been made so far. He comes across a loan case of ESKAY enterprises. The security interest was enforced by the bank against the secured immovable asset (one of the residential properties of the owner, located in Faridabad, Haryana) of ESKAY enterprise under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Later, the bank has given the advertisement for a public auction in two newspapers (one was Economics Time and another was Rashtriya Sahara) and conducted an auction for the sale of the secured immovable assets. The ESKAY enterprise was not satisfied with the process of advertisement, including the selection of two newspapers that have low circulation in relevant areas; hence they advance a writ petition to the high court for declaring the auction sale invalid.

During the Initial years, ESKAY enterprises show ethical commitment through their conduct and active choices, but later maintaining profit become difficult especially due to cut -through competition; hence ESKAY enterprises started adopting anti-competitive measures to keep their profit intact. Competition Commission of India found the ESKAY enterprises guilty of being the party to anti-competitive agreements hence issues cease and digest notice against ESKAY enterprises. This incident gave a jolt to the brand equity of ESKAY; thereafter it become difficult for to ESKAY maintain its market share resultantly it lands in financial distress.

Mr. Vivek Kapur, a younger brother of Mr. Vijay, is a personal finance advisor. In order to promote his investment advisory firm, he migrates to Chandigarh from Jalandhar. There he booked a 3BHK flat by making the advance payment and agreed to pay the rest of the consideration as per the specified schedule. He made payment of instalments as scheduled. But for the purpose of making such payment, he took some of the money from his aunty and also took the help of his mother. Property is duly registered in name of Mr. Vivek only. The authorities under the Prohibition of Benami Property Transactions Act 1988 mark the transaction as Benami considering the fact that the property is registered in name of Mr. Vivek whereas the title deed (documents of registration) found in the custody of the aunty of Mr. Vivek during a search that was conducted in some other reference.

Ms. Anaya Vaishnava of Delhi who is a renowned architect and interior designer gets the projects an d engagement from all across the globe, especially in the Middle East. She developed healthy contacts there and frequently visit there for the work but had the permanent establishment of his firm in New Delhi only. Ms. Anaya resides outside India from 15th May 2021 to 12th July 2021 for the interior decoration of the mansion and stately home. Mr. Anaya is a common friend of Mr. Vivek Kapoor and Mr. Gourav Taneja.

Ms. Anaya used to travel through some specific airline company hence crew members and pilot st aff turned acquaintances with her. Mr. Gourav Taneja was one such pilot. With help of some crew members and the knowledge of the pilot (Mr. Gourav), Ms. Anaya smuggled 20 bars of gold into India. Further with help of Mr. Vivek, the same is converted into cash and then integrated into the formal financial system as untainted money. Later the enforcement directorate discovered the transaction, and hence booked Mr. Gourav and some other crew members under the provision of the Prevention of Money-Laundering Act, 2002. Where Mr. Kapoor and Ms. Anaya managed to escape.

Ms. Anaya has flown away to the Maldives on 11th December 2021 as India has no Extradition Treaty with the Maldives, She decided to settle there and started practicing her profession of the interi or designer there and never returned back to India thereafter. Employees working for Ms. Anaya lost their job as firms were seized and confiscated.

The housing project in which Mr. Vivek booked a flat comprises flats, floors, and an independent villa. The promoter of the project is Kailash Realtor Private Limited (KRPL), which is renewed for timely possession and state of art outlook of the common area. The Gross floor area of 3BHK flats, one such booked by Mr. Vivek is 1600 sq. ft. The area of the internal and external walls amounted to 180 sq. ft and 112 sq. ft respectively. There are two exclusive balconies and the total area of both of them is 60 sq. ft. Each allottee is granted a smart card that will help them to access the facilities at the gym, club, swimming pool, community hall, and some other miscellaneous services. Landscapes are developed as part of the project and these are capable to attract every passer-by.

Being true to the repute of KRPL, the construction was completed on the time, and possessions were given to respective allottees. For upkeep and maintenance of the common area, an association of allottees has been formed, which is yet to be registered under the concerned act. In absence of local laws, the promoter handed over the documents and plans, including that of common areas, to the association of allottees.

Multiple choice questions

1. Mr. Gourav Taneja is guilty of committing an offence under section 3 of the Prevention of Money - Laundering Act, 2002 which is punishable under section 4. The nature of the offence of money laundering is;
   (a) Cognizable, Bailable
   (b) Cognizable, Non-bailable
   (c) Non-cognizable, Bailable
   (d) Non-cognizable, Non-bailable

2. Regarding anti-competitive agreements stated in the Competition Act, 2002 pick the option that depicts the correct match of the followings.

A. resale price maintenance	1. Agreement to limit, restrict or withhold
B. exclusive supply agreement	2. Restricts, or is likely to restrict, to whom goods are sold or from whom goods are bought
C. tie-in arrangements	3. Agreement restricting dealing in any goods other than those of the seller
D. refusal to deal	4. A condition that the prices to be charged
E. exclusive distribution agreement	5. Condition to purchase some other goods

   (a) A – 2, B – 3, C – 4, D – 5, E – 1
   (b) A – 4, B – 1, C – 5, D – 2, E – 3
   (c) A – 4, B – 3, C – 5, D – 2, E – 1
   (d) A – 2, B – 1, C – 5, D – 4, E – 3

3. Identify the correct carpet area of the 3 BHK flat purchased by Mr. Vivek out of the option given below;
   (a) 1248 sq. ft
   (b) 1428 sq. ft
   (c) 1560 sq. ft
   (d) None of the above

4. Promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees within;
   (a) 30 days after obtaining the occupancy certificate
   (b) 30 days after obtaining the completion certificate
   (c) 1 month after obtaining the occupancy certificate
   (d) 3 months after obtaining the occupancy certificate

5. Ms. Anaya returned back to India in July 2021, state the maximum date by which she must surrendered the unspent/unused foreign exchange.
   (a) 10th October 2021
   (b) 9th November 2021
   (c) 11th December 2021
   (d) 8th January 2022

Descriptive questions

6. Regarding the purchase of a 3BHK flat for Mr. Vivek, you are required to advise on following issues pertaining to the said transaction;

   (a) Can the authorities under the Prohibition of Benami Property Transactions Act 1988 based upon the fact that property is registered in the sole name of Mr. Vivek whereas the title deed (documents of registration) found from the custody of the aunty of Mr. Vivek during a search, mark the transaction of purchase of 3BHK flat as Benami?

   Is there any circumstantial evidence that can be used as a litmus test for determining the nature of the transaction as Benami or Not?

   (b) Will it make any difference if the title deed is also in possession of Mr. Vivek? Providing support to your answer/opinion.

7. Regarding the sale of immovable secured assets of ESKAY enterprises by the bank (the secured creditor) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, you are required to advise;

   (a) Procedure to be followed for the advertisement the sale of the immovable secured assets along with content that it must comprise of;

   (b) Can an auction conducted by a bank in case of ESKAY enterprises be declared invalid?

Answers to Multiple choice questions

1. (b)
2. (c)
3. (b)
4. (b)
5. (d)

Answers to Descriptive Questions

Answer 6

a. In the matter of **Mangathai Ammal (Died) through legal heirs vs. Rajeswari** (Civil Appeal no. 4805 of 2019 dated 09.05.2019), the Supreme Court held that while considering a particular transaction as Benami, the intention of the person who contributed the purchase money is determinative of the nature of the transaction. The intention of the person, who contributed the purchase money, has to be decided on the basis of the surrounding circumstances; the relationship of the parties; the motives governing their action in bringing about the transaction, and their subsequent conduct, etc.

To hold a particular transaction is benami in nature these six circumstances can be taken as a guide:
1. The source from which the purchase money came:
2. The nature and possession of the property, after the purchase:
3. Motive, if any, for giving the transaction a Benami colour:
4. Position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
5. Custody of the title deeds after the sale:
6. Conduct of the parties concerned in dealing with the property after the sale.

Since part of the consideration provided by aunty of Mr. Vivek and title deed also found from her possession, whereas property is registered in the sole name of Mr. Vivek; hence prima-facie the transaction seems to fall under the forbidden area as Benami, but other factors such as who is benefited from property (Mr. Vivek is staying in flat or flat is rented-out and rent realised from there passed on to his aunty) shall also need to be considered.

b. Benami transaction as per clause 9 to section 2 of the Prohibition of Benami Property Transactions Act 1988 means a transaction or an arrangement where a property is transferred to, or is **held by, a person, and the consideration for such property has been provided, or paid by, another person;** and the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

Sub-clause A to clause 9 to section 2 has four exceptions as well. Exceptions (iii) and (iv) read as transaction shall not be benami if property is purchased and registered by;

Any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual.

Any person in the name of his brother or sister or **lineal ascendant** or descendant, where the names of brother or sister or lineal ascendant or descendant and the indivi dual appear as **joint owners** in any document, and the consideration for such property has been provided or paid out of the known sources of the individual.

In the given case property is registered in name of Mr. Vivek only; whereas consideration for same is arranged with help from his aunty and mother, though the mother is covered under exception iii to section 2 (9) (A), but the help of aunty indicates Benami nature prima-facie. But in the facts of the case, nowhere it is mentioned that property is held by Mr. Vivek for immediate or future, direct or indirect benefit, of the aunty.

It is worth noting the apex court judgment in the landmark case of **'Pawan Kumar Gupta vs. Rochiram Nagdeo',** AIR 1999 SC 1823, that says word **provided** used in section 2 (9) (A) **shall not be constructed narrowly**. So even if the purchaser had availed himself of the help rendered by his father for making up the sale consideration that would not make the sale deed a Benami transaction so as to push it into the forbidden area envisaged in section 3(1) of the act. Court also took the example of a purchaser of land, who might have availed himself of the loan facility from the bank to make up the purchase money.

Hence if the title deed is also in the possession of Mr. Vivek, then taking the help of her aunty in order to make arrangements of funds to pay the instalments on the schedule shall not make push transactions into the forbidden area; **hence the transaction is not a Benami transaction.**

Answer 7

a. As per sub-rule 6 to rule 8 of the Security Interest (Enforcement) Rules, 2002 the authorised officer shall serve to the borrower a notice of 30 days for sale of the immovable secured asset.

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding a public auction, the **secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include, -**

(a) The description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) The secured debt for recovery of which the property is to be sold;

(c) Reserve price, below which the property may not be sold;

(d) Tune and place of public auction or the time after which sale by any other mode shall be completed;

(e) Depositing earnest money as may be stipulated by the secured creditor;

(f) Any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

b. Facts given in the case are similar to those considered by the High Court of Delhi in the case of Anil Kumar Batla vs. Allahabad Bank, W.P. (C) No. 1135 of 2014 dated 19th August 2014), the property was situated in Faridabad. The question raised whether the newspaper namely 'Economic Times' (in English) and 'Rashtriya Sahara' (in Hindi) had sufficient circulation in Faridabad?

The intent of sub-rule (6) of rule 8 of the Enforcement Rules, is to ensure the widest publicity in order to get the best price for the property. The word "sufficient" has been defined in the Oxford Dictionary to mean 'adequate' (esp. in quantity or extent) for a certain purpose; enough (for a person or thing, to do something).

There is no evidence on record that there is sufficient or adequate circulation of Economic Times in Faridabad. Further, Economic Times is generally purchased by a specific class of people who are interested in financial matters. Moreover, the property in question is a residential house and not a commercial property. However, one would not primarily rest its finding for publication in the Economic Times.

There is a specific finding that 'Rashtriya Sahara' has an independent edition for the State of Haryana. There is also a finding that the public notice was published in the Delhi Edition of 'Rashtriya Sahara', that too, on a page which was meant for 'East Delhi'. It is a matter of knowledge that East Delhi is a Trans Yamuna area, abutting the city of Ghaziabad and Noida in UP, and is in the other direction to Faridabad which abuts Badarpur, South Delhi.

It was held by the High Court of Delhi that auction sale on the basis of a notice published in a newspaper having low circulation in the locality where the property was situated was not valid.

Hence in the case of ESKAY enterprises, considering the low circulation of newspapers in which advertisement of the public auction was published for the sale of the secured immovable asset, the auction conducted by the bank **can be declared invalid.**

CASE STUDY 1
MR. BHANU PRATAP TANEJA
(RERA, Competition act, PBPTA.1988)

Mr. Bhanu Pratap Taneja is a leading real estate developer based in **Delhi**. His company Garvit Bhoomi Developers Pvt. Limited having **registered office** in Bhikaji Cama Place, **New Delhi**

In the last decade, It had successfully developed four housing projects
- two in **Gurgaon (Haryana state) and**
- one each in Jaipur (Rajasthan) and Lucknow (UP).

They had a robust management team. Having been the name behind developing more than five thousand luxurious apartments with modern amenities, they had the reputation of delivering the projects well within the promised time.

Beginning of the year 2015, they launched another project (Omega Capetown Residency) in Indirapuram, **UP** in which 1000 residential units consisting of 2BHK and 3BHK apartments were to be developed. They were to be completed in all respects by January 2018 and delivered to the consumers by that date. This project was being carried on smoothly and the Real Estate (Regulation and Development) Act, 2016 came to be enacted w.e.f. 1st May, 2016. Section 3, which was enacted later w.e.f. 1st May 2017.

Since Omega Capetown Residency consisted of 1,000 residential units, it was required to be registered and has submitted the requisite documents with concerned authorities. Application for registration was found to be complete in all respects, the Omega Capetown Residency Project was granted registration by RERA (UP) within the statutory period. It was provided with a registration number including a log-in ID for assessing the website of the Authority and to create webpage.

In the meantime, Mr. Taneja was APPROACHED BY some of the influential developers that an understanding had been reached among them TO CONTROL THE PRICE OF APARTMENTS to be built by them. However, because of legal tangles such understanding could not be brought into writing and it was also not intended to be enforced by legal proceedings. Mr. Taneja did NOT AGREE to the proposal because even though the understanding was not in writing and it was not intended to be enforceable by legal proceedings, it was still illegal as per the COMPETITION ACT, 2002. This revelation made by Mr. Taneja discouraged the intending developers and they desisted from being a party to this proposal.

Mr. Taneja's SON Garvit, who was a commerce graduate and holder of law degree. GARVIT HAD A COLLEGE FRIEND ROHIT whose FATHER Mr. Dev Kumar. Mr. Dev Kumar deals in sale, purchase and renting of properties under the title DEV PROPERTY DEALERS' from the Yusuf Sarai market. Since Rohit had joined his father's business, it was thought prudent to convert the existing proprietary business into a registered partnership firm titled as Dev & Sons Property Dealers'. Because of the enactment of RERA, Rohit consulted his friend Garvit regarding its implications in case of real estate agents. Accordingly, the firm was got registered as real estate agent with the help of Garvit's legal advisor.

Further, Garvit made a proposal to Rohit and his father that they could associate themselves with his Omega Capetown Residency, a registered RERA project in Indirapuram for facilitating sale of apartments which they readily accepted.

GARVIT CAUTIONED THEM that as per the Act, since their firm was now a registered real estate agent they were not supposed to facilitate sale/purchase of any plot, apartment or building in a real estate project being sold by the promoter in any planning area, if such project was not registered with RERA of the concerned State. In addition, GARVIT'S LEGAL ADVISOR TOLD THEM that " As required by Section 10, a registered real estate agent would maintain and preserve proper books of accounts and other necessary documents. Further, such agent would not involve himself in any unfair trade practice like making a false statement regarding services to be provided by him. He would also not permit the publication of any advertisement whether in any newspaper or otherwise of services that were not intended to be offered. Besides, the agent would also have to help the intending buyers in getting the required information and documents to which they were entitled, at the time of booking of any property.

ROHIT HAD A FRIEND TARUN whose FATHER Dr. Sreenivas Sharma. Dr. Sreenivas Sharma was a surgeon in a government hospital and was residing in a rented government flat in the hospital campus itself. He had an intense desire to have a luxurious flat of his own. Tarun had joined IBM after doing MBA from IIFT, New Delhi. So, with the combined salary of both, they decided to buy a flat. Tarun contacted Rohit to help him in searching a suitable apartment for his family.

In turn, Rohit informed him that one particular 3BHK flat at an ideal location was available in Omega Capetown Residency in Indirapuram as the original allottee had withdrawn from the scheme; otherwise the booking under this project was already full.

Dr. Sharma got interested in the information and went to the Omega Capetown Residency along with his family to see the concerned apartment. He liked its strategic location and gathered more information regarding sanctioned plan, layout plan along with the other specifications, etc. He then asked for stage-wise time schedule of completion of the project and also enquired regarding provision of water, sanitation and other amenities.

Since, Rohit personally knew Garvit and his father Mr. Taneja - the promoters of the project - Dr. Sharma and his family had a lively and fruitful meeting with them. Subsequently, he and his son jointly entered into agreement for sale with the promoters of the project & made payment of 75% of the cost of the apartment, while remaining 25% of the cost was to be paid at the time when the apartments were ready for occupation.

A few months after booking the apartment, Dr. Sharma got a notice from the promoters of Omega Capetown Residency that due to unforeseen circumstances they were not in a position to complete the project and needed the allottees' consent for transferring of their majority rights and liabilities to another reputed developer M/s. Sai Developers Pvt. Limited of **New Delhi**. In case any of the allottees was not agreeable to this proposal he could get his money refunded. Since Dr. Sharma was very much attached to the location of the flat, he accepted the proposal after enquiring with Rohit and his father. He also learnt that 95% of the allottees had already given their written permission.

Further, the Authority had given its written approval to the proposal for transfer and completion of Project by M/s. Sai Developers Pvt. Limited. Dr. Sharma was also assured by Mr. Bhanu Pratap Taneja, the erstwhile promoter with whom he had earlier interacted satisfactorily, that all the pending obligations would be fulfilled by the new developer and in NO CASE the date of completion of the project would be extended; otherwise it would attract penalty. It was also disclosed by Mr. Taneja that the new promoter would rectify any structural defect if occurred within 5yrs from the date of handing over the possession of the apartments. Dr. Sharma, thus felt relieved.

M/s. Sai Developers completed the project on time and received Completion Certificate from the Competent Authority. As per the agreement for sale, Dr. Sharma made payment of the remaining 25% of the cost. Thereafter, he received Occupancy Certificate and took physical possession of the apartment well before two months since the allottees were supposed to take physical possession within statutory period of two months from the issue of Occupancy Certificate.

He was also given other necessary documents and plans, including that of common areas. He also became a member of the RWA formed by the allottees. Meanwhile, the promoter executed a registered conveyance deed in favour of each of the allottees along with the undivided proportionate title in the common areas to the RWA.

I. Multiple Choice Questions

1. Registration of a real estate project shall not be required -
   (a) where the area of land proposed to be developed DOES NOT EXCEED 500 Sq.mts or the No of apartments proposed to be developed does not exceed **EIGHT**.
   (b) where the area of land proposed to be developed DOES NOT EXCEED 5000 Sq.mts or the number of apartments proposed to be developed does not exceed **EIGHTY**.
   (c) where the area of land proposed to be developed DOES NOT EXCEED 250 Sq.mts or the number of apartments proposed to be developed does not exceed **FOUR**.
   (d) where the area of land proposed to be developed DOES NOT EXCEED 300 Sq.mts or the number of apartments proposed to be developed does not exceed **THREE**.

2. Who is required to submit a copy of duly obtained approvals and commencement certificate for getting the project registered with RERA:
   (a) Allottee
   (b) Promoter
   (c) Real Estate Agent
   (d) None of the above

3. A registered real estate agent shall -
   (a) Facilitate the sale/purchase of any plot, apartment or building, being sold by the promoter in any planning area, which is registered with the Authority;
   (b) maintain and preserve prescribed books of account, records and documents;
   (c) not involve himself in any unfair trade practices
   (d) All of the above.

4. The promoter is required to rectify any structural defect if it occurs within a period of ----- years from the date of handing over the possession of the apartments to allottees -
   (a) Two years
   (b) Three years
   (c) Four years
   (d) Five years
5. Registration of on-going project for which completion certificate is yet to be received is mandatory -
   (a) Yes, if the area of land (developed or to be developed) exceeds five hundred square meters or the number of apartments (developed or to be developed) exceeds eight.
   (b) No, irrespective of the area of land or the number of apartments
   (c) Can't say
   (d) None of the above
6. A real estate developer can leave the project mid-way by selling that project to another developer if he has taken a written approval of ---------- of allottees along with approval of the Authority.
   (a) 2/3rd
   (b) 1/3rd
   (c) $3/4^{th}$
   (d) 1/4th
7. The time limit within which an allottee is required to take physical possession of the apartment after issue of occupancy certificate is -
   (a) one month
   (b) two months
   (c) three months
   (d) four months
8. A certificate certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications as approved by the competent authority under the local laws is called -
   (a) Commencement Certificate
   (b) Completion Certificate
   (c) Occupancy Certificate
   (d) None of the above
9. The flat purchased by Dr. Sharma jointly with his wife Mrs. Neelima Sharma though funded by him would be held as 'benami transaction' under the Prohibition of Benami Property Transactions Act, 1988
   (a) Yes
   (b) No
   (c) Can't say
   (d) None of the above
10. As per the Competition Act, 2002 '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, understanding or action is intended to be enforceable by legal proceedings.
   (c) Whether or not, such arrangement, understanding or action is formal or in writing; or whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.
   (d) None of the above.

DESCRIPTIVE QUESTIONS

1. (i) Examine the following given aspects W.r.t the allottee in the situation given in the case study:
   (a) Rights exercised by Dr. Sharma as an allottee.
   (b) Duties fulfilled by Dr. Sharma as an allottee.
   (c) Right which was not exercised by him and duty which was not required to be fulfilled by Dr. Sharma.

   (ii) The promoters of Omega Capetown Residency transferred majority of rights and liabilities to Sai Developers Pvt Ltd. for the completion of the project. Advise as to the validity of such transfer of a real estate project to a Sai Developer's Pvt Ltd in the case study?

2. In the given case study Omega Capetown Residency has got itself registered under the Real Estate Regulatory Authority, as it consisted of 1,000 residential units. However, if Omega Capetown Residency consisted of only 250 residential units, then was it necessary to get itself registered under the Real Estate (Regulation and Development) Act, 2016:

   if yes, name the various important documents and declarations which are required to be submitted by a 'real estate developer' while registering a project with the Real Estate Regulatory Authority (RERA) having only 250 residential units and not 1,000 residential units.

3. Mr. Bhanu Pratap Taneja was approached by some of the influential developers to join their association so as to reach an understanding whereby they could inflate the price of the apartments built by them. Even though the deal was in favour of Mr. Bhanu Pratap Taneja, he rejected the proposal from other developers. In the light of the provisions of the Competition Act, 2002, discuss whether the decision of Mr. Bhanu Pratap Taneja is lawful?

ANSWER TO OBJECTIVE TYPE QUESTIONS:

1. (a)
Section 3 (1) of Real Estate (Regulation and Development) Act, 2016 requires that
   - No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, in any real estate project or part of it in any planning area without registering the real estate project with the Real Estate Regulatory Authority established under this Act.
   - It is provided that projects that are ongoing on the date of commencement of this Act and for which completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act.

   Thus, section 3 (1) has made the registration of a real estate project in any planning area mandatory.

   SECTION 3 (2) CONTAINS CERTAIN EXEMPTIONS from registration.

   According to it, no registration of the real estate project shall be required -

   (a) where the area of land proposed to be developed does not exceed 500 square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases;
   (b) However, if the appropriate Government considers it necessary, it may reduce the threshold below 500 square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

2. (b)
As per Section 4 (2) (c) of the Real Estate (Regulation and Development) Act, 2016. THE PROMOTER is required to submit a copy of duly obtained approvals and commencement certificate for getting the project registered with RERA

3. (d)
As per Section 10 of the Real Estate (Regulation and Development) Act, 2016
(1) Every real estate agent registered under section 9 shall—

   a. not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority;
   b. maintain and preserve such books of account, records and documents as may prescribed;
   c. not involve himself in any unfair trade practices, namely:—
      (i) the practice of making any statement, whether orally or in writing or by visible representation which—
         (A) falsely represents that the services are of a particular standard or grade;
         (B) represents that the promoter or himself has approval or affiliation which such promoter or himself does not have;
         (C) makes a false or misleading representation concerning the services;
      (ii) permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.
   d. facilitate the possession of all the information and documents, as the allottee is entitled to, at the time of booking of any plot, apartment or building, as the case may be;
   e. discharge such other functions as may be prescribed.

4. (d)
As per Section 14 (3) of the Real Estate (Regulation and Development) Act, 2016 In case of any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for the sale relating to such development is brought to the notice of the promoter within a period of **FIVE YEARS** by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within **thirty days,** and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this act

5. (a)
Hint: Refer Section 3 of the Real Estate (Regulation and Development) Act, 2016. It may not be mandatory in a particular State if the State has granted exemption to such on-going project. (also see Answer to Q1)

6. (a)
Section 15(1) of the Real Estate (Regulation and Development) Act, 2016 says that- The promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from **TWO THIRD allottees,** except the promoter, and without the prior written approval of the authority. It is to be noted that if a consumer or his family holds more than one unit in the project then he will be considered as one consumer only.

7. (b)
As per Section 19 (10) of the Real Estate (Regulation and Development) Act, 2016 Every allottee shall take the physical possession of the apartment, plot or building as the case may be, within a period of **TWO MONTHS** of the occupancy certificate issued for the said apartments, plot or building as the case may be.

8. (b)
As per Section 2 (q) of the Real Estate (Regulation and Development) Act, 2016 **"COMPLETION CERTIFICATE"** means the completion certificate or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications as may be approved by the competent authority under the local laws.

9. (b)

As per Section 2 (9) (iii) of the Prohibition of Benami Property Transactions Act, 1988 Benami transaction" means, **a transaction or an arrangement**—

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

Except when the property is held by

- any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

10. (c)
According to Section 2 (b) of the Competition Act, 2002, 'Agreement' includes any arrangement or understanding or action in concert:
(i) Whether or not, such arrangement, understanding or action is formal or in writing; or
(ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

ANSWER TO DESCRIPTIVE TYPE QUESTIONS:

1. (i) (a)
With reference to Section 19 of the Real Estate (Regulation and Development) Act, 2016, Dr. Sharma, as an allottee, exercised the following rights:
(i) Obtained the information relating to sanctioned plans, layout plans along with the specifications as approved by the competent authority.
(ii) Demanded to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities.
(iii) Claimed physical possession of the said apartment.
(iv) Obtained the necessary documents and plans, including that of common areas, after getting the physical possession of the apartment from the promoter.

(i) (b)
With reference to Section 19 of the Real Estate (Regulation and Development) Act, 2016, Dr. Sharma, as an allottee, fulfilled the following duties:
(i) Made necessary payments within the time as specified in the agreement for sale.
(ii) Became a member of the RWA formed by the allottees.

(iii) Took physical possession of the apartment within a period of two months from the issue of Occupancy Certificate.

(iv) Participated towards registration of the conveyance deed of the apartment.

(i) (c)

(i) With reference to Section 19 of the Real Estate (Regulation and Development) Act, 2016, Dr. Sharma, as an allottee, did not exercise the following right:

The right to claim the refund of amount paid along with prescribed rate of interest. It was so because the promoter was able to give possession of the apartment in accordance with the terms of agreement for sale.

(ii) With reference to Section 19 of the Real Estate (Regulation and Development) Act, 2016, Dr. Sharma, as an allottee, was not required to fulfill the following duty:

The duty to pay interest at prescribed rate for delay in making any payment. It was so because he had made the payments in accordance with the terms of agreement for sale.

(ii)

As per section 15 of the Real Estate (Regulation and Development) Act, 2016, a promoter is permitted to transfer his majority rights and liabilities in respect of a real estate project to a third party.The provisions given below are to be adhered to by the promoter for transfer:

(a) Obtain prior written consent from two-third of allottees. Such consent will not include the consent given by the promoter.

(b) Also obtain prior written approval of the Authority.
//ofe: It is to be ensured that such transfer shall not affect the allotment or sale of the apartments, plots or buildings, as the case may be, in the real estate project developed by the promoter.

(i) After obtaining the consent of both allottees and the Authority, the new promoter shall be required to independently comply with all the pending obligations under the provisions of the Act or rules & regulations made thereunder.

(ii) The new promoter is also required to comply with the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.

(iii) Further, the new promoter must note that any transfer so permitted shall not result in extension of time to him to complete the real estate project.
//ofe: In case of default, he shall be liable to the consequences for delay, as per the provisions of the Act or the rules and regulations made thereunder.

Since in the given case study, 95% of the allottees had already given their written permission. Further, the Authority had given its written approval to the proposal for transfer and completion of Project by M/s. Sai Developers Pvt. Limited in compliance with the requirements given in the said provisions. Such transfer of a real estate project to a Sai Developer's Pvt Ltd. is valid.

2. According to proviso to section 3 of the Real Estate (Regulation and Development) Act, 2016, projects that are on-going on the date of commencement of the Act, and for which the completion certificate has not been issued, the promoter of the project are required to make and application to the concerned Authority for the registration of the said project within a period of 3 months from the date of commencement of the Act.

Further, the section provides that no registration of real estate project shall be required where the area of land proposed to be developed does not exceed 500 square meters or the number of the apartments proposed to be developed does not exceed 8 inclusive of all phases.

Hence, the Act requires registration of on-going projects where completion certificate was yet to be obtained as well as new projects, if the area to be developed exceeded 500 sq. mtrs. or apartments to be built under the project exceeded eight. Thus, registration of Omega Capetown Residency was must with the Real Estate Regulatory Authority of UP (RERA, UP), as consisted of 1,000 residential units.

Further, even if Omega Capetown Residency consisted of only 250 residential units (i.e. more than 8 units), it will be compulsory to get itself registered under the Act. The process of registering a project with the Real Estate Regulatory Authority (RERA) which consists of 1,000 units or 250 units is same which is given under section 4 of the Act.

With reference to Section 4, various important documents and declaration required to be submitted while registering a project with RERA are as under:

- Details of the project such as name, address, type, names and photographs of the promoters, etc.
- Details of the project which were already launched by the real estate developer in the preceding 5 years and their present status.
- Approvals and commencement certificates obtained from the competent authority for each phase of the project separately.
- Sanctioned layout plan, the development plan for the project and details of basic facilities being made available like drinking water, electricity etc.
- Proforma of allotment letter, agreement for sale and conveyance deed to be signed with the consumers.
- Location of the project with clear demarcation of the land for the project.
- Number, type and carpet areas of units to be sold.
- The details of open areas if any like terraces, balconies etc.
- Details of associated engineers, contractors, architects and intermediaries in the project.
- A declaration, duly supported by an affidavit, stating the following important matters:
  - that the promoter has a legal title to the land and it is free from all encumbrances along with legally valid documents;
  - the time period required for completion of the project;
  - that seventy per cent. of the amount realised from the allottees, from time to time, shall be deposited in a separate escrow account and shall be used only for the purpose of completion of project;
  - that the promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice; and shall take all the pending approvals on time from the competent authorities; etc.

3. According to section 2(b) of the Competition Act, 2002, 'Agreement' includes any arrangement or understanding or action in concert:

   (i) Whether or not, such arrangement, understanding or action is formal or in writing, or
   (ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

   Further, section 2(c) of the Competition Act, 2002, "Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods Or Provision of services.

   An association for the welfare of the trade or formed for any other purpose not mentioned in the aforesaid definition will not be a cartel. Thus, it is only when an association, by agreement amongst themselves, limits control or attempts to control the production, distribution, sale / price of, or trade in goods or provision of services, that it will be cartel.

   Hence, an agreement which prohibits an enterprise or person or their association for entering into an agreement in respect of production, supply, distribution, storage, acquisition or control of goods or services, which causes or is likely to cause an appreciable adverse affect on competition. Such agreements entered in contravention of the above are void. These agreements are presumed to have an appreciable adverse affect on competition.

   Here, in the given situation, the agreement between Mr. Bhanu Pratap Taneja and other builders would have fallen into the ambit of section 2(b) and 2(c) of the Competition Act, 2002 as the aim of the association was to increase the price of the apartments. Thus, such an association would be void.

CASE STUDY 2
MR. MANOHAR MEHTA
(FEMA, RERA, PMLA, PBPTA.1988)

Mr. Manohar Mehta, renowned builder (Mumbai), owns a reputed building construction company "Sri Ram Building Construction and Real Estate". Due to his vast business empire, he is known as the "King of the Property World".

On the personal front, Mr. Mehta in his family has an elderly mother, wife, and three children. His father, Mr. Sri Ram Mehta, had recently expired after prolonged sickness. Mr. Manohar Mehta's MOTHER, **Mrs. Rama Devi**, is a religious lady always dedicating her time in worship and holy works. WIFE, **Urvashi**, is a home maker and a socialite. She is mostly involved in all the social activities and runs her own NGO named "AAWAZ". Mr. Mehta regularly give financial contribution to his wife's NGO. These minor donations gave Mr. Mehta a Noble man tag in the social circle and better business prospects.

Sonia, ELDEST DAUGHTER of Mr. Mehta, is married and well settled with her husband in Australia. She has recently started own import export business in Australia with the help of her father. Mr. Mehta would transfer the amount to his daughter and she regularize the amount in the books of accounts of her business.

Recently, a project was started by Mr. Mehta in Marol area of Mumbai. The project was named as "Shubh Appartment". Under this project a 5 storey building comprising of 2 flats (2 BHK) at each floor were constructed. The actual construction cost of each flat was Rs. 50 lakh. The flat was sold at Rs. 60 Lakh. The advance booking charges of Rs. 6 lakh for each flat was collected from the buyers by cheque. Proper receipt was issued to all the buyers for the advance payment.

Out of the 10 flats, 4 flats were sold at an increased price of Rs. 62 Lakh. Rs. 2 lakh each was taken in cash from the 4 buyers. Therefore, he earned in total Rs. 8 Lakh for these 4 flats. This amount of Rs. 8 lakh was send to Sonia via an independent agent. Sonia utilized this amount in her business and taken into record via some entry in her books of accounts.

Mr. Manohar Mehta has TWO SONS, **Rohit and Sorav**. Sorav is the youngest son. He is pursuing his graduation from one of the best universities of Chicago. For his education, Mr. Mehta remitted foreign exchange of USD 2, 00,000 through authorized person. During course of his studies, Sorav was caught with the seasonal influenza, so there he required an emergency medical treatment. Mr. Mehta transmitted additional amount of USD 70,000 for treatment through authorized person who was well known to him for hassle free transfer.

Rohit, the elder son, after successful completion of his M.B.A. Finance degree, is actively supporting his father in his real estate business. To give a start to his career, Mr. Mehta handed over the project **"Royal Aashiana"** to be constructed in **Kharghar**. The said project was proposed to be developed in 1000 sq. mts.

Rohit was working on the project under guidance of Mr. Mehta. He marketed about the said project and invited persons to purchase the flats in the Royal Ashiana. It was an ongoing project, Rohit without registration of the project made an agreement to sell some of the flats. As per Mr. Mehta's regular morning routine, he one day read his favorite column "Property for Sale" in the newspaper. He came across one advertisement regarding the sale of the residential plot in Panvel districtof Maharashtra. He discussed about the advertisement with his manager, Mr. Shyam Pareekh. He asked his manager to visit the actual site of the mentioned property.

Mr. Pareekh called the land owner, Mr. R. Thakker, and took the appointment for the visit. He went to Panvel to meet the owner and see the property. It was a 10,000 square feet plot near the city area. Mr. Thakker quoted a price of Rs. 1crore for selling his property. After two rounds of meeting the final negotiation with the land owner was done and deal was locked for Rs. 90 Lakh.

On mutual consensus between them, down payment of Rs. 20 lakh was made to Mr. Thakker in cash. Further, a payment of Rs. 70 Lakh was done by cheque and the property was registered in the name of his (Mr. Mehta) mother. Being a sacred woman, she was not interested in all such types of transactions or arrangements made on her name by Mr. Mehta.

After few months, Mr. Manohar Mehta from his sources came to know that an agricultural land is on sale by a farmer, Mr. Bhima Singh. The farmer's 5 acres of agricultural land was located in Thane district of Mumbai. Mr. Manohar Mehta thought it would be a great deal to buy the agricultural land around the lush green vicinity of the Thane district.

He further thought that he can resale this property after converting it to farm houses to the potential buyers.

After the detail discussion with his management regarding the purchase of land, Mr. Manohar Mehta went to Thane to see the agricultural land. The land was just 500 meters away from the highway. After visiting the land Mr. Mehta became keen to buy the property. They had a talk with the FARMER, Mr. Bhima Singh. The farmer being illiterate hardly knew about the legal sale/purchase of the land. Mr. Manohar Mehta and Mr. Pareekh negotiated and finalized the deal in Rs. 80 Lakh.

Since Mr. Manohar Mehta required funds for purchasing the Thane property, he decided to sell his Panvel plot which was in the name of his mother. He retransferred the Panvel property to himself and then sold the Panvel plot for Rs. 1.10 Crore. He took partial amount by cheque and rest by cash. This way he safeguarded himself from showing the capital gain on financial record. Mr. Mehta received Rs. 80 Lakh in cheque and rest Rs. 30 Lakh in cash. Whereas, Mr. Mehta induced Bhima Singh, and paid him Rs. 50 Lakh through cheque and Rs. 30 lakh through cash.

Mr. Manohar Mehta was still having Rs. 30 Lakh out of sale of 1.10 Crore panvel property, at his disposal. Mr. Mehta decided to deposit Rs. 2,000 each to his wife, two sons and mother, saving accounts every month. He would be depositing of Rs. 2000 each per month for next couple of years.

During one of the corporate parties while having a discussion, Mr. Mehta's friend advised him to invest the remaining amount in the shell company outside India. Mr. Mehta liked the suggestion and decided to send Rs. 10 Lakh to invest in the shell company in Singapore via Hawala. He learned about Mr. Varun Das who runs a business of hawala under the veil of running a financial company. Mr. Mehta contacted Varun Das who agreed to transfer the fund via Hawala on 1% commission basis. In this way Mr. Mehta managed to circulate the amount in the shell company outside India. Mr. Manohar Mehta also donated Rs. 50,000 in cash to his wife's NGO ÄAWAZ".

After few months, Mr. Mehta decided to buy a new car, worth Rs. 50 Lakh. He did the down payment of Rs. 5 Lakh via cheque. For the remaining Rs. 45 lakh he took 3 years auto loan, so that he can deposit the monthly installment in the bank. Hence in this way the remaining Rs. 10 Lakh, which he gained from the sale of the Panvel property, was utilized..

Due to frequent transactions of hefty amount and his conduct of other financial activities in a year, Mr. Mehta bank accounts and his family members account of transactions were in the scrutiny of the Income Tax Department.

On further investigation it was discovered that Mr. Mehta, Mr. Thakkar, Rohit and Sonia being guilty for different offences punishable under the different Acts.

I. MULTIPLE CHOICE QUESTIONS

1. Sonia plans to make investment in India. She was permitted to do so as per the FEM regulation in -
   (a) Trading in transferable development rights
   (b) Real Estate business and construction of farm houses
   (c) Agricultural or plantation activities
   (d) Chit funds subscribed through banking channel and on non-patriation basis

2. Sonia ordered exports of goods from India for her business. The amount (export value) of good shall be released and repatriated to India within period -
   (a) 3 Months from date of export
   (b) 6 Months from date of export
   (c) 9 Months from date of export
   (d) 9 Months from date of invoice covering such export

3. Amount released for the real estate project from allottees in separate account can be withdrawn by promoter after it is certified by-
   (a) Cost accountant and an Architect
   (b) Engineer, and a Chartered Accountant
   (c) an Architect and an Engineer
   (d) Engineer, an Architect, and a Chartered Accountant in practice

4. "Who according to the Provision of Prevention of Money Laundering Act is/ are held to be liable in dealing of Panvel property-
   (a) Mr. Manohar Mehta
   (b) Mr. Thakkar
   (c) Both (a) and (b)
   (d) Mr. Shyam Pareekh

5. Who among the following is liable for an offence of money laundering as per the Part C of the Schedule given in the Prevention of money laundering Act-

(a) Mr. Mehta
(b) Mr. Thakkar
(c) Mr. Atul
(d) Ms. Sonia

6. How much amount of penalty Mr. Mehta has to pay on illegal remittance of money transferred to Sorav
(a) USD 6,00,000
(b) USD 1,80,000
(c) USD 60,000
(d) USD 50,000

7. Suppose any project started by Mr. Mehta was not completed within preferred time due to force majeure. Remedy available to Mr. Mehta in this situation
(a) Registration may be interim cancelled by Authority
(b) Registration need to be freshly applied
(c) Registration granted may be extended for period not exceeding 1 year on application
(d) Registration may be extended for reasonable period on application.

8. Mr. Mehta sells a flat of Royal Aashiana to Mr. X for the amount Rs. 75 lakh. Mr. X made the advance payment. The correct value of the advance payment is
(a) Rs. 7.5 Lakhs
(b) Rs. 8 Lakhs
(c) Rs. 8.5 Lakhs
(d) Rs. 9 Lakhs

9. In case of dispute between Mrs. Rama Devi and Mr. Mehta, can Mr. Mehta legally claim her right over the Panvel Plot?
(a) Yes, because he is the beneficial owner in the transaction
(b) No, because the transaction is Null and void
(c) Yes, because he paid consideration for the transaction
(d) None of the above

10. Mr. Mehta files an application for initiation of voluntary liquidation proceeding of his Real Estate construction company. Mr. X, a home buyer of a flat in one of the project of Mr. Mehta claimed for the re-fund of paid amount or demanded for handover of possession of flat. Which amongst following is not incorrect statement
(a) X cannot claim the amount due to pending of Insolvency process
(b) X can file a suit for the default committed by Mr. Mehta under IBC
(c) X's right & interest is protected after execution of an agreement to sale till the conveyance of the flat
(d) None of the above.

II. DESCRIPTIVE QUESTION

1. What would be the consequences in the following given situations:
a) Where if Mr. Mehta remitted Foreign Exchange USD 2,00,000 and USD 70,000 as educational and medical expenses to Sorav .
b) Sorav used USD 20,000 out of the remitted medical expenses (i.e., USD 70,000) and used remaining amount to purchase immovable property jointly with Mr. Mehta in Chicago.

2. Suppose Royal ashiana, is a 15 year old building of Mr . X. It was purchased by Mr . Mehta in January 2016. He planned to re-develop the said building into residential apartments. He launched the project in end of January 2016. During the course, the Government enacted the Real estate(Regulation and Development) Act, 2016.Mr. Mehta seek advise of his legal consultant on the issues related to the registration of the said Project
i. Is the Registration for the re-development of society is mandatory?
ii. If he plans to develop a new society under new name with new allotments. Is the registration mandatory of the project?
iii. State the position where project have been completed and obtained the certificate of completion before the commencement of RERA?
iv. Where if the project is to be devolved into phases ?
v. Where if the authority has not taken any decision on application for the registration within the prescribed period.

3.
(i) What remedy is available to Mr. Mehta, in case he want to compound for the commission of illegal remittance to Sorav under FEMA Act 1999?
(ii) According to the case study the property bought by Mr. Mehta in the name of his mother, Mrs. Rama Devi, is a Benami Transaction and will be confiscated.

Suppose the property rightfully belonged to Mrs. Rama Devi then what measures she can take to save the property from confiscation. Explain?

I. ANSWERS TO OBJECTIVE TYPE QUESTIONS

1. (d) [Hint: As per regulation 4 (b) explanation (ii) of the FEMA (permissible capital account transaction) Regulation 2000.]- ICAI ANSWER (not found in module)
Students ANSWER as per ICAI Module:
Given in the list of prohibited capital transactions, The **person resident outside India is prohibited from making investments** in India in any form, in any company, or partnership firm or proprietary concern or any entity whether incorporated or not **which is engaged or proposes to engage**:
   i. **In the business of chit fund**; 15 [Registrar of Chits or an officer authorised by the state government in this behalf, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians. NON- RESIDENT INDIANS SHALL BE ELIGIBLE TO SUBSCRIBE, THROUGH BANKING CHANNEL AND ON NON- REPATRIATION BASIS, to such chit funds, without limit subject to the conditions stipulated by the Reserve Bank of India from time to time]

2. (c) As per regulation of FEMA (Export of goods and services) regulation 2016
In ordinary case: The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India **within nine months or within such period** as may be specified by the Reserve Bank, in consultation with the Government, from time to time, from the date of export, provided.

   However, where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of shipment of goods;

3. (d)
As per Section 4 (2), proviso to (D) of clause (l) of the RERA, 2016

   STUDENTS ANSWER: SECTION 4 sets out the **PROCEDURE** that a promoter needs to follow **For** making an **APPLICATION** to the Authority **for registration of real estate project**.

   Section 4 (2) states that the promoter shall enclose such documents along with the application referred to in sub-section (1) (D) to Clause (I) of section 4(2) states that –

   a declaration shall be submitted, supported by an affidavit, which shall be signed by the promoter or anyperson authorised by the promoter, stating:—

   that seventy per cent. of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose:

   It is provided that the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project.

   It is further provided that the **amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice** that the withdrawal is in proportion to the percentage of completion of the project.

4. (c)
As per Section 3 PMLA, whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

5. (d) As per Part C of the Schedule to the Prevention of Money Laundering Act, 2002 **Schedule offence under Part C:** An offence which is the offence of cross border implications and is specified in,—
   (i) Part A; or
   (ii) the offences against property under Chapter XVII of the Indian Penal Code.
   (iii) The offence of wilful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

Offence of cross border implications means –

a) Any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person remits the proceeds of such conduct or part thereof to India; or
b) Any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India.

6. (c)
Section 13(1A) and 13(1C)
Where Acquisition of any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A. the penalty shall be

- Upto three times, the sum involved.

As per Schedule III of FEM (Permissible Current Account Transactions) Regulations, 2000 : Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 250,000 only (ie., Studies and Medical expenses) total 270000 is excess of 250000 by 20000. Penalty is 3times i.e., 3*20000$ = 60000$

7. (c) [Hint: Refer Section 6 of RERA, 2016]

Reference: As per section 6 (provision for the extension of registration), The registration granted under section 5 may be extended by the Authority on an application made by promoter due to **Force Majeure,** in such form and on payment of such fee may be [prescribed]. However, the Authority may, in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, **not exceed a period of one year**

8. (a) [Hint: As per Section 13 of RERA, 2016]
Reference: Section 13 prohibits a promoter from taking any deposit or advance without first entering into agreement for sale. The provisions are started as under:

(1) A promoter shall **not accept a sum more than ten per cent of the cost of the apartment**, plot, or building as the case may be, as an advance payment or an application fee, from a person **without first entering into a written agreement for sale** with such person and register the said agreement for sale, under any law for the time being in force.

9. (b) [Hint: Section 6 Prohibition of Benami Property Transactions Act, 1988]
Reference: Prohibition on retransfer of property by benamidar [Section 6]

No person, being a benamidar **shall re-transfer the benami property** held by him to the beneficial owner or any other person acting on his behalf.

In case where any property is **re-transferred in contravention** of the aforesaid provision, the transaction of such property shall be deemed to be **null and void**.

10. (c) [Hint: Section 11 (4) read with section 89 of the RERA, 2016]
Reference: Section 11(4) states that

The promoter shall—

(a) **be responsible** for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or **to the allottees** as per the agreement for sale, or to the association of allottees, as the case may be, **till the conveyance of all** the apartments, plots or buildings, as the case may be, **to the allottees**, or the common areas to the association of allottees or the competent authority, as the case may be.

SECTION 89 provides that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

ANSWERS TO DESCRIPTIVE QUESTIONS

1.

(a) As per section 13 (1) of the FEMA, 1999, If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to
- Thrice the sum involved in such contravention where such amount is quantifiable, or
- up to two lakh rupees where the amount is not quantifiable.
Any Adjudicating Authority adjudging any contravention to above provisions, may, if he thinks fit in addition to any penalty which he may impose for such contravention **direct that** any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government **and further direct that** the foreign exchange holdings, if any of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

According to the above provisions, Mr. Mehta will be penalized thrice of the extra amount (USD, 20,000) remitted above the prescribed limit (USD 2, 50,000). Hence liable to pay a penalty of USD 60,000 to the Government.

(b) The second issue is related to sections 13(1A), 13(1C) & 37A of the FEMA Act, 1999 read with Regulation 5 of the FEM(Acquisition & transfer of immovable property outside India)Regulation , 2015.

As per section 13(1A), if any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, of the foreign exchange, foreign security or immovable property.

13(1C) of FEMA says that if any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.

According to Section 37A of the FEMA, upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property:

Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

As per regulation 5 of the FEM (Acquisition & transfer of immovable property outside India) Regulation, 2015, a person resident in India may acquire immovable property outside India jointly with a relative who is a person outside India. Provided there is no outflow of funds from India.

Since in the given case, Mr. Mehta remitted Foreign exchange to Sorav in excess to the limit prescribed under the FEMA. Sorav partially used USD 20,000 for medical treatment and rest USD 50,000 to purchase property outside India jointly with Mr. Mehta. So Both Mr. Mehta and his son Sorav will be liable under sections 13(1), 13(1A), 13(1C) of the FEMA, 1999.

2.

(1) According to section 3(2) of the Real Estate (Regulating) Authority Act, 2016, no registration of the real estate project shall be required for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project. So Registration for the re-development of society (Royal Ashiana) was not required.

(2) According to the above provision no registration is required when any project is renovated or repair or re-development and it does not involve marketing, advertising, selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

However, in the given situation in the question, Mr. Mehta plans to develop it as a new society under new name with new allotments. So registration of the said project was necessaited as the Act.

(3) As per the proviso to section 3(1) of the RERA, projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act. In the given case, where the project have been completed and obtained the certificate of completion before the commencement of RERA, such project shall not require registration.

(4) As per the explanation to section 3 of the RERA, where the real estate project is to be developed in phases, every such phase shall be considered a standalone real estate project, and the promoter shall obtain registration under this Act for each phase separately. Therefore if the said project is to be developed in phases, it needs separate registration for each phase.

(5) As per Section 5 of the RERA, the Authority has to decide on the application within 30 days of its receipt. It further provides that in case the Authority fails to take a decision within the said period of 30 days the project shall be deemed to be registered.

3.

(i) According to provision of Section 15 (1)

(1) Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed."

(2) Where a contravention has been compounded under sub-section (l), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.

As per the above mention provision Mr. Mehta will submit the application to the concerned authority for compounding of the offences committed in contravention to the FEMA Act.

(ii) The Section 5 of PMLA authorizes the Director or any other officer not below the rank of Deputy Director to attach the property. Section 8 of PMLA lays down an elaborate procedure for adjudication of complaint under Section 5 of PMLA. It calls for a show cause notice to be issued to the offender/ person from whom property has been seized, so as to give the person an opportunity to make a case against attachment. Such a person in order to avoid confiscation, can demonstrate the legitimate source of his income/earning or assets, out of which or by means of which he has acquired the property attached. The evidence on which he realized and other relevant information and particulars, and to basically convince the authority about the property which should not be declared to be the property involved in money laundering.

If the authority reached the conclusion that the offense has not taken place it shall order release of such property to the person entitled to receive it. Hence as per the above provision, Mrs. Rama Devi aggrieved by the provisional attachment may file her objection before the adjudicating authority.

CASE STUDY 3
MR. KRISHNAKANT MATHUR
(PMLA, FEMA, RERA, Competition act, PBPTA)

Mr. Krishnakant Mathur was a lecturer in agricultural college of Pushkar. After 25 years of his service he retired from his job last month. To utilise his time, Mr. Mathur keeps the accounts of his society and has also started a coaching classes for the needy and poor students.

Mr. Mathur has THREE CHILDREN, two daughters **JAYA & LATA AND SON NEERAJ**. His wife Asha Devi is a house wife. Neeraj is eldest of all the three children. Jaya and Lata are still studying in Class 12th and 10th respectively. At the time of retirement of Mr. Mathur, Neeraj has completed his engineering degree.

During his work tenure, Mr. Mathur purchased one property (area 2000 Sq feet), at Mansarover colony, Jaipur in the name of his son Neeraj Mathur. The property already has a constructed house over it. Mr. Mathur also owns an ancestral property in his village Titari. Since he was posted at Jaipur, so he resided at Mansarover colony house with his family.

Neeraj got a good job in Maharashtra State Electricity Board (MSEB) as a Junior Engineer. He was posted at Pune. He was very desperate to earn more money and become rich. For clearing the contractors billing and giving necessary approvals he started giving favours to the contractors and vendors. Various projects were in the hands of MSEB, they authorised Neeraj to finalise the tenders related to supply of required articles, goods and services for attainment of the government projects. Many contractors pleased him by cash or kind for acceptance of their tenders for the projects. Neeraj used his position in the said department by manipulating the bidding process. Soon, Neeraj got promotion. He decided to celebrate his grand success and planned for a trip to Hongkong with his friend. There in Hongkong, he came to know about XBL Company, which was a joint ventures abroad of Indian Companies.

He thought to make an equity investment in XBL Company. He talked with the Indian Service Providers for the investment of funds to Securities Exchange of Hongkong for buying equity in XBL Company. Neeraj applied for drawl of foreign exchange, but due to legal compliances, authorised dealer denied for the said transaction. Neeraj, through known authorise dealer, on payment of commission exported the foreign exchange for the equity investment in XBL Company. So in this way, Neeraj made an overseas investments.

In the meantime, Neeraj, while residing in Pune, met a girl in his office named Shalini. They both fell in love with each other. After couple of months they both decided to marry without informing any of the family members as they both are of different caste. As a **WITNESS RAHUL**, Neeraj's friend, was the only one who knew about his marriage. Rahul is located in Dubai and works as a Senior Manager with Al-Aadil Works LLC. Rahul insisted him to come to Dubai. So Neeraj and Shalini planned their visit to Dubai. Shalini discussed about her trip with her friend. Her friend told that Dubai is a beautiful place and is a hub for Gold and electronics. Since Shalini had a keen interest in buying gold and Neeraj had a restriction in carrying foreign currency, he came up with an idea. He gave Rahul's family Rs. 1 Lakh in cash, in India and took the equivalent foreign currency from Rahul in Dubai. They both had a good time in Dubai. They visited the Gold Souq in Deira. Shalini purchased gold jewellery worth Rs.1.5 Lakh. Rahul also took them around to see some latest Electronic items. Neeraj found that the price of the Smart Television was less and the shopkeeper proposed further discount without a bill. So Neeraj also bought a new Television worth Rs.60000. After their return, they did not declare it to the Indian customs and passed through the Green channel. Custom officials on the matter of doubt withheld them at the airport and interrogated. After compliance with the required formalities under the legal prospects, the matter was sorted.

In 2016, during the period of demonetisation, Neeraj was holding a cash of Rs.10 Lakh. He deposited Rs.3 lakh is his and his wife's account within the permissible limit imposed by the government. **To settle the rest** of the amount he took the **HELP OF HIS FRIEND JAI BAKSHI**.

Jai is a renowned hotelier based in Mumbai. As per the discussion Jai told that he could manage Rs.2 Lakh by depositing it in his account. Further Jai told that he will charge 10% of Rs.2 Lakh to accommodate the amount in his record books. Also, he will return this amount only after 6 months due to scrutiny of IT dept.

Neeraj found that the market rate of changing the demonetised 500 and 1000 rupees notes were 50% of the given amount. So he thought it is better to agree to the terms and conditions of Jai and gave him Rs.2 Lakh. With the remaining Rs.5 Lakh, he booked a flat in Shubh Laxmi apartment near Badlapur Mumbai in the name of his wife Shalini. Neeraj on record showed above that paid amount of Rs. 5 lakh as a loan taken from Shalini's uncle.

Whereas, Shubh Laxmi Apartment, constructed by J.K. Builders was registered with the Maharashtra Real Estate Regulatory Authority. The flat was sold by Himmat Chand to Neeraj. In the meantime J.K. Builders filed an application for bankruptcy and shed of their responsibilities as to the completion and handover of the possession of the flats to the buyers. Neeraj approached to the office of J.K. Builders and they denied from their responsibilities by saying that the said flat was sold by Himmat Chand, so he owns the responsibility. Whereas Himmat chand took the plea that ultimate responsibility lies with the J.K. Builders, being a promotor. Neeraj went to the consumer forum for the relief.

In the meantime, due to the tip off received from unknown sources and on grounds of noticing the suspicious activities of Neeraj, Income Tax Department issued a scrutiny notice to him. According to the Notice, Neeraj was asked to clarify the mode of payment for the loan amount from his uncle as there was no entry of cash credited to Shalini's account. Neeraj and Shalini, however, managed and came safely out of a situation on benefit of doubt.

After few months, Neeraj went to Jaipur with his wife Shalini to meet his family. Mr. Mathur was extremely angry and shattered to see his son married without his consent. Mr. Mathur and his son had a heated argument and he turned both of them out of his house. Neeraj told that this house is in his name and legally belongs to him. Hence his father has no right to throw them away.

Mr. Mathur files a case for claiming ownership over the property as he does not want to give the possession of his house to Neeraj. As per plaint allegation, Mr. Mathur has purchased the property in 18/2/2015 in the name of his son Neeraj Mathur. As per plaint allegation, he has purchased the property out of his own income. He has claimed relief that he be declared as owner of the property and Neeraj should be permanently restrained from interfering in possession of the property.

Plaint clearly reveals that Mr. Mathur has purchased the property out of his own income in the name of his son Neeraj. It was his own property and he had claimed declaration of ownership right over the property. He has also prayed for permanent injunction against his son. Entire plaint allegation does not whisper that it was joint Hindu family property or purchased by Mr. Mathur for joint Hindu family. On the other hand, **Neeraj claimed** that he has purchased the property from his own income, his father was not having any right over the property.

During pendency of the suit, Mr. Mathur died. According to the procedure of the Tribunal in case of death of one of several plaintiffs or sole plaintiff, the right to sue survives. The Tribunal, on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. So, his wife and two daughters were impleaded as legal representatives of the deceased. His legal representatives have amended the plaint and have claimed declaration that the property is Joint Hindu family property. By detail amendment, made in the plaint, his legal representatives pleaded that Mr. Mathur was "Karta" of Joint Hindu Family.

The Tribunal held that in the present case, as per the claim of Mr. Mathur he purchased the property in the name of defendant i.e. the defendant was Benamidar. So, Mr. Mathur was not entitled to claim any right over such property in the light of Section 4 of the Prohibition of Benami Property Transactions Act, 1988.

Further, the Tribunal held that Late Mr. Mathur or legal representatives of the plaintiff have neither pleaded nor proved that the defendant was holding the property as a trustee or in a fiduciary capacity for the benefit of other persons for whom he was a trustee or was standing in a fiduciary capacity, inter alia, as per original pleading and amended pleading, the property was owned by Mr. Mathur as his self-acquired property or property was owned by Joint Hindu Family. Nothing has been pleaded by original plaintiff or his legal representatives that Neeraj was a trustee or standing in a fiduciary capacity for the present legal representatives, original plaintiff and for others. Inter alia, it has been specifically pleaded that the owner was the plaintiff and he has purchased the property in the name of the present defendant.

OBJECTIVE TYPE QUESTIONS:

1. In the given case study, Neeraj and Shalini bought gold jewellery worth Rs. 1.5 Lakh from Dubai. They have custom clearance through green channel. State whether the given act will constitute an offence under the Prevention of Money Laundering Act, 2002?
   (a) Yes, because the gold bought is beyond the permissible limit
   (b) Yes, because of an evasion of duty chargeable thereon goods on an & above the permissible limit.
   (c) No, because they are carrying the original bill of the purchased gold
   (d) No, because gold bought is within the permissible limit
2. Will Shalini's uncle be liable for punishment under the Money Laundering Act, if he lends the loan amount from his known sources of income?

(a) Yes, because he is knowingly associating in the crime
(b) No, because he is not a party to the crime
(c) Yes, because he is actually involved in the process
(d) Not sure

3. During the period of demonetisation Neeraj deposited Rs. 2 Lakh in Jai's account. who is the beneficial person in the light of the Prevention of Money-Laundering Act, 2002?
(a) Neeraj
(b) Jai
(c) Both a and b
(d) Neither a nor b

4. Suppose Mr. Mathur acquired a property from undisclosed & unaccounted sources of funds. Later, he created a trust of his entire property for his family benefit and appointed Neeraj as his trustee. Will Neeraj be held liable for such transaction made by Mr. Mathur-
(a) Yes
(b) No
(c) Partially Liable
(d) Not Sure

5. Neeraj in the course of his duty took commission in clearing the bill. This act can be termed as?
(a) Money laundering through Prevention of Corruption Act, 1988
(b) Money laundering through unlawful activities (Prevention) Act, 1967
(c) Money laundering through customs
(d) Money laundering through Indian Penal Code, 1860

6. Can Neeraj resale his house located in Jaipur to his father?
(a) No, it is prohibited under Benami Transaction
(b) Yes, Because Neeraj has the right to sale the property
(c) Yes, because Neeraj is an owner
(d) Both b and c

7. State which statement as to the drawl of the foreign exchange by Neeraj for transaction related to equity investment in XBL Company is correct –
(a) Neeraj can do such transaction through authorised dealer by providing commission on export for equity investment in XBL Company.
(b) Neeraj can do such transaction by directly buying equity in XBL Company
(c) Neeraj cannot transact for equity investment in XBL Company
(d) Drawl of foreign exchange by Neeraj for payment of commission on exports towards equity investment in XBL Company, is prohibited.

8. Neeraj can claim relief for the completion and handover of the possession of the flat purchased in Shubh Lakshmi Apartment against-
(a) J.K. Builders
(b) Himmat Chand
(c) Both (a) & (b)
(d) Maharashtra Real Estate Authority

9. When any transaction cannot said to be benami transaction-
(a) If a person deposits old currency in account of another person in an understanding that account holder will return the money in new currency
(b) Individual held property in joint name with his grand children with the consideration paid by an individual.
(c) Company raising share capital through fictitious shareholders
(d) Person takes a loan and not able to prove the genuinity of the lender

10. Suppose there are 3 bidders X, Y, & Z in a tender process initiated for MSEB. X & Y bidders were removed by neeraj unethically showing them incompetent to make bid in the tender process for supply of goods to MSEB for its project. This relates to-
(a) Regulation of combinations
(b) Abuse of dominant position
(c) Controlling affairs or management
(d) All of the above

DESCRIPTIVE QUESTIONS:

1.

a. Neeraj without consulting his Chief Engineer Authority, affixes his sign and seal to a document certifying Mr. X (Fictitious Client) as a registered dealer of electronic goods. He there by obtains his share for certifying the said document.

Mr. X misappropriates this forged document for his business to obtain various projects of government for supply of electric goods.

Examine the given situation as to the nature of offence committed under the Prevention of Money Laundering Act, 2002.

b. Neeraj While returning to India from Dubai trip gave wrong declaration about his gold and electronic purchase at the airport. State the nature of liability of Neeraj for the commission of the above act?

2.

a. Neeraj was given an offer by a company vendor to disclose him the lowest bid quoted by other vendors. Neeraj accessed the computer of his Executive Director and passed on the lowest quotation to the vendor and thus helped him in quoting the lowest among all the bids. Examine and analyse the situation and conclude how Neeraj will be held liable under PMLA?

b. If suppose Neeraj with one of his friend registers a company and quotes bid to get a tender of MSEB to get an extra income. Neeraj being at the back foot helps his friend unofficially to get maximum tenders allotted to their company. They need to raise a share capital of the company. So Neeraj decided to invest from his unknown sources of his income in the name of fictitious shareholders.

Determine in the given scenario, the liability of Neeraj being covered under which Act?

3. (i)
The Competition Commission of India (CCI) has received a complaint from a State Government alleging that Shubh Limited and Mangal Limited have entered into an informal agreement, not enforceable at law, to limit or control production, supply and market, to determine the sale price of their products. Such an action of these companies has an appreciable effect on competition.

Examining the provisions of the Competition Act, 2002:

(A) Decide whether the above agreement has appreciable effect on competition.

(B) What factors shall the Competition Commission of India consider while taking the above decision?
(C) What orders can the Competition Commission of India pass on completion of the inquiry?

(ii)
Explain the restrictions, if any, under Foreign Exchange Management Act, 1999 in respect of the following issue and transfer of shares:

Issue of Equity Shares of ` 1 crore at face value accounting for 45 percent of post-issue capital to non-resident Indians in U.S.A. on non-repatriation basis. The shares are issued by M/s ABC Knitwear Limited to finance the modernization of its plant.

ANSWERS TO OBJECTIVE TYPE QUESTIONS

1. (b) Yes, because of an evasion of duty chargeable thereon goods on an & above the permissible limit.
[Hint: As per Schedule I of PMLA, 2002 it is a predicate offence related to custom Act]

2. (b) No, because he is not a party to the crime.
[Hint: Section 3 of the Prevention of Money-Laundering Act, 2002 states of commission of an offence of money-laundering.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money laundering. Since Shalini's uncle has given the loan from the known sources of his income so he is not a part of this crime.]

3. (b) Jai
[Hint: 2(fa) of PMLA, 2002]

4. (b) No
[Hint: As per exception of Section 2 (9) (A) Neeraj is not liable for Benami Transaction as he stand in a fiduciary capacity for the benefit of other person.]

5. (a) Money laundering through Prevention Of Corruption Act, 1988
[Hint: Refer the schedule of PMLA, 2002]

6. (a) No, it is prohibited under benami transaction.
[Hint: Refer Section 6 of the Prohibition of Benami Property Transactions Act, 1988]

7. (d) Drawl of foreign exchange by Neeraj for payment of commission on exports towards equity investment in XBL Company, is prohibited
[Hint: Refer Schedule I of FEM (Current Account Transaction) Rules, 2000]

8. (c) Both J.K Builders and Himmat Chand
[Hint: Refer section 2(v) of the RERA]

9. (b) Individual held property in joint name with his grand children with the consideration paid by an individual
[Hint: Refer section 2(9) of the Prohibition of Benami Property Transactions Act, 1988]

10. (b) Abuse of dominant position
[Hint: Refer section 4 of the Competition Act, 2002]

ANSWERS TO DESCRIPTIVE QUESTIONS

1. a.

According to provision of the PMLA, 2002 the money earned by Neeraj is not from the legitimate sources. Since Neeraj forged the sign and seal of his Chief Engineer so the money earned by him is proceed of crime.

According to Schedule Part A of Para 1 of PMLA, Neeraj has committed an offence under section 472 and 473 of Indian Penal Code. These Section deals with the offence of making or possessing counterfeit seal, etc., with intent to commit forgery

- Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code and under any other section under this Code, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

b.

Neeraj is liable under provision of PMLA Act. His act is covered under provision of Part B of Schedule.

Part B of the Schedule refers to offence under the Customs Act, 1962.
Section 132 of the Customs Act states that whosoever makes sign, or use or cause to be made, sign or use any declaration, statement or document in relation to customs knowingly or having reasons to believe that such declaration statement etc. is false shall be punishable for a term which may extend to two years or fine or both.

2. a.

Neeraj has contravened the PMLA under Part A Para 22 of the Information Technology Act 2000.

According to the provision of Section 72 of Information of Technology Act 2000,
if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be **punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.**

Neeraj in the given case, without the consent of his Executive Director accessed the electronic records and passed on the official information to the vendor without permission.

This information can produce large profits and legitimize the ill-gotten gains through money laundering. Hence it is punishable under the Section 72 of the Information of Technology Act, 2000.

b.

The given issues falls within the ambit of the PBPT Act, 1988. According to Section 2 (26) "Property" means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property.

According to Section 2 (10) "benamidar" means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

According to Section 2 (9) (B), a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or (D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious.

Hence, according to all the above provisions, Neeraj has done Benami transactions. He has done the investment in the share as a Benamidar as he holds the share in the fictitious name of shareholders. Hence this is a Benami transaction and is liable for punishment under the Benami Transaction Act.

3. (i) (A)

The term 'agreement' as defined in section 2 (b) of the Competition Act, 2002, includes any arrangement or understanding or action in concert.

(i) whether or not such arrangement, understanding or action is formal or in writing, or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

Thus an agreement between Shubh Ltd. and Mangal Ltd. satisfies the above ingredients of an agreement as per section 2 (e) of the Act, so agreement has appreciable effect on competition.

(i) (B)

Factors to be considered:

(i) creation of barriers to new entrants in the market.

(ii) driving existing competitors out of the market.

(iii) foreclosure of competition by hindering entry into the market.

(iv) accrual of benefits to consumers.

(v) improvements in production or distribution of goods or provision of services.

(i) (C)

Orders of CCI: If after enquiry by the Director General, the Commission finds the agreement entered into by Shubh Ltd. and Mangal Ltd. are in contravention of section 3, it may pass all or any of the following orders:

(1) direct Shubh Ltd. and Mangal Ltd. to discontinue and not to re-enter such agreement.

(2) impose such penalty as it may deem fit which shall not be more than 10% of the average of the turnover for the last 3 preceding financial years, upon each of such person or enterprises which are parties to such agreement or abuse;

(3) direct that agreement shall stand modified to the extent and in the manner as may be specified in the order by the commission

(4) direct Shubh Ltd. and Mangal Ltd to abide by such other orders as the commission may pass and comply with the directions including payment of cost, if any.

(5) pass such other orders or issue such directions as it may deem fit.

(ii) Issue of equity shares to NRI's and transfer of shares by NRIs are capital account transactions.

RBI may in consultation with the Central Government specify any class or classes of transactions which are permissible [Section 6(2)(a)].

According to Regulation 3(1) of the Foreign Exchange Management (Permissible capital Account Transactions) Regulations, 2000 issued by RBI,

Investment in India by a person resident outside India is a permissible capital account transactions (Schedule II).

Further RBI is empowered under Section 6(3)(b) to prohibit, restrict or regulate, by regulations, transfer or issue of any security by a person resident outside India.

According to Regulation 5(3)(ii) of the said regulations a NRI may purchase shares of an Indian Company which is not engaged in Print Media Sector on non-repatriation basis without any limit (para 2 of Schedule 4). The shares may be issued by the company either by public issue or private placement.

The only condition is that the amount of consideration for purchase of shares shall be paid by way of inward remittance through normal banking channels from abroad or out of funds held in NRE/FCNR/NRO/NRSR/N&NR account maintained with an authorized dealer or as the case may be with an authorised bank in India (Para 3 of Schedule 4).

CASE STUDY 4
ALBERT JOHN
(PMLA, PBPTA, FEMA)

Albert John, right from his childhood had high dreams and aspirations. His hobbies included travelling, scuba diving, gliding, trekking, and other adventurous sports. To go around the globe was his biggest wish.

Therefore, after his schooling, to satisfy his prime interest in travelling, he opted for a two years' Diploma and thereafter, a 18 months' Post Graduate Diploma in Tourism and Travel Industry Management, from the University of Mumbai. After post-graduation he had a lot of options like to become a travel agent or join any immigration and customs services, travel agencies, airline catering or laundry services, etc.

Initially, however, he got a chance to join a reputed travel agency where he gathered on-hand experience and continued with the job for about two years but his innermost desire was to do his own business and therefore, he opened up a proprietary travel agency under the name of 'John Travel Agents' in Mumbai. Within a period of about five years he could earn substantially from his business. He used to arrange foreign currency also through his contacts for needy tourists who did not want to use banking channels for this purpose.

In the meantime, he got **MARRIED to Neelima George** and was comfortably **settled in his 2BHK** flat in Mumbai. Keeping in view the future expansion of his travel agency business, he decided to FORM A **PRIVATE LIMITED COMPANY** by the name 'John and George Travel Agency Pvt. Ltd. having its registered office in Mumbai. After, it was got registered with ROC, Mumbai with the authorised capital of Rs. 10 lacs, Albert wrapped up its business conducted so far under 'John Travel Agents'. His business was flourishing. By now he had seen most of the touring destinations of Europe and East Asia by taking his clients around. One of such CLIENTS was **Chimanbhai Patel**, a leading and famous EXPORTER of Mumbai. He was a rich and dynamic businessman dealing in gold, diamonds and precious as well as semi precious stones. He HAD THREE COMPANIES i.e., SHINING GOLD JEWELLERY PVT. LTD., which dealt in gold jewellery; RED STAR PVT. LTD. which dealt in diamonds and jewellery studded with diamonds; and BLUE SAPPHIRE PVT. LTD. which dealt in precious and semi-precious stones. He was the OWNER Of Two Palatial Bungalows situated at BANDRA and JUHU.

Once he took Chimanbhai, his wife and both of their married daughters as well as sons -in-law to Europe for a family vacation trip. He arranged for them Royal Caribbean's cruise liner 'Harmony of the Seas' which was like a five star hotel at sea, for a 'seven night' cruise starting from Barcelona. While on board, Chimanbhai proposed him a business deal which required him to deliver gold biscuits worth Rs. one crore to one of his close friends on his next visit to Hong Kong and for accomplishing this job he would get some hefty commission. After some hesitation he agreed to do the assigned work and the deal was done.

Albert managed to somehow pass on the tainted wealth as directed by Chimanbhai. In return he got rich kickbacks in the form of commission; and also admired this new way of earning quick money. The bond between Albert and Patel grew intense and he accomplished many such assignments including converting of Indian currency representing black money into foreign currency and delivering it outside India to a safe haven. This way slowly and gradually Albert entered into money laundering activities. Time passed on. He was a rich person now. He purchased a new 3BHK flat in the same locality and rented out his old flat. He also acquired properties in Uttrakhand and Rajasthan and at the same time invested additional funds in purchasing gold jewellery and diamonds including buying a rust coloured Mahindra XUV500.

Though the current line of activity helped him in fulfilling his high dreams and aspirations but in actuality he was converting proceeds of crime to make them appear as legitimate money. He was a changed person now keeping the moral ethics at bay.

Once, while travelling in a Vayu Airways flight from Hong Kong to Mumbai he was impressed by the hospitality provided by Neetu Bhatia, a member of the cabin crew. An idea clicked him. Albert knew very well that flight attendants had access to secure venues at airports. At times, they did not require baggage screening. The cabin crews underwent minimum security check and therefore, needle of suspicion and surveillance was also minimal in their case. Thinking so, Albert befriended her and through his mesmerizing talks he could gather that she was a resident of Vile Parle, Mumbai and a regular employee on this route.He developed a story which reflected his persona as that of a business tycoon. Neetu was highly impressed by the sweet talks and manners exhibited by Albert and they exchanged mobile numbers.

A few days later, Chimanbhai sent requisite Indian currency to Albert for conversion into around one lac US Dollars and its deliverance to his business associate in Hong Kong.

This time Albert thought of Neetu, called her and they met at a high profile restaurant 'Green Tea Day' in Worli. Albert disclosed her about delivering of USD one lac in exchange for handsome commission to one of his known and trusted business associates who would get the money lifted from the Hong Kong International Airport itself. Initially, Neetu was a little bit hesitant but the desire to earn some quick cash without putting in much effort prevailed over her good senses and she relented. Both of them, however, knew that it was a criminal conspiracy.

Albert had drawn a very simple modus operandi for her. He wrapped the stacks of dollars in aluminium foils and carbon sheets to dodge x-ray machine at the Mumbai airport. After placing them in her suitcase he put her make-up kit & clothes over them. At the security check, as he had anticipated, the foils were passed off as chocolates. After landing at Hong Kong Airport, Albert's local conduit picked up the cash from there.

As promised, Neetu got the commission for deliverance. Not being caught in her first operation, Neetu's confidence level rose to a considerable extent. A few other consignments, delivered through her, were a no glitch operation but in the seventh one Albert's luck ran out and this operation was spoiled by Enforcement of Directorate (ED) officials who caught her before the plane could take off from the Chhatrapati Shivaji International Airport, Mumbai. After being caught, Neetu got frightened and spilled the beans. She was taken under custody by ED Officers and her thorough investigation revealed the involvement of Albert. Her offence of carrying foreign currency on the behest of Albert was considered to be a Scheduled Offence falling in Part A of the Schedule to the PML Act (i.e. criminal conspiracy involving Section 120B of the IPC).

After following due procedures including filing a complaint before the jurisdictional Magistrate for taking cognizance of the scheduled offence, her residence was also searched and gold jewellery worth Rs. 21 lacs was recovered and Dy. Director duly authorised by the Director took steps to provisionally attach the recovered jewellery in the presence of two independent witnesses.

Simultaneously, following due procedures, a search team headed by Dy. Director raided the house of Albert. By the time the officers of ED entered his house, Albert was almost ready to go on a trip to Dubai as a part of routine job but with a special mission. The officers could smell a rat and took him to his rust coloured Mahindra XUV500. Immediate search of his car gave way to the recovery of 24 kgs. of gold which was going to be smuggled out of India through various conduits. It transpired from Albert that the gold belonged to Chimanbhai Patel, a famous exporter of Mumbai.

From the search of Albert's residence, various incriminating documents were also recovered. In one of the almirahs, there was a hidden bottom drawer but the hawk eyes of ED officers were able to detect it. Albert was asked to open it but he did not oblige giving lame excuse that the keys were misplaced. This compelled the officers to break open it. When opened forcibly, this secret drawer contained five silver pouches where narcotic drugs were securely kept.

On further enquiry it was found that he had two lockers in two different banks. A search of the lockers gave way to the recovery of fixed deposits receipts worth Rs. 1.25 crores, hard cash Rs. 50 lacs and property papers showing properties in Uttrakhand and Rajasthan. In both the properties his name was not registered as the owner. The title documents of residential property at Uttrakhand contained the name of Raj Karan, his driver and the property in Rajasthan was a farm house which was in the name of Sanju who was the husband of the full time maid-servant Rani working at his house. Both the properties seemed to be benami properties. Recovery of a green diary from one of the lockers confirmed the name of Chimanbhai Patel and the various transactions Albert had with him.

Time was up for both of them. Since dealing in drugs was a Scheduled offence under the PML Act, the ED Officers, filed a complaint before the jurisdictional Magistrate for taking cognizance of the scheduled offence. Thereafter, following the property attachment procedures, the Dy. Director duly authorised by the Director provisionally attached and seized all the movable and immovable properties as well as records. Identification marks were placed and an inventory was made in respect of seized property and records. This was done in the presence of two independent witnesses.

At the time when Albert revealed the involvement of Chimanbhai, immediately, a search team under the supervision of duly authorised Dy. Director was sent to the palatial bungalow of Chimanbhai Patel situated at Bandra. It was found that the bungalow was spread over 5000 sq.ft approximately. A search of the basement of his bungalow revealed presence of narcotic drugs and psychotropic substances. In between the wooden partitions used in the basement, they also found counterfeit Indian currency valuing Rs. 40 crores. It was a Scheduled offence falling in Part A of the Schedule to the PML Act where amount involved had no consideration. It was alleged by the Dy. Director that Chimanbhai Patel possessed proceeds of crime but tried to project the same as untainted property and therefore he was guilty of offence of money-laundering under Section 3 of the PML Act.

The other - Jal Tarang Mahal residence - a 7 BHK villa of Chimanbhai Patel at Juhu was also raided concurrently by the ED officials. It was really a humongous, palatial sea-facing bungalow covering approximately 25,000 sq.ft. area and fully done up with imported and handpicked interiors. The building had basement, ground floor and a first floor. In a two-day long search, the officials seized, inter-alia, thirty diamond rings worth Rs. 30 crores; fifty watches worth Rs. five crores; the choicest of rare paintings by M. F. Hussain, Hebbar, Tyeb Mehta and Amrita Shergil valuing approximately Rs. 21.5 crores which were displayed in a special air-tight hall so that moisture in the air could not damage them; high end and antique jewellery valued at Rs. 46 crores; high end cars which included Rolls Royce Ghost, Mercedes Benz, Porsche Panamera, Ford Mustang, Toyota Fortuner and Innova.

The total attachment and seizure of diamonds, gold, precious and semi-precious stones and other movable and immovable assets stood at Rs. 6562 crores. His various companies were also searched and a number of incriminating documents, files, computers, etc. were seized. The intensive search revealed that Chimanbhai used to bring his own black money from about twenty shell companies based at Hong Kong and Dubai into the accounts of his three main companies in India as foreign direct investment. He subsequently diverted these funds into the accounts of various shell companies describing transfers as unsecured loans from where the funds were siphoned off through various means including cash withdrawals.

An investigation was also conducted under FEMA, 1999 for alleged violations of Sections 3 and 4 of FEMA for dealing in and acquiring and holding foreign exchange in his account with United Royal Bank of Switzerland whose value in Indian currency was approximately Rs. 3,600 crores.

Being a Scheduled offence under Part A, it was required of authorised ED Officers, to file a complaint before the jurisdictional Magistrate for taking cognizance of the offence which was done immediately.

Thereafter, following the provisions of Section 17, the ED Officers seized all the movable and immovable properties as well as records in the presence of two independent witnesses. As in the case of Albert, identification marks were placed & an inventory of the seized property was made. All of them were arrested by the authorised ED Officers, since ED officers, on the basis of material in their possession, had reason to believe that they were guilty of an offence punishable under PML Act. Immediately after their arrest, the officers forwarded a copy of the order along with the material in their possession to the Adjudicating Authority in a sealed envelope, in the prescribed manner. Further, the guilty persons were, within 24 hours, taken to the jurisdictional Magistrate.

As we have noted earlier, keeping in view Section 5 (1), in all the above cases, the ED Officers, through written orders provisionally attached the properties because it was suspected that they were derived from the proceeds of crime. The ED Officers knew that the maximum period of attachment would be limited to 180 days from the date of the order. Thereafter, the ED Officers forwarded the copies of the orders provisionally attaching the properties of Neetu, Albert and Chimanbhai Patel along with the various documents in his possession to the Adjudicating Authority in a sealed envelope.

The ED Officers also filed complaints stating the facts of such provisional attachments before the Adjudicating Authority within thirty days of such attachments. The Adjudicating Authority served on Neetu, Albert and Chimanbhai Patel notices to explain in not less than 30 days their source of income, earning or assets out of which they had acquired the attached property. The attachment of the properties was confirmed by the Adjudicating Authority bearing in mind that such properties were involved in money laundering being obtained through the proceeds of crime. However, such confirmation was made only after considering the replies of the aggrieved persons as well as after hearing them. In terms of confirmation order passed by the Adjudicating Authority, the ED Officers, forthwith took the possession of the attached properties.

The trial of the above money laundering offences is being done by the jurisdictional Special Court. The Central Government in consultation with the Chief Justice of the High Court is empowered to designate one or more Courts of Sessions as Special Court or Special Courts for trial of offence of money laundering.

Under Section 4, if Neetu, Albert and Chimanbhai Patel are found to have committed the offence of money-laundering, then they shall be punishable with rigorous imprisonment which shall be minimum three years and maximum seven years and shall also be liable to fine. In case it is proved that the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to ten years instead of seven years.

On conclusion of a trial, if the Jurisdictional Special Court finds that the offence of money-laundering has been committed, it shall order that the properties involved in the money laundering shall stand confiscated to the Central Government.

If on conclusion of a trial, the Special Court finds that the offence of money laundering has not taken place, it shall order release of such property to the person entitled to receive it.

Multiple Choice Questions of 2 marks each

1. Whether the 2BHK flat owned by Albert but rented out can be considered to have been derived from the proceeds of crime:
   (a) Yes it can be considered because Albert(owner) is involved in money laundering activities;
   (b) No, it cannot be considered because Albert did not purchase it from funds obtained through money laundering activities;
   (c) No, it cannot be considered because Albert has rented it out;
   (d) None of the above.

2. Adjudicating Authority may serve a notice of not less than --------- on Neetu, Albert and Chimanbhai Patel who are believed to have committed offence of money laundering to explain their source of income, earning or assets out of which they had acquired the attached property.
   (a) 14 days
   (b) 30 days
   (c) 60 days
   (d) None of the above

3. After provisional order of attachment is confirmed by the Adjudicating Authority, the Director shall forthwith ----------.
   (a) confiscate the attached properties;
   (b) take the possession of the attached properties
   (c) seize the attached properties;
   (d) None of the above

4. Provisional attachment of property of Chimanbhai Patel suspected to be involved in money laundering ensures that he is prohibited to:
   (a) transfer the attached property;
   (b) convert the attached property;
   (c) dispose of the attached property;
   (d) All of the above

5. A complaint with the Adjudicating Authority is to be filed within a period of --------- days by the Director who provisionally attaches the property involved in money laundering.
   (a) 15
   (b) 20
   (c) 30
   (d) 60

6. If on conclusion of a trial by the Jurisdictional Special Court, the guilt of Neetu, Albert and Chimanbhai Patel is proved, it shall make an order to --------
   (a) Freeze the attached property;
   (b) Confiscate the attached property;
   (c) Seize the attached property;
   (d) None of the above.

7. Chimanbhai Patel was found to have been in possession of counterfeit Indian currency which is a Scheduled offence belonging to:
   (a) the Unlawful Activities (Prevention) Act, 1967;
   (b) the Indian Penal Code;
   (c) the Prevention of Corruption Act, 1988;
   (d) None of the above.

8. An offence specified in Part B of the Schedule shall be considered as Scheduled offence under PML Act only if the total value involved in such offence is --------.
   (a) Rs. 30.00 lacs or less;
   (b) Rs. 50.00 lacs or less;
   (c) Rs. 1.00 crore or more;
   (d) None of the above.

9. Both Raj Karan and Sanju are to be considered as Benamidar because they are the:
   (a) fictitious persons who have not made any payment for purchase of properties;
   (b) persons in whose name the benami properties are held without making any payment by them;
   (c) persons who have lent their names to be owners of the properties without making any payment by them;
   (d) All of the above.

10. Any property found to be involved in money laundering cannot be provisionally attached by the Director, ED for more than ----------.
    (a) 30 days
    (b) 60 days
    (c) 90 days
    (d) 180 days

Descriptive Questions of 10 marks each

1. As per the facts, Albert through laundered money purchased 3 BHK. Suppose if the said flat is purchased by him jointly on his and his wife's name, Neelima Goerge. Examine in the light of the Prevention of Money Laundering Act 2002, the following situtaions:

(a) Will Neelima be also liable for holding of the such joint property.
(b) If property is claimed by a person, other than whom the notice has been issued. Discuss the legal position of the person claiming the property.

2. (a)
Suppose Mr. X, a non-resident Indian, purchases a flat of Albert in India, for Rs.50,00,000 and paid Rs.30,00,000 in by account payee cheque of his own account and rest in cash. The registry was done at a value of Rs.30,00,000 which was paid by cheque. Discuss the nature of the transaction.

(b) (i) Albert was assigned by Chiman Bhai to deliver counterfeit currency-notes to one of his close friends to Honkong for which hefty commission was fixed by the Chiman Bhai. Discuss, whether the said act can be considered as money laundering. Who shall be liable for the commission of the money Laundering?

(b) (ii) State whether maintenance of foreign currency accounts in India and outside India by Albert is permittable in FEMA, due to his nature of business.

3. (i)
Chiman bhai is a person resident in India. He has different business units as to manufacturing & designing of jewellary in Hongkong which is owned by him. How will you determine whether a particular business units of Chiman bhai is a 'person resident in India' under the Foreign Exchange Management Act, 1999?
(ii)
Suppose if 'Blue Sapphire Pvt. Ltd." is a Singapore based company having several business units all over the world. It has a unit for cutting & manufacturing precious and semi-precious stones in the form to be used for the jewellery with its Headquarters in Mumbai. It has a Branch in Dubai which is controlled by the Headquarters in Mumbai. What would be the residential status under the FEMA, 1999 of units of Blue Sapphire Pvt. Ltd in Mumbai and that of Dubai branch?

I. ANSWERS TO OBJECTIVE TYPE QUESTIONS

1. (b): No, it cannot be considered because Albert did not purchase it from funds obtained through money laundering activities
[Hint: Based on Section 2 (1) (u) of the Prevention of Money-Laundering Act, 2002]

2. (b); 30 days
[Hint: Refer Section 8 of the Prevention of Money-Laundering Act, 2002].

3. (b); take the possession of the attached properties.
[Hint: Refer section 8 (4) of the Prevention of Money-Laundering Act, 2002].

4. (d); Transfer, convert or dispose off the attached property.
[Hint: Based on Section 2 (1) (d) of the Prevention of Money-Laundering Act, 2002]

5. (c); 30
[Hint: Refer Section 5 (5) of the Prevention of Money-Laundering Act, 2002].

6. (b); Confiscate the attached property.
[Hint: Refer Section 8 (3) and 8 (6) of the Prevention of Money-Laundering Act, 2002].

7. (b); the indian penal code
[Hint: Refer Schedule to the Prevention of Money-Laundering Act, 2002]

8. (c); Rs.1 crore or more
[Hint: Refer Section 2 (1) (y) of the Prevention of Money-Laundering Act, 2002].

9. (d); All of the above
Hint: Refer Section 2 (10) of the Prohibition of Benami Property Transactions Act, 1988.

10. (d): 180 days
[Hint: Refer Section 5 (1) of the Prevention of Money-Laundering Act, 2002].

ANSWERS TO DESCRIPTIVE QUESTIONS

1. According to section 8 of the PML Act, 2002, on receipt of a complaint or applications, if the Adjudicating Authority has reason to believe that any person has committed an offence of money laundering or is in possession of proceeds of crime, he may serve a notice of not less than thirty days.

   Such person shall be called upon to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property so or, seized or frozen.

   However, where a notice specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person.

   Where if, such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

   The Adjudicating Authority shall, after hearing the aggrieved person and the Director or any other officer authorised by him in this behalf, and taking into account all relevant materials placed on record before him, by an order, record a finding whether all or any of the properties referred to in the notice issued , are involved in money-laundering.

   Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

   <u>According to the above stated provisions, following are the answers:</u>

   (a) Since in the given case, Alberts holds the property jointly in his and his wife's name i.e. Neelima George. As per the above law, such notice shall be served to all persons holding such property. So accordingly, Neelima will also be served the notice, and being heard.

   Taking into account all relevant materials placed on record before him, by an order, record a finding whether all or any of the properties referred to in the notice issued , are involved in money-laundering, then in such case Neelima will also be liable for holding of the joint property.

   (b) If property is claimed by a person, other than whom the notice has been issued therein, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

2. (a)

According to the Explanation given to section 2(9) of the Prohibition to Benami Transaction Act, Benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract, where—

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;
(ii) stamp duty on such transaction or arrangement has been paid; and
(iii) the contract has been registered

Since the property is in the name of Mr. X and not in others name and it is registered on duly paid stamp duty, it is not a Benami Transaction.

(b) (i)

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

"Proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [Sec 2(1)(u)].

Every Scheduled Offence is a Predicate Offence. The occurrence of the scheduled Offence is a pre requisite for initiating investigation into the offence of money laundering.

In the given case, Chiman Bhai assigned Albert to deliver counterfeit currency notes to be given to his friends in Hongkong , which is an offence falling within the purview of scheduled offence in Part A of the PMLA, 2002 u/s 489B of the IPC. This section deals with the using as genuine, forged or counterfeit currency-notes or bank-notes. Acco. to the section whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged / counterfeit, shall be liable under the PMLA.

Hence, Albert, Chiman Bhai and his friends in Hongkong, all are said to be liable under the Prevention of Money Laundering Act.

(b) (ii)

The Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 specifies list of transactions, which are permissible in respect of persons resident in India in Schedule I.

Schedule I states the list of permissible classes of transactions made by persons resident in India. List specifies, maintenance of foreign currency accounts in India and outside India by a person resident in India. Accordingly, maintenance of foreign currency accounts in India and outside India by Albert is permittable in FEMA.

3. (i)

Person resident in India

Section 2(v) of FEMA, 1999 defines the term "person resident in India". According to Section 2(v) (iii), all business units in India will be "resident in India" even though these units are owned or controlled by a person resident outside India.

Similarly all business units outside India will be 'resident in India' provided the business units are either owned or controlled by a person resident in India [Section 2(v) (iv)].

It is necessary to determine the residential status of the person (i.e.,Chiman bhai) who owns or controls the business units in outside India.

(ii)

Blue Sapphire Pvt. Ltd., being a Singapore based company would be person resident outside India [(Section 2(w)]. Section 2 (u) defines 'person' under clause (vii) thereof, as person would include any agency, office or branch owned or controlled by such person. The term such person appears to refer to a person who is included in clause (i) to (vii). Accordingly Blue Sapphire Pvt. Ltd. unit in Mumbai, being a branch of a company would be a 'person'.

Section 2(v) defines a person resident in India. Under clause (iii) thereof person resident in India would include an office, branch or agency in India owned or controlled by a person resident outside India.

Blue Sapphire Pvt. Ltd unit in Mumbai is owned or controlled by a person resident outside India, and hence it, would be a 'person resident in India.' However, Dubai Branch though not owned, is controlled by Blue Sapphire Pvt. Ltd. unit in Mumbai which is a person resident in India. Hence prima facie, it may be possible to hold a view that the Dubai Branch is a person resident in India.

CASE STUDY 5
MRS. SHAKUNTALA BISHT
(IBC, RERA, PBPTA, FEMA)

Mrs. Shakuntala Bisht was a dynamic woman entrepreneur running her factory of manufacturing designer candles and other items made of wax as a proprietary concern in DEHRADUN (UTTRAKHAND) titled as **M/s. Bisht Designer Candles** since 2003. She had appointed a number of dealers pan India for selling her designer products.

She was residing in a bungalow on Subhash Road in Dehradun along with her family. Her HUSBAND Mr. O. P. Bisht was joint-secretary in Uttrakhand Sachivalaya. Her SON Varun had done his B.E. (Bachelor of Engineering) from IIT, Kharagpur and thereafter MBA from IIM, Kolkata in the year 2013. Her DAUGHTER Latika was pursuing B.Sc. (Hons.) in Physics from DIT University, Dehradun.

VARUN, being a brilliant student, secured a job in Accenture through Campus placement. He attended a three months' residential training programme and joined as Assistant Manager (Operations) in Pune branch of the company. He took a one BHK flat on rent at Hinjewadi locality, purchased some furniture and other daily household items and got himself settled in the new atmosphere. He was happy and content as the package offered to him was very lucrative.

MRS. BISHT had high aspirations and was desirous of expanding her business further. Therefore, in the year 2013, she thought of exporting her products to various countries crossing the borders of India. After discussing with her family members, she decided to Convert Her Proprietary Concern Into A Private Limited Company. Accordingly, she got registered her company under the title Bisht Designer Candles Pvt. Ltd. in which SHE AND HER DAUGHTER WERE DIRECTORS while ALL OF THE FOUR FAMILY MEMBERS WERE SHAREHOLDERS. Thereafter, she completed various formalities required for exporting her product which, inter-alia, included obtaining a ten digit importer-exporter code (IEC) number from Directorate General of Foreign Trade (DGFT).

In the year 2015, she sent her first export consignment of designer candles to a foreign buyer in Berlin, Germany. The order amounted to € 20800 and the importer was required to make payment in three months after shipment. As per the terms and conditions a Letter of Credit (L/C) was opened by the Deutsche Bank on behalf of the importer. Before shipping goods, Mrs. Bisht had to fill requisite export declaration form since the consignment did not fall in exempted category as mentioned in Regulation 4 of the FEM (Export of Goods and Services), Regulations, 2015. After shipment of goods, she submitted the documentary bill of exchange drawn under L/C to Syndicate Bank, Dehradun and got it discounted under her sanctioned bills discounting limit. On the due date Syndicate Bank received the export payment and squared off her liability. Subsequently, she explored candle market in the USA and came in contact with M/s. Williams' Art Gallery in Boston which had a five storey departmental store. In this store, one of the floors was meant only for designer candles and other items made of wax.

After due negotiations with the CEO Mr. Williams, she managed to get an advance of 50,000 USD being 50% of the total export value. It was well within her knowledge that in case an advance was received against export to a foreign buyer, the shipment of goods was to be made within one year of receipt of advance and the export documents were required to be routed through the same authorised dealer which received the advance on her behalf. She shipped the goods much before one year and also got payment well within the statutory period of nine months from the date of export.

On the of successful settlement of her first export consignment to M/s. Williams' Art Gallery of Boston, she took steps to complete another export order from the same party for USD 1,00,500. However, this time no advance payment was made by the importer and on the basis of his firm order, she dispatched the consignment of designer candles. After shipment of goods, she submitted the documentary B/E to Syndicate Bank, Dehradun for discounting. As per the agreement, the importer was to make payment on the completion of five months from the receipt of consignment at his godown. However, by the time five months were over, the importer could make payment of only 40% of the total export value.

Being in need of funds, she started raising and collecting funds from various sources. In one of the cases she had given an unsecured loan of Rs. 5 lacs to a private limited company in which a distant relative of her husband was a director. However, when she demanded her loan back from the company, it was transpired that the company was under liquidation process before the National Company Law Tribunal under Insolvency and Bankruptcy Code, 2016.

Varun was doing his job at Pune to the complete satisfaction of his superiors. In the next three years' time after joining Accenture, Varun could save a lot of money as he was a man of few needs. One day, a casual talk with the local grocer Ajay Gupta gave him an idea to buy a flat in a housing society. Ajay gave him the phone number of a known property dealer, Mr. Rajnikant. Thereafter, a meeting was fixed in the office of Mr. Rajnikant where he noticed a Certificate of Registration hanging on the wall of his office. On enquiry, he was told that now it was mandatory for the property agents to get themselves registered under Real Estate (Regulation and Development) Act, 2016. After seeing the certificate Varun could conclude that he was dealing with a genuine person.

After due negotiations, a ground floor 2BHK apartment was finalised in Vayudoot Apartments at a cost of Rs. 62.35 lacs. He himself arranged Rs. 30 lacs out of his savings; obtained a housing loan of Rs. 20 lacs from Axis Bank while the remaining amount of Rs. 12.35 lacs was given by his father out of his personal savings. The title deeds got registered in his name after making payment of stamp duty and other statutory dues. On an auspicious day Varun shifted to his new flat.

About after a month of shifting to his own flat, Varun's boss called him and informed that recognizing his hard work and devotion towards the company he was being transferred to Boston, USA on promotion as Manager (Operations). He was beaming with happiness and thanked his boss from the bottom of his heart. He was supposed to join within next one month. He went back to Dehradun, completed various formalities including obtaining of visa, packed his belongings and bade goodbye to his family. On the advice of his father he leased out his flat on rent to a reputed private company and then flew to Boston and joined his job. Over there, he was provided with a furnished apartment by the company in the suburbs of Boston. As daily commuting was a bit difficult, he purchased a second-hand SUV. Slowly and gradually he settled in his new home, new office and new country.

Here in Dehradun, Mrs. Bisht was pursuing vigorously to obtain export payment from M/s. Williams' Art Gallery because the statutory period of nine months was over long back and the remaining payment was yet to be received.

In the meantime, the authorities at Syndicate Bank also started pressurizing Mrs. Bisht to get the foreign exchange realised at the earliest since the statutory period of nine months was already over. They opined that in cases of default the Reserve Bank of India may also issue appropriate directions for the purpose of securing the payment if the goods were sold in USA or if they were still unsold to get them re-imported into India within the specified period. Though the RBI had not so far issued any directions but according to her bankers, omission on the part of RBI to give directions did not absolve her from the consequences of committing the contravention. Therefore, she was duty bound to realise the export payment as early as possible.

Besides taking various steps, she also persuaded her son Varun who was already in Boston to follow the matter vigorously and advised him to meet Mr. Williams personally and settle the case. A meeting was fixed and during conversation, it was transpired that though Mr. Williams had sold whole of the consignment, the purchaser was yet to make payment because of some mismanagement. However, on the vigourous persuasion of Varun, Mr. Williams exerted pressure on the local purchasers and within next one month, remaining payment along with interest was realised and repatriated to India.

Varun had a SCHOOL FRIEND Raman Verma in India who had done MBA from Symbiosis, Pune after his graduation from Dehradun and had joined sales team of LIC at Shimla. From time to time after joining Accenture in Boston, Varun was persuading him to visit Boston and nearby areas along with his wife Vaishnavi Verma. At last, Raman and his wife agreed for the foreign visit and both of them obtained visa.

Raman approached Canara Bank, Shimla for purchase of USD 12,000 for a private visit to the USA. The bank without much formalities gave him the required amount in foreign currency since it was well within USD 2,50,000, i.e. an amount which could be remitted by a resident individual in a financial year under Liberalised Remittance Scheme (LRS). Moreover, the foreign currency was not required to be remitted for any prohibited current account transaction [mentioned in Schedule I to the FEM (Current Account Transactions) Rules, 2000] like participation in lottery schemes or lottery like schemes existing under different names like money circulation scheme or remittances for the purpose of securing prize money/awards, etc. He was asked to submit a simple letter containing the basic information, viz., his name, address and that of beneficiary (i.e. self), SB account number, amount to be remitted and the purpose of remittance along with a cheque of equivalent amount in rupees.

In no time, both of them reached the USA. Varun received Raman and his wife with open heart at the Logan International Airport, Boston and all of them drove to his residence. The next ten days were full of fun and frolic. They visited a number of famous sites which included

- John F. Kennedy Presidential Museum & Library, BOSTON PUBLIC LIBRARY which was opened in 1852 as the first free publicly-supported municipal library in America,
- Museum of Fine Arts having world's most comprehensive art collections,
- Boston Public Garden famous for its Swan Boats and having over 600 varieties of trees,
- Old North Church & Historic Site where the two famous signal lanterns were hung launching the American Revolution,
- New England Holocaust Memorial where its six glass towers represented the six million Jews who perished in the holocaust,
- Bunker Hill Monument, etc.

In between, they had an overnight stay at New York as well. Varun helped them in purchasing some nice dresses, chocolates, perfumes, cosmetic items and also some souvenirs for their relatives and friends in India. They enjoyed their trip to USA to the fullest and flew back to India with nice memories.

Raman still had with him unspent amount of USD 3500. On enquiry with his bankers regarding surrender of this amount he was informed that he could surrender to the bank any unspent foreign exchange within a period of 180 days from the date of his return to India. Even if he approached the bank after this period, the bank would not refuse to purchase unspent foreign exchange merely because the prescribed period of 180 days had expired. He was further informed that he was permitted to retain with him foreign currency notes up to USD 2000 and foreign coins without any ceiling beyond 180 days and he could utilize this amount for his subsequent visit abroad.

Varun wanted to be inform regarding sale of his flat in Pune if he was to settle down in the USA permanently since his family at Dehradun was not that much inclined to keep the flat. He once again approached Mr. Rajnikant and enquired whether he, as NRI, could sell his flat. Mr. Rajnikant after obtaining necessary information from one of his lawyer friends, informed him that he was permitted to sell his flat in India to a person resident in India.

Further, he could also sell the flat (since it was not an agricultural or plantation property or farm house) to a person resident outside India who is an Indian citizen or to a person of Indian origin resident outside India. Such permission was available under Regulation 3 of FEM (Acquisition and Transfer of Immovable Property in India), Regulations, 2000.

As regards purchase of immovable property at Boston, Varun was informed that FEMA did not restrict such acquisition by a non-resident Indian and he had to follow local laws in this respect. However, if his family members in India remitted to him funds under the Liberalised Remittance Scheme (LRS) for purchasing immovable property outside India, then the said property should be in the name of all the members who made the remittances.

Even as per Section 6(4) of the FEMA, if he becomes a person resident in India in future, he would be allowed to hold, own or transfer the immovable property situated outside India because such property was acquired by him when he was resident outside India.

OBJECTIVE TYPE QUESTIONS (2 MARKS EACH)

1. Which of the following remittance would require prior approval of the Reserve Bank of India?
   (a) Donation exceeding 0.5% of foreign exchange earning during the previous three financial years or USD 40,00,000, whichever is less for contribution to funds promoted by educational institutes,
   (b) Commission per transaction to agents abroad for sale of commercial plots in India of USD 20,000 or 4% of the inward remittance whichever is more,
   (c) Remittance exceeding USD 10,00,000 per project for other consultancy services procured from outside India.
   (d) Remittance of 4% of investment brought into India or USD 90,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

2. Mr. O. P. Bisht's name does not appear in the registration papers relating to Pune apartment purchased by Varun though he contributed Rs. 12.35 lacs towards the cost of the apartment.
   (a) It is a benami transaction to the extent of Rs. 12.35 lacs.
   (b) It is wholly a benami transaction.
   (c) It is not a benami transaction
   (d) None of the above

3. Export of the following goods/software would require furnishing of the declaration under FEMA, 1999?
   (a) Goods imported free of cost on re-export basis
   (b) Publicity material supplied free of payment

(c) By way of gift of goods accompanying declaration by exporter that they are of 6 lakh rupees in value
(d) Unaccompanied personal effects of travellers

4. An exporter receiving advance payment against exports from the foreign buyer is required to make the shipment of the goods within ---------- of receiving advance payment, if export agreement does not mention anything to the contrary regarding time period:
(a) 6 months
(b) 9 months
(c) One year
(d) One and a half years

5. An Indian citizen resident outside India is permitted to transfer his agricultural property in India to:
(a) any person resident in India
(b) any person resident outside India if he is a citizen of India or a person of Indian origin.
(c) Neither (a) nor (b)
(d) both (a) and (b)

6. Foreign exchange purchased from an authorised dealer by a resident individual, if remains unspent, needs to be surrendered to the authorised dealer within_____of purchase or date of his return to India:
(a) 60 days
(b) 90 days
(c) 120 days
(d) 180 days

7. In case of goods valuing up to Rs. 5,00,000 as declared by the exporter and sent by way of gift to an importer in a foreign country:
(a) an export declaration need to be furnished
(b) an export declaration need not be furnished
(c) furnishing of export declaration depends upon the discretion of the authorised dealer who handles export documents
(d) furnishing of export declaration depends upon the discretion of the Custom authorities

8. The term 'Moratorium' in the Insolvency and Bankruptcy Code, means-
(a) A temporary prohibition on an activity by the competent authority.
(b) A period declared by the NCLT, during which no action can be taken against the Company or the assets of the Company.
(c) Suspension order of the Board on the debtor's operations.
(d) Order issued by the NCLT prohibiting an action against the creditor.

9. Is it possible for a non-resident Indian to acquire immovable property outside India:
(a) No, it is not possible
(b) Yes, it is possible
(c) Yes, it is possible but subject to the permission of RBI
(d) None of the above

10. As per the Insolvency and Bankruptcy Code, 2016, an Interim Resolution professional approved by the committee of Creditors:
(a) Can never be replaced until the conclusion of the resolution process
(b) Has a fixed term of 180 days
(c) Can be replaced with 75% voting in favour of the decision and approval of the Board
(d) Can be replaced with 75% voting in favour of the decision.

DESCRIPTIVE QUESTIONS (10 MARKS EACH)

1. Analyse the following situations under the Foreign Exchange Management Act, 1999:
(i) Forex Dealers Ltd. is an Authorised Person within the meaning of Foreign Exchange Management Act, 1999. Reserve Bank of India issued certain directions to the said Authorised Person to file certain returns, which it failed to file. You are required to state the penal provisions to which the said Authorised Person has exposed itself.
(ii) Mr. Shekhar resided for a period of 150 days in India during the Financial year 2016-2017 and thereafter went abroad. He came back to India on 1st April, 2017 as an employee of a business organization. What would be his residential status during the financial year 2017-2018?
(iii)'Printex Computer' is a Singapore based company having several business units all over the world. It has a unit for manufacturing computer printers with its Headquarters in Pune. It has a Branch in Dubai which is controlled by the Headquarters in Pune. What would be the residential status under the FEMA, 1999 of printer units in Pune and that of Dubai branch?

2. Examine with reference to the provisions of the Foreign Exchange Management Act, 1999 whether there are any restrictions in respect of the following:
   (i) Drawal of Foreign Exchange for payments due for depreciation of direct investment in the ordinary course of business.
   (ii) A person, who is resident of U.S.A. for several years, is planning to return to India permanently. Can he continue to hold the investment made by him in the securities issued by the companies in U.S.A.?
   (iii) A person resident outside India proposes to invest in the shares of an Indian company engaged in construction of farm houses.
   (iv) A person, who is resident of Canada, is planning to acquire an immovable property in Mumbai.

3. Analyze the following situations under the Real Estate (Regulation and Development) Act, 2016:
   (i) Mr. Ram booked a 4 BHK flat under the Gateways project. The project is under supervision of Mr. Pankaj. Mr. Pankaj without telling the allottees reduced the number of rooms from 4 to 3 himself. Whether this is allowed under the Act and what remedies does the Allottees have.
   (ii) Mr. Vivaan booked a 4 BHK flat under the Flower Valley project for a total cost of Rs. 2 Crore. The project is under supervision of Mr. Shyam. Mr. Shyam put a condition to pay Rs. 50 Lakhs as an application fee before entering into a written agreement for sale with Mr. Vivaan. Decide whether the contention of Mr. Shyam is valid?

ANSWERS TO OBJECTIVE TYPE QUESTIONS

1. (c) Remittance exceeding USD 10,00,000 per project for other consultancy services procured from outside India.
   [Hints: Refer Regulation 2 of Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000]

2. (c) it is not a benami transaction

   [Hint: Refer Section 2 (9) of the Prohibition of Benami Property Transactions Act, 1988. It is not a benami transaction because all statutory dues have been paid and his father knew about the transaction. Therefore, it falls under exempted category. The amount so contributed can be a loan or gift to the son.]

3. (c) By way of gift of goods accompanied by a declaration by the exporter that they are of six lakh rupees in value
   [Hint: Refer Regulation 4 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015]

4. (c) one year
   [Hint: Refer Regulation 15 of the FEM (Export of Goods and Services), Regulations, 2000]

5. (a) any person resident in india
   [Hint: Refer Regulation 3 of FEM (Acquisition and transfer of immovable property in India) Regulations, 2000]

6. (d) 180days
   [Hint: Refer Regulation 7 of FEM (Realisation, Repatriation and surrende r of Foreign Exchange) Regulations, 2015]

7. (b) an export declaration need not be furnished.
   [Hint Refer Regulation 4 the FEM (Export of Goods and Services), Regulations, 2015 which has exempted such export transaction from furnishing of export declaration]

8. (b) A period declared by the NCLT, during which no action can be taken against the Company or the assets of the Company
   [Hint: Section 14 of the Insolvency and Bankruptcy Code, 2016, describes moratorium. It is an order passed by the adjudicating authority (NCLT) declaring a moratorium on the debtor's operations for the period of the Insolvency Resolution Process, during which no action can be taken against the Company or the assets of the Company. This operates as a 'calm period' during which no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the debtor.]

9. (b) Yes, it is possible
   [Hint: FEMA does not impose any restriction on acquisition of immovable property outside India by a non-resident Indian. Further, when at a future date the person concerned becomes a person resident in India, Section 6(4) even permits him to hold, own or transfer immovable property situated outside India since such property was acquired by him when he was resident outside India]

10. (c) Can be replaced with 75% voting in favour of the decision and approval of the Board
[Hint: As per section 22 of the Insolvency and Bankruptcy Code, 2016, an Interim Resolution professional approved by the Committee of Creditors can be replaced with 75% voting in favour of the decision and approval of the Board.

ANSWERS TO DESCRIPTIVE QUESTIONS

1. (i)
Section 11(3) of the Foreign Exchange Management Act, 1999 states that where any Authorised person contravenes any direction given by the Reserve Bank of India under the said Act or fails to file any return as directed by the Reserve Bank of India, the Reserve Bank of India may, after giving reasonable opportunity of being heard, impose on Authorised Person,

- a penalty which may **extend to ten thousand rupees** and
- in the case of continuing contraventions with an **additional penalty** which may extend to **two thousand rupees for every day** during which such contravention continues.

Since as per the facts given in the question, the Authorised person, namely, Forex Dealers Ltd., has failed to file the returns as directed by the Reserve Bank of India. According to the above provisions, it has exposed itself to

- a penalty which may extend to ten thousand rupees and in the case of continuing contraventions in the nature of failure to file the returns, with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

(ii)
According to the provisions of section 2(v) of the Foreign Exchange Management Act, 1999, a person in order to qualify for the purpose of being treated as a "Person Resident in India" in any financial year, must reside in India for a period of more than 182 days during the preceding financial year. In the given case, Mr. Shekhar has resided in India for a period of only 150 days, i.e., less than 182 days, during the financial year 2016-2017. Hence, he cannot be considered as a "Person Resident in India" during the financial year 2017-2018 irrespective of the purpose or duration of his stay.

(iii)

Printex Computer being a Singapore based company would be person resident outside India [(Section 2(w)].

Section 2 (u) defines 'person' under clause (vii) thereof, as person would include any agency, office or branch owned or controlled by such person. The term such person appears to refer to a person who is included in clause (i) to (vii). Accordingly printex unit in Pune, being a branch of a company would be a 'person'.

Section 2(v) defines a person resident in India. Under clause (iii) thereof person resident in India would include an office, branch or agency in India owned or controlled by a person resident outside India. Printex unit in Pune is owned or controlled by a person resident outside India, and hence it, would be a 'person resident in India.'

However, Dubai Branch though not owned is controlled by Printex unit in Pune which is a person resident in India. Hence prima facie, it may be possible to hold a view that the Dubai Branch is a person resident in India.

2. **Capital Account Transactions:** All the transactions referred to in the question are capital account transactions.

Section 6(2) of FEMA, 1999 provides that the Reserve Bank may in consultation with the Central Government specify the permissible capital account transactions and the limit upto which foreign exchange will be allowed for such transactions.

(i) **Depreciation of direct investments:** According to proviso to section 6(2), the Reserve bank shall not impose any restriction on the drawal of foreign exchange for certain transactions. One such transaction is drawal of foreign exchange for payment due for depreciation of direct investment in the ordinary course of business. Hence this transaction is permissible without any restrictions.

(ii) **Person resident in USA returning permanently to India:** When the person returns to India permanently, he becomes a resident in India. Section 6(4) provides that a person resident in India may hold, own, transfer or invest in foreign currency, foreign security, etc. if such currency, security or property was acquired, held or owned by such person when he was resident outside India or

inherited from a person who was resident outside India. In view of this, the person who returned to India permanently can continue to hold the foreign security acquired by him when he was resident in U.S.A.

(iii) **Investment in shares of Indian company by non-resident:** Reserve Bank issued Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.

Regulation 4(6) of the said Regulations prohibits a person resident outside India from making investment in India, in any form, in any Company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage in construction of farm houses. Hence it is not possible for a person resident outside India to invest in the shares of a company engaged in construction of farm houses as such investment is prohibited.

(iv) **Acquisition of immovable property by person resident outside India:** Reserve Bankissued Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.

The regulations specify the classes of capital account transactions of persons resident outside India in Schedule II. Under this schedule, acquisition and transfer of immovable property in India by a person resident outside India is permissible. Hence, the person resident of Canada can acquire the immovable property in Mumbai.

3. (i)
Adherence to sanctioned plans and project specifications by the promoter **(Section 14)**

The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—

(1) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person.

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

(2) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least 2/3rd of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation.—For the purpose of this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of 5 yrs by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within 30 days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

Hence, in the instant case, reducing the number of rooms does not come under minor additions or alterations. The promoter i.e. Mr. Pankaj Gupta shall not make any additions and alterations in the sanctioned plans, layout plans and specifications within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such buildings.

(ii)

No deposit or advance to be taken by promoter without first entering into agreement for sale

According to section 13 of the said Act, a promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

In the instant case, the cost of the flat is Rs. 2 crore and Mr. Shyam put a condition to pay Rs. 50 Lakhs as an application fee before entering into a written agreement for sale with Mr. Vivaan. This is invalid as a promoter can accept only Rs.20 Lakhs (10% of Rs. 2 Crore) as an advance or an application fee without first entering into a written agreement for sale.

CASE STUDY 6
Ronit Chawla
(IBC, FEMA)

Ronit Chawla was a Fellow Chartered Accountant (FCA) practicing in the field of corporate and economic laws. He represented his clients before Company Law Board (CLB) and thereafter in National Company Law Tribunal (NCLT).

After coming into force of Insolvency and Bankruptcy Code, 2016 w.e.f. 28 May, 2016, he learnt about the Limited Insolvency Examination (LIE) for becoming Insolvency Professional (IP). Since he had about eleven years of experience as practicing CA, he attempted the very first examination of LIE conducted by Insolvency and Bankruptcy Board of India (IBBI) in December 2016 and successfully cleared it. He then enrolled himself with a reputed Insolvency Professional Agency (IPA) and got registered with IBBI by fulfilling the requisite formalities including payment of non-refundable application fee of Rs. ten thousand.

His FATHER Roopesh Chawla, a resident of Green Park, New Delhi, was recently posted as Chief Manager in Bank of India, Delhi which was a full-fledged Foreign Exchange (FX) branch though Roopesh, being unable to get a chance to work in a FX branch, had very little knowledge of rules relating to Foreign Exchange. Therefore, he used to consult His Son Ronit in the matters of foreign exchange from time to time. His MOTHER Rukmani Chawla was a senior teacher in Kendriya Vidyalaya, New Delhi, taking commerce classes.

Rajnish Sinha, a CLOSE FRIEND of Roopesh, was heading a Delhi branch of Punjab National Bank (PNB) and knew that Roopesh's son Ronit besides being a Chartered Accountant was also an Insolvency Professional. Rajnish, on behalf of PNB, wanted to initiate corporate insolvency resolution process (CIRP) before NCLT in the case of its customer Manohar Masale Pvt. Ltd. (MMPL) of Delhi which had defaulted in repaying the dues of the bank totaling approximately Rs. 23.00 lacs. Accordingly, PNB being financial creditor, while making an insolvency resolution application to NCLT proposed the name of Ronit as Interim Resolution Professional (IRP). MMPL was sanctioned cash credit limit of Rs. 10.00 lacs against hypothecation of stock of raw material and finished goods and another bill discounting limit of Rs. 5.00 lacs against actionable claims. MMPL was registered with an authorised capital of Rs. 25.00 lacs but its paid up capital was to the tune of Rs. 10.00 lacs.

Initially started as a registered partnership concern (Manohar Masale & Co.) by two brothers, namely, Ram Manohar and Shyam Manohar, it did profitable business and keeping an eye on future business growth, it was converted into a private limited company with Ram, Shyam and Shyam's elder son Shivam as directors. Shyam's younger son Dwapam, an alumnus of IIFT, Delhi and also a law graduate, did not have any interest in the family business and was more inclined to continue with his current employment in a German MNC having its office in Gurugram.

MMPL's factory in Okhla Industrial Area was located on the one-fourth portion of the plot which was co-owned by the brothers. However, the bank had created an equitable mortgage on the plot as well as factory building while sanctioning the working capital limits to the company.

The elder brother Ram Manohar was the anchoring person who steered the company to newer heights due to his sheer business acumen and inherent managerial skills but one day, all of a sudden, he had a massive heart attack resulting in his untimely death. Since he was not married, the business of 'masale making' was now run by Shyam and his son Shivam. However, the father-son duo could not manage the business properly because of the lack of foresight, faulty interpersonal relations and poor organisational skills. Their authoritative style of leadership resulted in demotivation of workers which led to labour unrest and all sort of other conflicts. The paternalistic approach towards them which Ram always displayed was missing altogether. Needless to say, the output started declining and wastage of raw material turned north. Since there was no vigourous follow-up as well, the debtors to the tune of around Rs. 12.00 lacs were long overdue. Consequently, the company started suffering losses and also defaulted on dues from the bank.

When PNB, even after repeated reminders to MMPL, could not realise its dues and the liability touched the height of around Rs. 23.00 lacs (including normal and overdue interest), Rajnish Sinha, on behalf of PNB, decided to file corporate insolvency resolution application duly supported by ledger extracts and other specified evidences (services of Information Utility could not be used as by the time application was filed there was no IU registered with IBBI) with Adjudicating Authority i.e. NCLT, New Delhi for initiating CIRP against MMPL.

NCLT considered the corporate insolvency resolution application along with the proposed name of Ronit as Interim Resolution Professional (IRP). Within next 10 days of receipt of application (which was lesser than the statutory period of 14 days) NCLT ascertained that there existed default because the defaulted amount was much more than the minimum required of Rs. one lac. Since the CIRP application was complete in all respects, NCLT admitted it and within the statutory period of next seven days after admission, it conveyed its order of commencement of CIRP to the financial creditor (i.e. PNB) and the corporate debtor (i.e. MMPL).

The order of NCLT confirmed the proposed appointment of Ronit as IRP for 30 days, for Ronit had a clean record without any disciplinary proceedings pending against him. It was also stated in the order that a moratorium period of 180 days had become applicable during which all suits and legal proceedings, etc. against MMPL (i.e. corporate debtor) were to be held in abeyance so as to give time to the ailing company to resolve its status. MMPL was also barred from transferring or disposing of any of its assets or any legal rights therein. However, the supply of specified essential goods and services to the MMPL as mentioned in the order, were not to be interrupted during moratorium period.

In the meantime, Ronit's father Roopesh faced a peculiar problem related to the foreign exchange matter at his branch. His FX officer brought to his knowledge that one of their exporter customers who had received an advance of USD 75,000 from an importer based at California, USA against export of ready-made jeans had not shipped the requisite items worth USD 2,00,000 by utilizing the advance so received. The exporter, not willing to ship the goods, wanted to refund the advance to the importer along with interest for which permission of Roopesh was required.

Roopesh did not allow the refund immediately and in turn, advised the FX officer to gather more knowledge about FX provisions whether refund along with interest was permissible. At the same time he also discussed the matter with his son Ronit who advised him to refer FEM (Export of Goods and Services) Regulations, 2015. A scrutiny of the relevant banking records revealed that 14 months had already expired since advance of USD 75,000 was received.

Further, he came to know that if goods were not shipped within one year of receipt of advance, such advance could not be refunded without the permission of the RBI. Accordingly, he advised the customer to seek permission of RBI through his branch.

After his appointment as IRP, Ronit assumed full control of the affairs of MMPL. Since powers of the board of directors stood suspended he was empowered to exercise such powers. Accordingly, he took immediate custody and control of all the assets of the MMPL including its business records.

Following the orders of NCLT, Ronit took steps to make a public announcement within three days from the date of his appointment regarding the initiation of CIRP against MMPL.

Public announcement, included the following aspects:

- Name and address of the corporate debtor (i.e. MMPL) and its registration or incorporating authority.
- His details as IRP and the fact that he would be vested with the management of the corporate debtor and be responsible for receiving claims.
- Penalties for false or misleading claims.
- The last date for the submission of the claims.
- The date on which the CIRP would end.

After the expiry of last date for submission of claims, a Committee of Creditors was constituted which included PNB and five trade creditors who had cumulative dues of Rs. 3.00 lacs. Within seven days of its constitution, the first meeting of the committee was called. In the meantime, Ronit electronically submitted an Information Memorandum to the creditors after they had given an undertaking regarding maintaining of confidentiality. This Information Memorandum contained details of assets and liabilities of the MMPL with their estimated values, audited financial statements for the last two financial years and provisional financial statements for the current financial year made just eight days earlier from the date of the application, a list of creditors and the amounts claimed by them which were duly admitted and other prescribed information.

In the meeting of the Committee of Creditors it was resolved to let Ronit continue as full-fledged Resolution Professional (RP) since he was eligible to be appointed as an independent director and was not a related party of the MMPL and such decision was conveyed to the NCLT as well as MMPL. As RP, Ronit assumed all those powers which were conferred on him as IRP. He was required to manage the operations of the MMPL during the CIRP period.

Based on the Information Memorandum, Rajnish on behalf of PNB as resolution applicant undertook to prepare a resolution plan as per the provisions of the Code for onward submission to Ronit. Before finalizing the resolution plan, he along with his 2 officers took up the matter with Shyam & his son Shivam regarding the revival of MMPL and repayment of long outstanding dues or face liquidation if they were not inclined to revive the company. The fear psychosis of liquidation made them think frantically to save their company from imminent death. Having woken up from their slumber they started exploring ways to bring in short term finance and also to rope in some professional who would help the company in its revival.

Shyam saw a ray of hope in his younger son Dwapam and persuaded him to participate in the management of the affairs of the company at least for the first three months to which he ultimately agreed. In the meantime Shyam, with a view to raise short term finance, consulted his elder sister Rama Devi to lend at least Rs. 5.00 lacs for a short period of about one year and also convinced his daughter Ria, her husband Dushyant as well as Dwapam to invest at least Rs. 3.00 lacs each in the share capital of the company. Shivam who had invested funds in the share market agreed to sell his securities to raise Rs. 3.00 lacs against which he was to be allotted shares in the MMPL.

As per the banker's advice, Shyam also started inter-acting with long overdue debtors for recovery who eventually agreed to pay 50% of Rs. 12.00 lacs in the current month and balance in the next month. Out of the raised amount, the operational creditors were to be paid fully while dues of PNB were to be satisfied to the extent of Rs. 12.00 lacs. Further, Rs. 2.50 lacs were to be allocated towards insolvency resolution process costs including fee of RP and remaining amount was to be utilized as working capital. Since both the directors of MMPL had consented to repay Rs. 12.00 lacs in one lump sum, Rajnish on behalf of PNB assured them that he would take up the matter of waiving of overdue interest up to Rs. 2.00 lacs with his Dy. General Manager and would also seek permission to revive MMPL's limits which were currently frozen.

Based on the experience he gathered while working with two MNCs, Dwapam assumed the role of a leader to set the company on rails. He took note of the prevailing situation from which the ailing MMPL was passing through.He observed that the current as well as liquid ratios were much far away from the standard norms of 2:1 and 1:1 respectively. The turnover ratios were also unhealthy and at the same time the operating ratio was very high – not a good sign for any business. An investment of about Rs. 5.00 lacs was tied up in raw material like whole red chillies, coriander seeds, turmeric, black pepper, dry mango, etc.

Since currently the business of spices was run in a traditional manner, Dwapam decided to take the following short, medium and long term measures:

Short term measures:

- to understand the needs and wants of customers in the target market;
- to apply the principles of scientific management;
- to set standards for raw material, wastage, working conditions, etc.;
- to conduct time and motion studies;
- to provide financial incentives and to adopt social security plans for the workers;
- to secure registration with FSSAI immediately;
- to appoint an Administrative Officer and, if need be, to appoint another one in future;
- to devise competitive pricing strategy;
- to create a corporate brand identity by assigning the product a brand name 'Manohar Uttam Masale' which would help in building a brand image;
- to design an attractive package and label by using a graphic design of spices combining green, yellow and red colours for different varieties of masale;
- to promote the masale by advertising initially in leading newspapers and depending upon income generation in future, to advertise on FM radio, TV as well as cinema halls;
- to adopt sales promotion measures like free gift offers, contests, free sample distribution, etc.
- to select the similar channels of distribution as used by the competitors;
- to conduct SWOT analysis of MMPL and important competitors;
- to create an effective Website of the company;
- to take decisions regarding various activities under physical distribution of masale like order processing, transportation, warehousing and inventory control;
- to adopt strict credit policy by reducing debtors' days with a regular follow-up;
- to use an accounting software;
- to submit various Government Returns within the prescribed time limits so that avoidable hefty penalties are not levied.

Medium and Long Term Measures:

- to stop heavy expenditure on repairs and maintenance by installing new machines and grinders;
- to establish direct contacts with the cultivators for obtaining raw material which would help in avoiding middlemen and their high commissions;
- to develop the remaining three-fourth portion of the plot and rent out some of the developed portion to a commercial establishment;
- to renovate the factory building.
- to manufacture more types of different spices like Rajma Masala, Pindi Chana Masala, Shahi Paneer Masala, Dal Makhni Masala, Mushroom Matar Masala, etc;
- to diversify MMPL's operations by manufacturing Jams and Ketchups;
- To explore offshore markets.

Rajnish prepared a resolution plan containing the above strategies and submitted it to Ronit for his consideration. Later on, a meeting of committee of creditors was called by Ronit and the resolution plan was presented for its approval. The plan was duly approved by full majority. Thereafter, Ronit submitted the approved resolution plan to the NCLT for its approval.

Since the resolution plan was approved by the committee of creditors much before the statutory period of 180 days and also met the prescribed requirements, NCLT approved it and passed an order to this effect.

Now the plan was binding on the MMPL and its employees, members, PNB and operational creditors as well as other stakeholders involved in the resolution plan.

OBJECTIVE TYPE QUESTIONS (2 MARKS EACH)

1. "Default" under the IBC is said to be occurred on the fulfillment of condition/s-
   (a) Debts becoming due and payable
   (b) Non- payment of the debt
   (c) Liability /obligation in respect of a claim which is due
   (d) Both (a) & (b)

2. In the case study PNB initiated Corporate Insolvency Resolution Process against MMPL for the default in the capacity of-
   (a) Corporate debtor
   (b) Operational debtor
   (c) Financial creditor
   (d) Resolution applicant

3. If the goods against which an advance payment is received from a foreign buyer are not shipped within one year and there exists no agreement regarding timing of shipment, the advance payment:
   (a) shall be refunded within reasonable time without prior approval of Reserve Bank.
   (b) Shall be refunded within one year from the date of receipt of advance payment without the prior approval of Reserve Bank
   (c) Shall be refunded within one year from the date of receipt of advance payment with the prior approval of Reserve Bank
   (d) Shall be refunded after one year from the date of receipt of advance payment on the basis of reasonable cause.

4. PNB through an assignment agreement, assigned here the debt to the X trust. X trust filed the petition for initiation of corporate Insolvency resolution process (CIRP) against MMPL. State the correct statement with respect to the competency of the X trust in the filing of the petition in the above situation-
   (a) X Trust is not a competent applicant as per section 6 of the IBC
   (b) X Trust is being authorized by the PNB to file an application
   (c) X Trust in the capacity of financial creditor can file a valid petition.
   (d) None of the above

5. As per the Insolvency & Bankruptcy Code, 2016, resolution plan is prepared by ---------- is submitted to ---------- for examination and submission to ---------- for approval.
   (a) Committee of Creditors, Adjudicating Authority, Resolution Professional
   (b) Resolution applicant, committee of creditors, Adjudicating Authority
   (c) Resolution applicant, Resolution Professional, Committee of Creditors
   (d) Committee of Creditors, Resolution Professional, Adjudicating Authority

6. The maximum duration during which the appointment of Interim Resolution Professional (IRP) is valid shall not exceed -------- days.
   (a) 10
   (b) 20
   (c) 30
   (d) 40

7. In the case study, the expenses of public announcement shall be borne by the-
   (a) MMPL
   (b) Ronit
   (c) Roopesh
   (d) PNB
8. In the case study, committee of creditors of MMPL was constituted on 17.3.2018. Time limit, within which the first meeting of committee of creditors should be held, is ----------.
   (a) 20.3.2018
   (b) 22.3.2018
   (c) 24.3.2018
   (d) 31.3.2018
9. Ronit, being an Insolvency Professional can be appointed as Resolution Professional, if:
   (a) he is eligible to be appointed as an independent director under section 149 of the Companies Act, 2013
   (b) he is not a related party of the corporate debtor
   (c) only (a)
   (d) Both (a) and (b)
10. MMPL finds material irregularity in exercise of the powers of the Ronit during the corporate insolvency resolution period. Remedy available to MMPL-
   (a) File a complaint to the adjudicating authority
   (b) Complain to the committee of creditor's
   (c) Complaint filed before the IBBI
   (d) File an appeal against the order of adjudicating authority against the approval of resolution plan.

DESCRIPTIVE QUESTIONS (10 MARKS EACH)

1. Suppose the resolution plan prepared by Rajneesh was delayed in approval by committee of creditors. Ronit, further presented the said resolution plan, before NCLT after 180 days of insolvency commencement date.
   Answer the following-
   (i) What step shall be taken by NCLT on such presented resolution plan.
   (ii) What, if MMPL contravened the resolution plan which effected its employees and stake holders.
   (iii) What consequences be there where liquidator continued the business of MMPL during liquidation process.
2. Ronit in an examination of sale of property of MMPL finds that a transaction was made by the MMPL to Rama devi (the elder sister of Shyam) in 6 months preceding the Insolvency Commencement date, was undervalued.
   Give the following answers in reference to the above situation-
   (i) State the validity of the conduct of such transaction by MMPL to Ramadevi.
   (ii) What will be the consequences when resolution professional determines such transactions undervalue and fails to report that same to NCLT?
   (iii) What order NCLT shall pass when MMPL entered into an undervalued transaction?
3. (a) Discuss the legal position and liability of Mr. Shyam in the following given situations
   (i) Where Mr. Shyam fraudulently transferred his holding of shares in favour of his sister of Rs.1 lakh within 1 year immediately preceding the insolvency commencement date.
   (ii) Mr. Shyam makes false entry in the books of account of MMPL to defraud creditors on insolvency commencement date.
   (iii) Shyam permitted Shivam to provide information for initiation of CIRP which is false in material particular and omits material fact related to a books of accounts of a specified period in the application.
   (b) What course of action can be taken by NCLT against the directors of the MMPL for transactions defrauding creditors?

ANSWERS TO OBJECTIVE TYPE QUESTIONS

1. (d) Both a & b (Debts becoming due and payable & Non- payment of the debt)
   [Hints: As per section 3(12), Default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be]
2. (c) Financial creditor
   [Hints: Financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;{section 5(7)}]

3. (b) Shall be refunded within one year from the date of receipt of advance payment without the prior approval of Reserve Bank
[Hint: Refer Regulation 15 of the FEM (Export of Goods and Services), Regulations, 2000]

4. (c) X Trust in the capacity of financial creditor can file a valid petition
[Hint: Refer Section 5 (7) of the Code]

5. (c) Resolution applicant, Resolution Professional, Committee of Creditors
[Hint: Refer Section 5 (25) read with section 28 of the Code]

6. (c) 30
[Hint: Refer Section 16 of the Code]

7. (d) PNB
[Hint: Refer Section 15 of the Code]

8. (c) 24.3.2018
[Hint: Refer Section 22 (1)]

9. (d) Both a & b (he is eligible to be appointed as an independent director under section 149 of the Companies Act, 2013 & he is not a related party of the corporate debtor)
[Hint: Refer Regulation 3 of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016]

10. (d) File an appeal against the order of adjudicating authority against the approval of resolution plan.
[Hint: section 61(3) of the IBC]

ANSWERS TO OBJECTIVE TYPE QUESTIONS

1.

(i) According to section 33 of the Insolvency and Bankruptcy Code, 2016, where the Adjudicating Authority before the expiry of the insolvency resolution process period does not receive a resolution plan as approved by the committee of creditors, it shall—
(a) **pass an order** requiring the corporate debtor to be liquidated as per the relevant provisions
(b) **issue a public announcement** stating that the corporate debtor is in liquidation; and
(c) **require such order to be sent to the authority** with which the corporate debtor is registered.

According to section 12 of the Insolvency and Bankruptcy Code, 2016, the corporate insolvency resolution process (CIRP) shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

As per the facts, Ronit, presented the approved resolution plan, before NCLT after the prescribed period for the completion of CIRP i..e, after 180 days of insolvency commencement date.

According to the above stated provisions, NCLT, shall pass an order requiring the corporate debtor (MMPL) to be liquidated. It shall issue a public announcement of its liquidation and send such order to the Registrar of companies.

(ii) As per Section 33(3) of the Insolvency and Bankruptcy Code, 2016, where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred above.

Accordingly, the employees and the stakeholders of MMPL, whose interests are affected by contravention in compliances of the resolut ion plan, may make an application to NCLT for initiation of liquidation. On receipt of an application, if the Adjudicating Authority determines that the MMPL has contravened the provisions of the resolution plan, it shall pass a liquidation order.

(iii)As per section 33(7) of the Insolvency and Bankruptcy Code, 2016, the order for liquidation shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor.

However, where the business of the corporate debtor when continued during the liquidation process by the liquidator, it shall not be deemed to be notice of discharge to the officers, employees and workmen of the corporate debtor. So the Conduct of business of MMPL during liquidation process by the liquidator i s tenable and shall not be deemed to be notice of discharge to the officers, employees and workmen of the MMPL.

2.

(i) Validity of the conduct of undervalued transaction:

As per the provisions given in section 45 of the Insolvency and Bankruptcy Code, 2016, Ronit, on an examination of the transactions of the MMPL, determines that certain transactions were made by MMPL with a related party (Rama devi) within the period of two years preceding the insolvency commencement date (in 6 months preceding the Insolvency Commencement date), which were undervalued. Ronit, shall make an application to the NCLT to declare such transactions as void and reverse the effect of such undervalued transaction and requiring the person who benefits from such transaction to pay back any gains he may have made as a result of such transaction.

(ii) **Failure to report to NCLT of undervalued transactions:**

As per the stated facts given in the light of the provisions laid in Section 47 of the Insolvency and Bankruptcy Code, an undervalued transaction has taken place and Ronit (Resolution Professional) has not reported it to the NCLT, in such case, a creditor, member or a partner of a MMPL, as the case may be, may make an application to the NCLT to declare such transactions void & reverse their effect in accordance with relevant provisions of the Code.

(iii)**Order of NCLT:**

Where the NCLT, after examination of the application made above, is satisfied that undervalued transactions had occurred; and Ronit (RP) after having sufficient information or opportunity to avail information of such transactions did not report such transaction, there it shall pass an order of —

(a) restoring the position as it existed before such transactions and reversing the effects thereof in the manner as laid down in section 45 and section 48 of the Code. The order of the Adjudicating Authority may provide for the following:—

(1) require any property transferred as part of the transaction, to be vested in the corporate debtor(MMPL);

(2) release or discharge (in whole or in part) any security interest granted by the corporate debtor (MMPL);

(3) require any person to pay such sums, in respect of benefits received by such person, to the Ronit (RP), as the Adjudicating Authority may direct; or

(4) require the payment of such consideration for the transaction as may be determined by an independent expert.

(b) requiring the Board(IBBI) to initiate disciplinary proceedings against Ronit.

3. (a) (i)

As per the provisions given in section 68 of the Code, Mr. Shyam, Director (an officer in default) has within the twelve months immediately preceding the insolvency commencement date, fraudulently transferred his holding of shares in favour of his sister of Rs.1 lakh (which is more than value of ten thousand rupees).

So, Mr. shyam, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both: However, he shall not be liable to any punishment under this section if he proves that he had no intent to defraud or to conceal the state of affairs of the corporate debtor.

(a) (ii)

According to section 71 of the Code, on and after the insolvency commencement date, Mr. Shyam, makes a false entry in the books of account of MMPL with an intent to defraud or deceive any person, he shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.

(a) (iii)

As per Section 77 of the Code, as Shyam permitted Shivam to provide informations in the application under section 10,which is false in material particular and omits material fact related to a books of accounts of a specified period, so he shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years or with fine which shall not be less than one lakh rupees, but which may extend to one crore rupees, or with both.

(b)

As per section 69 of the Code, on or after the insolvency commencement date, where the directors of the MMPL—

(a) has made transfer of, or charge on, or has caused or connived in the execution of a decree or order against, the property of the corporate debtor;

(b) has concealed or removed any part of the property of the corporate debtor within two months before the date of any unsatisfied judgment, decree or order for payment of money obtained against the corporate debtor,

such directors of MMPL, shall be punishable with imprisonment for a term which shall not be less than one year, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.

However, directors of MMPL, shall not be punishable under this section if the acts mentioned in clause (a) were committed more than five years before the insolvency commencement date; or if he proves that, at the time of commission of those acts, he had no intent to defraud the creditors of the corporate debtor.

CASE STUDY 7
XMC Pvt. Ltd., a car manufacturing company (Competition act)

During March 2017, XMC Pvt. Ltd., a CAR MANUFACTURING COMPANY, launched its TXI model of car with a lot of advertisements and promotions in all types of media platforms, inter alia, highlighting the Ex-showroom price of the said car model in MUMBAI as Rs.6.25 lacs.

Mr. Nazir, a PROSPECTIVE BUYER of the said model, visited an authorised dealer of XMC Pvt. Ltd. i.e. M/s Ratan Lal & Sons located at Bandra, Mumbai and after due consultation/ discussion with the representatives of M/s Ratan Lal & Sons, booked a vehicle of the aforesaid model on 11th May, 2017 on payment of Rs. 100,000/-. M/s Ratan Lal & Sons in turn provided the money receipt for the aforesaid transaction with serial number ABC/1010 as well as booking reference number 218/ 2017 to Mr. Nazir. He was assured by the representatives of M/s Ratan Lal & Sons that the booked vehicle will be delivered within three months from the date of booking i.e. by 10th August, 2017. However, the representative of M/s Ratan Lal & Sons have stated to Mr. Nazir that as per XMC Pvt. Ltd.'s policy, five months' time is given in writing so as to keep some buffer for delays which may arise due to unforeseen exigencies or transportation of vehicle or other logistic problems. Mr. Nazir, inter alia, noted the conditions in the booking document that "the vehicle would be delivered within six months from the date of booking".

Believing the assurance given by the representative of M/s Ratan Lal & Son, Mr. Nazir accepted the terms of the booking and thought that he will get the vehicle within three months from the date of booking as assured by the representatives of M/s Ratan Lal & Son and in worst scenario he will get delivery of the vehicle within six months from the date of booking as per the terms and conditions of booking of the vehicle. However, within three months of booking of the vehicle, M/s Ratan Lal & Son failed to deliver the vehicle to Mr. Nazir despite repeated request and after 10th August, 2017, Mr. Nazir contacted the representatives of M/s Ratan Lal & Sons many times for delivery of the vehicle and they kept on giving assurances that the delivery of the vehicle will be done within six months from the date of booking as per the conditions of booking.

After five months, on 15th February 2018, Mr. Nazir written an e-mail to XMC Pvt. Ltd. highlighting the issue of delay in delivery of the booked vehicle, but did not get any response. Then he wrote an email to the President of XMC Pvt. Ltd. and got the reply that his grievances will be looked into by the sales team of the Company and the concerned dealer.

Despite the assurance of the president of XMC Pvt. Ltd., the booked vehicle was not delivered to Mr. Nazir. Rather, through M/s Ratan Lal & Sons, he was informed that due to delay in production of the said model, the Company is not able to deliver the same and he was asked to wait for some more time. Subsequently, he received a letter from XMC Pvt. Ltd wherein, inter alia, it was informed that due to unprecedented number of bookings for the said model the delivery of the car will be delayed for two months. Through the said letter, it was also informed that the price of the booked car will be revised and it will be effective from the date of booking by dealer to the customer.

About the market and the state of competition

As per Mr. Nazir, XMC Pvt. Ltd. is a big player in the car manufacturing market. Its financial strength and brand name is much more compared to other players in the market. Also, it commands largest market share in terms of sales and revenue compared to its competitors and in the last financial year XMC PVT. LTD. ACQUIRED A LOSS MAKING CAR MANUFACTURING COMPANY i.e. Trisha Ventures Pvt. Ltd.

As per Mr. Nazir, XMC Pvt. Ltd. has taken recourse to terms and conditions of the booking documents to enforce price hike and also not honouring the commitment made for the delivery within the given time period despite repeated correspondence. XMC Pvt. Ltd. and its dealer at Mumbai M/s Ratan Lal & Sons started the gimmick of non-delivery due to production delay and started informing that there will be higher price of the vehicle.

Mr. Nazir alleged that he and other similarly situated consumers are being not given with delivery of the vehicle in due time and the delay tactics done by XMC Pvt. Ltd. is to increase the price of the vehicle and to exploit the consumers by not giving the benefit of initial launch price which is not fair in a competitive market.

Concerns raised

As per Mr. Nazir, XMC Pvt. Ltd. has abused its powers to fix the price of the vehicle. It has initially priced attractively and launched with heavy advertisements & promotions to lure the customers and take maximum bookings by taking interest free amount of Rs. 100,000/- as booking amount.

By doing this XMC Pvt. Ltd. has been able to not only generate huge amounts of cash which is interest free but also create buzz in the market because of publicity in the media regarding heavy bookings of the said vehicle. It is stated that XMC Pvt. Ltd. has arbitrarily increased the price of the vehicle to encash on the market demand.

Not only that, the Company has also not passed on the benefit of recent GST reduction on the passenger cars by Government to the consumers in the said car model. However, it has passed on the benefit of the GST reduction on its other car models to the customers which are not in such demand. Most of other manufacturers have duly passed the GST reduction to the customers.

As per Mr. Nazir, XMC Pvt. Ltd. has indulged in unfair practices in connivance with its dealers by manipulating its delivery policy and price policy. After seeing huge response because of attractive initial offer price, it not only delayed in giving delivery of the booked car but also increased the price which is nearly two times of the offer price at the time of booking. It has not honored the commitment of delivery and price to the buyer who had booked on the very first day and first hour of the launch.

Mr. Nazir stated that it is not just an individual issue but it involves the larger interests of car buyers, who do not have any recourse to effective mechanism against the abuse of dominant position by such auto manufacturers for imposing anti-competitive terms on the buyers.

Based on the above submissions Mr. Nazir alleged that the aforesaid conduct of XMC Pvt. Ltd. is not in tandem with the provisions of the Competition Act, 2002 and it has acted in a manner which can be termed as anti-competitive.

OBJECTIVE TYPE QUESTIONS (2 MARKS EACH)

1. Which of the following is the appropriate authority for redressal of the grievances of Mr. Nazir?
   (a) District Consumer Redressal Forum
   (b) Competition Commission of India
   (c) Car Manufacturers Association of India
   (d) Both (a) and (b)

2. Under which provisions of the Competition Act, 2002, the grievances of Mr. Nazir can be examined?
   (a) Prohibition of horizontal anti-competitive agreement u/s 3(3) of the Competition Act, 2002
   (b) Prohibition of abuse of dominant position under section 4 of the Competition Act, 2002
   (c) Prohibition of vertical anti-competitive agreement u/s 3(4) of the Competition Act, 2002
   (d) Regulation of combination under section 6 of the Competition Act, 2002

3. Mr. Nazir stated that "it is not just an individual issue but it involves the larger interests of car buyers, who do not have any recourse to effective mechanism against the abuse of dominant position by such auto manufacturers for imposing anti-competitive terms on the buyers". What would be his prime intention in stating so?
   (a) The car manufacturer's conduct towards him is exploitative
   (b) The car manufacturer is imposing anti-competitive terms on him.
   (c) The conduct of car manufacturer is not conducive to the market as it affects larger consumers' interest.
   (d) All the above

4. Let, Mr. Nazir approached the Competition Commission India for his grievances and you are the person in the Commission to take a decision in the matter and according to you the matter pertains to abuse of dominance. What would be your sequence of analysis of the matter?
   (a) XMC Pvt. Ltd. is dominant or not
   (b) Whether the alleged conduct is abusive under section 4 of the Competition Act, 2002
   (c) Whether XMC Pvt. Ltd. falls under the definition of enterprise as defined under the Competition Act, 2002
   (d) Define the relevant market where XMC Pvt. Ltd. is operating

5. Let Mr. Nazir approached the Competition Commission India for his grievances and you are the person in the Commission to take a decision in the matter and according to you the matter pertains to vertical restraint under section 3(4) of the Competition Act, 2002. What would be your sequence of analysis of the matter?
   (a) Whether XMC Pvt. Ltd. and M/s Ratan Lal & Sons have entered into an agreement
   (b) Whether XMC Pvt. Ltd. and M/s Ratan Lal & Sons are placed at vertical level.
   (c) Whether there is any appreciable adverse effect on competition because of anti-competitive agreement between XMC Pvt. Ltd. and M/s Ratan Lal & Sons.

(d) Whether XMC Pvt. Ltd. and M/s Ratan Lal & Sons have agreed on some issues which are anti-competitive in terms of section 3(4) of the Competition Act, 2002.

6. If you think delineation of relevant market is necessary to examine the fact of the case, then what should be the relevant product market in this case?
   (a) Market for passenger car
   (b) Market for dealership services for passenger car
   (c) Market for motor vehicle
   (d) Market for non-commercial passenger car

7. Mr. Nazir submitted that XMC Pvt. Ltd. is a dominant market player in the relevant market, if you agree with his submission, what would be your reasoning?
   (a) Market share of XMC Pvt. Ltd. is largest
   (b) Competitors of XMC Pvt. Ltd. have lesser financial strength
   (c) XMC Pvt. Ltd. is a known brand
   (d) Consumers are dependent on XMC Pvt. Ltd.

8. Given the facts that XMC Pvt. Ltd. and M/s Ratan Lal & Sons, in connivance with each other, have delayed the delivery of the booked passenger car to Mr. Nazir and revised the price of the said car, it cannot be a case of cartelization. What would be the possible reason?
   (a) The fact does not reveal any exclusive agreement btw XMC Pvt Ltd. &M/s Ratan Lal & Sons.
   (b) The fact does not reveal any agreement of XMC Pvt. Ltd. with other car manufacture in Price fixing
   (c) The fact does not reveal that M/s Ratan Lal & Sons is involved in price fixation of delay in giving delivery of the car to Mr. Nazir
   (d) None of the above

9. In case the Competition Commission of India ordered that Mr. Nazir should approach in the appropriate forum, what would be your reaction?
   (a) The Competition Commission of India is rightly ordered so because the allegations of Mr. Nazir do not raise any competition concerns in any market.
   (b) The order of the Competition Commission of India should be challenged in National Company Law Appellate Tribunal as it failed to address the concerns of Mr. Nazir in terms of the provisions of Competition Act, 2002.
   (c) Since it is grievance of an individual consumer, Consumer Redressal Forum is the appropriate authority to deal this matter.
   (d) None of the above

10. If you think that XMC Pvt. Ltd. has abused its dominant position, then which of the following conduct of XMC Pvt. Ltd. is abusive in terms of Section 4 of the Competition Act, 2002?
   (a) not giving delivery of the booked car within the assured time
   (b) The President of XMC Pvt. Ltd. vide its mail to Mr. Nazir informed that the price of the booked vehicle will revised and it will be applicable on the date of invoice by dealer to the customer
   (c) XMC Pvt. Ltd has not passed the benefit of tax deduction to the consumers
   (d) None of the above.

DESCRIPTIVE QUESTIONS (10 MARKS EACH)

1. Do you think that the concerns raised by Mr. Nazir can be examined through the provisions of the Competition Act, 2002? If yes, explain the steps through which the matter can be examined.
2. Do you think that not giving delivery of the booked car within the assured time without enabling provisions in the booking form is tantamount to imposition of unfair conditions and revision of price of the vehicle with effect from the date booking tantamount to imposition of unfair price on Mr. Nazir? Examine the given situations in terms of the provisions of the Competition Act, 2002.
3. What is relevant market? State the provisions of the Competition Act, 2002 to delineate the relevant market. Delineate the relevant market in the instant case.

ANSWERS TO OBJECTIVE TYPE QUESTIONS

1. (a) District Consumer Redressal Forum
   [Hint: The matter relates to concerns of an individual consumer regarding non-delivery of booked vehicle in the given time]

2. (b) Prohibition of abuse of dominant position under section 4 of the Competition Act, 2002
   [Hint: The allegations essentially relate to abuse of dominance by a car manufacturing company, directly or through its authorized dealer]

3. (c) The conduct of car manufacturer is not conducive to the market as it affects larger consumers' interest.
[Hint: The tried to portray his issue as an issue of consumer exploitation to draw the attention of the competition authority]

4. c, d, a, b
[Hint: To examine a case under section 4 of the Competition Act, 2002, it is to be seen first whether the alleged entity is an enterprise or not before defining the relevant market, assessment of its position of dominance in the relevant market and examination of its conduct]

5. b, a, d, c
[Hint: To examine a case under section 3 (4) of the Competition Act, 2002, first i t is to be seen whether the alleged two entities are in a vertical chain and whether they have entered into any agreement as defined under the Competition Act, 2002. Then it is to seen whether such agreement is anti-competitive and it has appreciable adverse effect on competition]

6. (a) Market for passenger car
[Hint: Essentially, the allegations relate to passenger car market]

7. (d) Consumers are dependent on XMC Pvt. Ltd.
[Hint: All are the factors prescribed under section 19 (6) the Competition Act, 2002 to assess dominance of an enterprise in a relevant market]

8. (b) The fact does not reveal any agreement of XMC Pvt. Ltd. with other car manufacture in price fixing
[Hint: Cartelization requires agreement amongst players placed at horizontal level]

9. (a) The Competition Commission of India is rightly ordered so because the allegations of Mr. Nazir do not raise any competition concerns in any market
[Hint: No competition concerns raised in the matter as delay in giving delivery to a consumer or not passing the benefit of tax reduction to consumer or increasing the price cannot said to be anti-competitive]

10. (d) None of the above
[Hint: Refer section 4 of the Competition Act, 2002]

ANSWERS TO DESCRIPTIVE QUESTIONS

1. Even though the concerns raised by Mr. Nazir cannot be redressed by the competition authority as it essentially relates to grievances of an individual consumer of a passenger car manufactured by XMC Pvt. Ltd, however if the matter is placed before the competition authority it will be examined in terms of section 4 of the Competition Act, 2002.

   It is so because the allegations of Mr. Nazir essentially relate to abuse of dominance by XMC Pvt. Ltd, directly or through its authorized dealer M/s Ratan Lal & Sons.

   To examine the matter under section 4 of the Competition Act, 2002, it is to be seen first whether the alleged entity is an enterprise or not before defining the relevant market, assessment of its position of dominance in the relevant market and examination of its conduct.

   Enterprise: Yes, XMC Pvt. Ltd. is an enterprise in terms of Section 2 (h) of the Act.

   Relevant Product Market: The market for passenger car [section 2 (t)]

   Relevant Geographic Market: whole of India [see section 2 (s)]

   Relevant Market: the market for passenger car in India [section 2 (r)]

   Assessment of Dominance of XMC Pvt. Ltd.: Appear to be dominant in the market for passenger car in India as it has highest market share and financial strength besides its brand name and dependence of the consumer on it.

   Assessment of the alleged conduct of XMC Pvt. Ltd.: Not appear to be abusive. Delay in giving delivery of a product to a consumer or not passing the benefit of tax reduction to consumer or increasing the price cannot said to be anti-competitive in terms of Sec 4 of the Competition Act, 2002.

2. To examine the matter under section 4 of the Competition Act, 2002, it is to be seen first whether the alleged entity is an enterprise or not before defining the relevant market, assessment of its position of dominance in the relevant market and examination of its conduct. **(all the steps of answer no. 1 above to be followed)**

Delay in giving delivery of a product to a consumer without enabling provisions in the booing document may be an issue of breach of contract between two parties. It may not be a case of imposition of unfair condition in term of the provisions of section 4 of the Competition Act, 2002. Further, increasing price is a commercial decision of an enterprise which is taken considering the market demand conditions of the product. If market is competitive then excess price, if any, can be wiped out in the long run, no intervention of the competition authority is required. However, if the company raised the price after negotiation with the consumer, it can be challenged in other appropriate forum.

3. As per section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

   Further, the term 'relevant product market' has been defined in section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

   And, the term 'relevant geographic market' has been defined in section 2(s) of the Act to mean a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

   In order to determine the 'relevant product market', the Commission, in terms of the factors contained in section 19(7) of the Act, is required to have due regard to all or any of the following factors viz. physical characteristics or end- use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products.

   Similarly in order to determine the 'relevant geographic market', the Commission, in terms of the factors contained in section 19(6) of the Act, is required to have due regard to all or any of the following factors viz., regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after - sales services.

   As stated above, as per the provisions of the Competition Act, 2002 the relevant market comprises of the relevant product market and relevant geographic market. In the instant matter, the relevant product market may be considered as the 'market for passenger car'.

   It may be noted that the allegations of Mr. Nazir pertains to purchase and after sale service of a passenger car which cannot be substitutable with other type of vehicle in terms of price, end use, characteristics, etc.

   The relevant geographic market in this matter may be considered as 'India' because the condition of competition in passenger car market in India is homogeneous throughout India. A consumer can buy a passenger car from any part of India with similar competitive condition. Thus, the market for passenger car in India may be considered as the relevant market in this case.

Sr.no	Key Terms	Explanation
1	Plaintiff and Defendant	A person or company that makes a legal complaint about someone else in a court of law: The party against whom the complaint is made is the defendant; or, in the case of a petition, a respondent. Case names are usually given with the plaintiff first, as in Plaintiff v. Defendant.
2	Question of Law	An issue that is within the province of the judge, as opposed to the jury, because it involves the application or interpretation of legal principles or statutes.
3	Key Ratio Decidendi	Ratio decidendi is a Latin phrase meaning "the reason for the decision." Ratio decidendi refers to the legal, moral, political and social principles on which a court's decision rests. It is the rationale for reaching the decision of a case.
4	Ors.	Others (When there are more than one party in a case instead of writing name of all the parties, we use Ors. for more than 1 other parties and Anr for only 1 another party.
5	Anr.	Another
6	Revolving door policy	This refers to a practice wherein people in highly influential positions in the government move to jobs in the private sector and vice versa. It is believed that such movement of people between the government and the private sector can lead to serious conflict of interest.
7	Rebuttable term	Both in common law and in civil law, a rebuttable presumption is an assumption made by a court that is taken to be true unless someone comes forward to contest it and prove otherwise. For example, a defendant in a criminal case is presumed innocent until proved guilty.
8	Leniency Application	Leniency program is available for enterprises / individuals who disclose to the CCI their role in a cartel and co-operate with the consequent investigations. Section 46 of the Competition Act, 2002 which states that if any cartel member alleged to have entered into an anticompetition agreement makes full disclosure to the CCI with respect to the alleged violation, then the CCI may impose a lesser penalty on such cartel member. However, the disclosure shall be full, true and vital disclosures.
9	Obiter dicta	Obiter dictum (plural obiter dicta) is an opinion or a remark made by a judge which does not form a necessary part of the court's decision. The word obiter dicta is a Latin word which means "things said by the way." Obiter dicta can be passing comments, opinions or examples provided by a judge.
10	Perincuriam	A court decision made per incuriam is one which ignores a contradictory statute or binding authority and is therefore wrongly decided and of no force.
11	De jure	according to rightful entitlement or claim; by right.
12	Special Leave Petition	Special leave petition (SLP) means that an individual takes special permission to be heard in appeal against any high court/tribunal verdict. It can be filed in case a high court refuses to grant the certificate of fitness for appeal to Supreme Court of India.
13	pari material	The general principle of in pari materia, rule of statutory interpretation, says that laws of the same matter and on the same subject must be construed with reference to each other. The intent behind applying this principle is to promote uniformity and predictability in the law.
14	Contraband	goods that have been imported or exported illegally.
15	Summary Suit	Summary suit or summary procedure is provided under order XXXVII of the Code of Civil Procedure, 1908. The summary suit is an unique legal procedure used for enforcing a right in an efficacious manner as the courts pass judgement without hearing the defence. The defendant had to apply for leave for defend, if they want to defend

Significant Case Laws

Chapter-1
Competition Act,2002

Cases included under this Chapter

S. No.	Title of the Case	Court/ Date
1.	Mahindra Electric Mobility Limited & Ors V/s CCI and Another	High Court of Delhi/ dated 10.04.2019
2.	Competition Commission of India V/s M/s Fast Way Transmission	Supreme Court of India / dated 24.01.2018
3.	Rajasthan Cylinders and Containers Ltd V/s UOI	Supreme Court of India / 01.10.2019
4.	CCI V/s Bharti Airtel Ltd.	Supreme Court of India / 05.12.2018
5.	Monsanto Holdings Pvt. Ltd and Ors. V/s CCI	High Court of Delhi / 20.08.2020
6.	Samir Agrawal (Appellant) V/s Competition Commission of India	Supreme Court of India / 15.12.2020
7.	M/s B Himmat Lal Agrawal Parnter V/s Competition Commission of India	Supreme Court of India / 18.05.2018
8.	Flipkart Internet Pvt. Ltd V/s Competition Commission of India & Ors	Supreme Court of India / 13.01.2020
9.	Uber India Systems P Ltd V/s CCI	Supreme Court of India /03.09.2019
10	Competition Commission of India V/s Thomas Cook (India) Ltd.	Supreme Court of India/ 17.04.2018
11.	SCM Solifert Ltd. V/s Competition Commission of India	Supreme Court of India/ 17.04.2018

1. Mahindra Electric Mobility Limited & Ors. vs. CCI & Another
(Citation: Delhi HC, W.P.(C) No. 11467/2018 dated 10.04.2019)

Facts

- The complaint alleged that three car manufacturers, Honda Siel Cars India Ltd, Volkswagen India Pvt. Ltd and Fiat India Automobiles Limited, restricted free availability of spare parts in the open market, which caused a denial of market access for independent repairers. This was in addition to other anti-competitive effects including high prices of spare parts and repair and maintenance services for automobiles.
- After a detailed investigation by the Director General (DG) into the practices of 14 car manufacturers (the Informant had only complained about three car manufacturers), the CCI found that the car manufacturers had contravened provisions of Sections 3 and 4 of the Act and levied a penalty of 2% of the total turnover in India on each of the manufacturers.
- As a consequence, some car manufacturers filed a writ before the Delhi HC challenging the constitutional validity of certain provisions of the Act, which directly impacted the validity of the CCI's final order in the Auto Parts Case

Issue

1. Whether the CCI is a tribunal exercising judicial functions?
2. Whether the composition of the CCI is unconstitutional and violates the principle of separation of powers?
3. Whether the 'revolving door' practice at the CCI vitiates any provisions of the Act and, more specifically, if the manner for decision making provided under Section 22(3) of the Act is unconstitutional?
4. Whether it is illegal to expand the CCI's scope of inquiry?

Key Ratio Decidendi

1. Ruling on the first issue, the Delhi HC held that the CCI is in part administrative, expert (when discharging advisory and advocacy functions) and quasi-judicial (while issuing final orders, directions and penalties) and cannot be characterized as a tribunal solely discharging judicial powers.
2. On the second issue, the Delhi HC dealt with each of the provisions of the Act that were challenged by the petitioners and also undertook a comparison of regulatory models of different specialized bodies/tribunals vis-à-vis the CCI. In particular, the following were upheld to be valid:
   (a) Section(s) 61 and 53T of the Act (which deal with exclusion of jurisdiction of Civil Courts and High Courts, respectively).
   (b) Section 9 (which Provides for the selection procedure/committee for members of the CCI).
   (c) Section(s) 11, 55 and 56 (which deal with tenure of the members of the CCI and the provision for supersession by the Central Government in the event the CCI is unable to discharge its functions).
   (d) Section 53D (which prescribes the composition and constitution of the Appellate Tribunal).
   (e) The Delhi HC declared Section 53E of the Act (which deals with composition of the selection committee of the Appellate Tribunal), to be unconstitutional subject to the decision of the Hon'ble SC in Central Administrative Tribunal v. Union of India (wherein certain provisions of the Finance Act, 2017 have been challenged).
3. Regarding the "revolving door policy", the Delhi HC emphasised the principle of 'who hears must decide' and stated that any violation of this rule would render any final order void. It is also clarified that much would depend on the factual context and merely resorting to the practice of "revolving door" would not render Section 22 of the Act invalid or arbitrary. It is necessary that the party raising such objections must have been prejudiced.
4. Further, in line with the decision of the Hon'ble SC in Excel Crop Care Limited v. Competition Commission of India, the Delhi HC held that the CCI is well within its power to expand the scope of inquiry to include other issues and parties. This is because at the prima facie stage, the CCI may not have all information in respect of the parties' conduct.

2. Competition Commission of India vs M/s Fast Way Transmission
(Citation: Supreme Court, Civil Appeal No. 7215 of 2014 dated 24.01.2018)

Facts

On August 1, 2010, the broadcasters of the news channel 'Day & Night News' ('Broadcasters') entered into a channel placement agreement with the Multi System Operators ('MSOs'), forming part of the Fast Way group, for a period of one year. A notice of termination was served on the Broadcasters, which was alleged to be an act of abuse of dominant position by the MSOs in denying market access to the Broadcasters.

In its order, CCI found that the MSOs were dominant in the relevant market, having 85% of the total subscriber share. CCI opined that the MSOs' reason for termination, that the Broadcasters had low television rating points ('TRP'), and that the MSOs were facing spectrum constraint, were insufficient and mere after thoughts put forth by the MSOs. Accordingly, a penalty of ₹ 8,40,01,141 was imposed by CCI on the MSOs.

In appeal before the COMPAT, CCI's order was reversed. The COMPAT held that a broadcaster cannot be said to be a competitor of MSOs, and denial of market access can be caused only by one competitor to another.

Issue

Whether abuse of dominant position as specified in the Competition Act is dependent on the existence of, or effect on, competitors, or is it based on the abuse that the enterprise may indulge in on the basis of its dominant position in the relevant market in any manner?

Proceedings Before the CCI and the COMPAT

When the MSOs unilaterally terminated the Channel Placement Agreement (CPA) with the broadcaster, the broadcaster (Kansan News Private Limited) approached the CCI alleging violation of the Competition Act. The CCI found that the group of MSOs were inter-related and constituted a "group" in terms of the Competition Act. Additionally, the CCI found that the group occupied a dominant position in the relevant market for the provision of cable TV services in Punjab and Chandigarh.

The MSOs raised various preliminary arguments. They contended that the broadcaster had suppressed the fact that it had already approached (without relief) the High Court of Punjab & Haryana and the Supreme Court alleging breach of contract by the MSOs. Additionally, it was pointed out that the broadcaster had also filed a case with the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) challenging the termination of the CPA. Most importantly, the MSOs also challenged the jurisdiction of the CCI claiming that a dispute between a broadcaster and an MSO falls within the exclusive jurisdiction of the TDSAT. On merits, the MSOs contended that their conduct was based on technical and commercial reasons and, thus, could not be considered an abuse of dominance.

Rejecting the contentions on merits, the CCI determined that the MSOs' conduct amounted to denial of market access and a violation of section 4(2)(c) of the Competition Act. The CCI, thus, held that the MSOs were abusing their dominant position and imposed a penalty of INR 8,40,01,141 (INR 84 million) on the group of MSOs. It may be noted that the CCI, in its order, did not deal with the issue of 'jurisdiction'.

Against the CCI order, the MSOs approached the COMPAT reiterating their arguments on jurisdiction and merits.

The COMPAT set aside the CCI order on the premise that denial of market access (under section 4(2)(c) of the Competition Act) can be occasioned only by one competitor to another. The COMPAT reasoned that since the broadcaster and the MSOs were not competitors, there could not be denial of market access and, thus, set aside the CCI's order and the penalty imposed thereby.

Subsequently, the CCI approached the Supreme Court challenging the COMPAT's decision on the ground that abuse of dominant position as specified in the Competition Act is not dependent on the existence of, or effect on, competitors, but is based on the abuse that the enterprise may indulge in on the basis of its dominant position in the relevant market in any manner.

Key Ratio Decidendi [CCI]

The Supreme Court partly agreed with both the CCI and the MSOs. The Supreme Court took into consideration the Preamble of the Competition Act and its salient provisions to conclude that the CCI has been vested with a positive duty to eliminate all practices that have an adverse effect on competition. Although the Supreme Court did not directly deal with the issue of jurisdiction, it specifically noted the non-

obstante clause (section 60) in the Competition Act, which expressly states that the provisions of the Competition Act shall have an overriding effect notwithstanding anything inconsistent therewith contained in any other law.

Accordingly, the Supreme Court noted that once the existence of a dominant position is proved, the question of whether the denial of market access is being done by a competitor or not is irrelevant. The only relevant factor, according to the Supreme Court, is the denial of market access due to unlawful termination of the CPA. Thus, the Supreme Court agreed with the CCI and set aside the COMPAT's decision in this regard.

The Supreme Court observed that CCI has a positive duty to eliminate all practices that lead to an adverse effect on competition. Distinguishing from the opinion of the COMPAT, the Supreme Court held that for there to be an abuse of dominant position, once dominance is made out, it becomes irrelevant whether the parties are competitors or not. The Supreme Court observed that Section 4(2)(c) of the Competition Act would be applicable for the simple reason that the Broadcasters were denied market access due to an unlawful termination of the agreement between the Broadcasters and MSOs. The Supreme Court noted that the position of dominance of the MSOs was clearly made out, owing to subscriber share of 85% enjoyed by the MSOs in the relevant market of 'Cable TV market in Punjab and Chandigarh' and held that the MSOs acted in breach of Section 4(2)(c) by terminating the agreement, but found that the reasons for termination provided by the MSOs were justified, and therefore quashed the penalty imposed by CCI.

3. Rajasthan Cylinders and Containers Limited vs UOI
(Citation: Supreme Court, Civil Appeal No. 3546/2018 dated 01.10.2019)

Facts

- A tender was floated by Indian Oil Corporation Ltd (IOCL) for the purchase of LPG cylinders.
- An LPG cylinder manufacturer approached the CCI challenging the tender conditions imposed by IOCL. However, while the case against IOCL was closed, during the investigation of the aforesaid tender, the Director General (DG) noticed a similar pattern in a bid submission by LPG cylinder manufacturers. This chain of events led the CCI to initiate an inquiry, on its own motion, into the alleged cartelization and bid-rigging by LPG cylinder manufacturers.
- Subsequent to the DG's investigation and recommendations in its investigation report, the CCI came to the conclusion that 45 LPG cylinder manufacturers, out of the 47 which were inquired into, had entered into an anti-competitive agreement in violation of the Competition Act by rigging bids in IOCL tender.
- This led to the CCI imposing penalties on those LPG cylinder manufacturers found in contravention. Except for one party, 44 parties filed an appeal before the Competition Appellate Tribunal (COMPAT) challenging the CCI order. While the COMPAT upheld the CCI decision as to the existence of the contravention, it ordered reduction of the penalties on the basis of the principle of "relevant turnover".

Issue

Can enterprises be in violation of the Competition Act, 2002 (Competition Act) when prevailing market conditions are themselves not conducive to a competitive market?

Key Ratio Decidendi

1. The Supreme Court reiterated that the purpose of the Competition Act is not merely to eliminate anti-competitive practices but also to promote and sustain competition.
2. The Supreme Court held that there need not be direct evidence of cartelization since such agreements are entered into in secret and the standard or proof required is that of balance of probabilities. However, the Supreme Court held that the presumption of anti-competitiveness attached to horizontal agreements is rebuttable by parties through evidence.
3. While examining the market conditions prevailing in the LPG cylinders market, the Supreme Court held that "those very factors on the basis of which the CCI has come to the conclusion that there was cartelization, in fact, become valid explanations to the indicators pointed out by the CCI". The Supreme Court noted that the above mentioned market condition led to a "situation of oligopsony that prevailed because of limited buyers and influence of buyers in fixation of prices was all prevalent".
4. On the basis of the above factors, the Supreme Court held that the LPG cylinder manufacturers had discharged their onus by showing that the parallel behavior was not a result of concerted practice but of the market conditions where IOCL was calling the shots in so far as price control is concerned.
5. Thus, the Supreme Court held that at this stage it was up to the CCI to inquire further in the case, which it failed to do. The Supreme Court also took note of the fact that the CCI had failed to summon the IOCL before it, despite the IOCL having "full control over the tendering process".
6. Accordingly, the Supreme Court held that there was not "sufficient evidence" to hold the LPG cylinder manufacturers in violation of the Competition Act and set aside the COMPAT orders upholding the LPG cylinder manufacturers in violation of the Competition Act.

4. CCI vs Bharti Airtel Ltd

(Citation: Supreme Court, Civil Appeal No. 11843 of 2017 dated 05.12.2018)

Facts

- In 2017, the CCI, acting on information filed by Reliance Jio Infocomm Limited ('Jio') under Section 19(1) of the Competition Act, 2002 ('Act'), ordered the Director General, CCI ('DG') to investigate ('CCI Order') against the alleged cartelization by Bharti Airtel Limited, Vodafone India Limited, Idea Cellular Limited and the Cellular Operators Association of India ('OPs'). It was alleged that OPs had cartelized to deny Jio entry into the telecom sector by not providing it adequate Points Interconnection ('POIs'), resulting in call failures between Jio and other networks. Jio had also filed letters with the TRAI complaining against the conduct of the OPs.
- The Bombay High Court ('BHC') by way of an order dated September 21, 2017 ('BHC Order') set aside the CCI Order and held that the telecom sector is governed, regulated and controlled by certain special authorities, and the CCI does not have the jurisdiction to deal with interpretation or clarification of any "contract clauses", "unified license", "interconnection agreements", "quality of services regulations", etc., which are to be settled by the TRAI/ Telecom Disputes Settlement & Appellate Tribunal ('TDSAT'). BHC further held that the powers of CCI are not sufficient to deal with the technical aspects associated with the telecom sector, which solely arise out of the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act') and related regulations. CCI and Jio, aggrieved by the BHC Order, approached the SC.

Issue

Whether CCI has jurisdiction to deal with the matter unless the issues are settled by authorities under the TRAI Act?

Key Ratio Decidendi [CCI]

Dealing with the question of whether the CCI had jurisdiction to look into the allegations of collusion amongst the incumbents, the Supreme Court held that the TRAI Act and the Competition Act are both special Acts and primacy has to be given to the respective objectives of both the regulators under their respective statutes.

The Supreme Court clarified that the jurisdiction of the CCI is not ousted by the TRAI Act. However, the Court was cognizant that simultaneous exercise of jurisdiction by both could lead to conflicting outcomes and uncertainties. Having determined that both require primacy and cognizant of the implications of simultaneous exercise of jurisdiction by both, the Supreme Court sought to maintain the balance by adopting the following approach:

The TRAI, being the expert regulatory body governing the telecom sector, has, in the first instance, powers to decide contractual issues such as obligation to provide POIs, reasonableness of demand for access to POIs, concepts of "subscriber", "test period", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of contract".

Once these "jurisdictional aspects" are straightened and answered by the TRAI, the CCI can exercise its jurisdiction under the Act. The CCI's exercise of jurisdiction is as such, not rejected but pushed to a later stage when the TRAI has undertaken the necessary activity of determining of the jurisdictional facts.

The Supreme Court has recognised that CCI's jurisdiction is not excluded by presence of sectoral regulators and to that end, the CCI enjoys primacy with respect to issues of competition law. However, to the extent the Supreme Court holds that despite such primacy, the CCI is "ill equipped to proceed" on account of absence of the determination of "jurisdictional aspects" by a sectoral regulator, the Supreme Court grants to the CCI a 'follow- on' jurisdiction.

5. Monsanto Holdings Pvt. Ltd. and Ors. vs.CCI
(Delhi HC, W.P.(C) 3556/2017 and CM Nos. 15578/2017, 15579/2017 &35943/2017 dated 20.05.2020)

Facts

The case is related to the trait rate charged via MMBL and the alternative terms and situations imposed by means of it for the usage of the generation for production Bt. Cotton Seeds. Monsanto is a business enterprise engaged in growing and commercializing generation for producing genetically modified seeds. It holds a portfolio of patents, emblems, and licenses. It is said that Monsanto become the first business enterprise to broaden and commercial ize Bt. Cotton Technology (Bollgard-I). The era is geared toward genetically editing hybrid seeds to instil a particular trait – resistance to bollworms.MMBL is an agency integrated in India and is a part of the Monsanto organization inasmuch as it is a joint assignment business enterprise among MHPL (that's a one hundred subsidiary of Monsanto) and Mahyco. Further, MHPL additionally holds 26% fairness in Mahyco. The Nuziveedu Seeds Ltd. ('NSL'), Prabhat Agri Biotech Ltd. ('PABL'), and Pravardhan Seeds Pvt. Ltd. ('PSPL') had filed Information beneath section 19(1)(a) of the Competition Act earlier than CCI alleging contravention of the Competition Act. The Informants had accused the Petitioner of abusing its role as the dominant participant inside the marketplace of Bt Cotton Seeds by means of charging unreasonably high trait fees.

Issue:

1. Whether no word may be issued to the Directors / Persons In-rate of the Company until the CCI returns a finding in opposition to the Company that it has indulged in anti aggressive sports under Sections 3 and four of the Competition Act;
2. Whether Section 48 of the Competition Act, which offers for vicarious liability of folks inprice and chargeable for the conduct of commercial enterprise of the Company, will follow handiest on contravention of orders of CCI or DG under Sections 42 to 44 of the Competition Act and no longer to contravention of Sections three and 4 of the Competition Act.

Key Ratio Decidendi

On the decision passed in Telefonaktiebolaget L.M. Ericsson v. Competition Commission of India & Another: W.P.(C) 464/2014

- Sections 60 and 62 of Competition Act give the Competition Act an overriding effect and provide the Act to be in addition to and not in derogation of other Acts. This Court in Telefonaktiebolaget L.M. Ericsson v Competition Commission of India & Another provided that Section 60 would not reduce the weight of the Patents Act and Section 62 makes it clear that Competition Act is in addition to other laws.
- In Telefonaktiebolaget examining the two Acts, the Court observed that orders that can be passed by the CCI under Section 27 of Competition Act relating to abuse of dominant position are different from the remedies under provisions pertaining to Compulsory License under the Patents Act.
- In Telefonaktiebolaget, the Court also observed that under certain circumstances the prospective licensee can approach the Controller for a compulsory license but the same would not be inconsistent with CCI passing an order under Section 27.
- CCI under Section 20 of the Competition Act has a power to make a reference to any regulator where in course of proceedings the CCI proposes to take any decision which may be contrary to provisions of any statute, the implementation of which has been entrusted to any statutory authority.
- Section 21 of the Competition Act enables any statutory authority, charged with administration of any statute to make a reference to CCI if it proposes to take any decision, which may be contrary to the provisions of Competition Act.
- In Telefonaktiebolaget, the Court concluded that there was no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act, and, thus, the jurisdiction of the CCI to investigate complaints regarding abuse of dominance in respect to patent rights could not be excluded.

On Competition Commission of India v. Bharti Airtel Ltd. And Ors.: Civil Appeal No. 11843/2018

- In the said case, the Supreme Court did not hold that jurisdiction of CCI in respect of matters, regulated by a specialised statutory body were excluded from the applicability of the Competition Act.
- Role of TRAI as a regulator is materially different from that of a Controller and is more pervasive.

- The Bombay High Court decision, upheld by the Supreme Court, after examining the role of TRAI, held that TRAI's role was different than the role of a Controller and thus Telefonaktiebolaget L.M. Ericsson (supra) was not applicable.

On Interpretation canvassed by Petitioner of Section 3 (5) of the Competition Act, 2002

- Section 3(5)(i) of the Competition Act cannot be broken down in the manner as suggested.
- The words "or to impose reasonable conditions" are placed between two commas and thus must be interpreted as being placed in parenthesis that explains and qualifies the safe harbour of Section 3(5). Plainly, the exclusionary provision to restrain infringement cannot be read to mean a right to include unreasonable conditions that far exceed those that are necessary, for the aforesaid purpose.
- While an agreement, which imposes reasonable condition for protecting Intellectual Property Rights is permissible any agreement which imposes unreasonable conditions is impermissible under the Competition Act.
- The Hon'ble Court found no reason to interfere with the Impugned Order of Investigation. The Hon'ble Court further found the said order to be an administrative order and held that unless the same is found to be arbitrary or unreasonable, it shall not be interfered with.

Conclusion

The Hon'ble Judge upholding the jurisdiction of CCI and disregarding the writ petition of the Petitioners, held that an order surpassed by using the CCI below Section 26(1) of the Competition Act is an administrative order and, consequently, unless it's miles found that the equal is bigoted, unreasonable and fails the Wednesbury test no interference would be warranted. Since a evaluate on deserves was impermissible on the time of the choice of the Hon'ble Judge, consequently, the Hon'ble Judge avoided examining the deserves of the dispute.

6. Samir Agrawal (Appellant) V Competition Commission of India & Ors

(Citation: Supreme Coure Civil Appeal No. 3100 of 2020, and Judgement dated December 15, 2020)

Facts

- The present appeal is at the instance of an Informant who describes himself as an independent practitioner of the law.
- The Appellant, submitted that the Competition Commission of India (CCI) initiated an inquiry, under section 26(2) of the Competition Act, 2002 (the Act), into the alleged anti competitive conduct of Ola and Uber, alleging that they entered into price-fixing agreements in contravention of section 3(1) read with section 3(3)(a) of the Act, and engaged in resale price maintenance in contravention of section 3(1) read with section 3(4)(e) of the Act.
- The Informant submitted that Ola and Uber Ola provide radio taxi services and essentially operate as platforms through Mobile App which allow riders and drivers, to interact. A trip's fare is calculated by an algorithm based on many factors.
- The Informant alleged that due to algorithmic pricing, neither are riders able to negotiate fares with individual drivers for rides, nor are the drivers able to offer any discounts. Thus, the pricing algorithm takes away the freedom of riders and drivers to choose the best price on the basis of competition, as both have to accept the price set by the pricing algorithm.
- As per the terms and conditions agreed upon between Ola and Uber with their respective drivers, the driver is bound to accept the trip fare reflected in the app at the end of the trip, without having any discretion insofar as the same is concerned.
- The drivers receive their share of the fare only after the deduction of a commission by Ola and Uber for the services offered to the rider. Therefore, the Informant alleged that the pricing algorithm used by Ola and Uber artificially manipulates supply and demand, guaranteeing higher fares to drivers who would otherwise compete against one and another.
- Cooperation between drivers, through the Ola and Uber apps, results in concerted action under section 3(3)(a) read with section 3(1) of the Act. Thus, the Informant submitted that the Ola and Uber apps function akin to a trade association, facilitating the operation of a cartel.
- Further, since Ola and Uber have greater bargaining power than riders in the determination of price, they are able to implement price discrimination, whereby riders are charged on the basis of their willingness to pay and as a result, artificially inflated fares are paid. Various other averments qua resale price maintenance were also made, alleging a contravention of section 3(4)(e) of the Act.

Issue

- Whether Ola and Uber Apps function akin to a trade association, facilitating the operation of a cartel.
- Whether Ola and Uber due to their greater bargaining power than riders in the determination of price, they are able to implement price discrimination, and artificially inflating fares / resale price maintenance alleging a contravention of section 3(4)(e) of the Act.

Key Ratio Decidendi

Decision of the CCI

- The Informant has not alleged collusion between the Cab Aggregators i.e. Ola and Uber through their algorithms; rather collusion has been alleged on the part of drivers through the platform of these Cab Aggregators, who purportedly use algorithms to fix prices which the drivers are bound to accept.
- In the conventional sense, hub and spoke arrangement refers to exchange of sensitive information between 3 competitors through a third party that facilitates the cartelistic behaviour of such competitors. The same does not seem to apply to the facts of the present case.
- For a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first place. In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), this cannot be said to be amounting to collusion between the drivers.
- In the case of ride-sourcing and ridesharing services, a hub-and-spoke cartel would require an

agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them. There does not appear to be any such agreement between drivers inter-se to delegate this pricing power to the platform/Cab Aggregators. Thus, the Commission finds no substance in the first allegation raised by the Informant.

- In case of app-based taxi services, the dynamic pricing can and does on many occasions drive the prices to levels much lower than the fares that would have been charged by independent taxi drivers. Thus, there does not seem to be any fixed floor price that is set and maintained by the aggregators for all drivers and the centralized pricing mechanism cannot be viewed as a vertical instrument 4 employed to orchestrate price-fixing cartel amongst the drivers.
- The allegations raised by the Informant with regard to price fixing U/s 3(3)(a) read with section 3(1), resale price maintenance agreement under section 3(4)(e) read with section 3(1), the CCI observed that existence of an agreement, understanding or arrangement, demonstrating/indicating meeting of minds, is a sine qua non for establishing a contravention under Section 3 of the Act. In the present case neither there appears to be any such agreement or meeting of minds between the Cab Aggregators and their respective drivers nor between the drivers inter-se. In result thereof, no contravention of the provisions of Section 3 of the Act appears to be made out given the facts of the present case.
- The allegation as regards price discrimination also seems to be misplaced and unsupported by any evidence on record. Imposition of discriminatory price is prohibited under Section 4(2)(a)(ii) of the Act only when indulged in by a dominant enterprise. It is not the Informant's case that any of the OPs is dominant in the app-based taxi services market.
- Ola & Uber are not an association of drivers, rather they act as separate entities from respective drivers.

Decision of the NCLAT

- In the instant case, the Informant claims to be an Independent Law-Practitioner. There is nothing on the record to show that he has suffered a legal injury at the hands of Ola and Uber as a consumer or as a member of any consumer or trade association. Not even a solitary event of the Informant of being a victim of unfair price fixation mechanism at the hands of Ola and Uber or having suffered on account of abuse of dominant position of either of the two enterprises have been brought to the notice of this Appellate Tribunal. We are, therefore, constrained to hold that the Informant has no locus standi to maintain an action qua the alleged contravention of Act.

- Assuming though not accepting the proposition that the Informant has locus to lodge information qua alleged contravention of the Act and appeal at his instance is maintainable, on merits also we are of the considered opinion that business model of Ola and Uber does not support the allegation of Informant as regards price discrimination.
- The allegation of Informant that the drivers attached to Cab Aggregators are independent third party service provider and not in their employment, thereby price determination by Cab Aggregators amounts to price fixing on behalf of drivers, has to be outrightly rejected as no collusion inter se the Cab Aggregators has been forthcoming from the Informant.
- As regards the issue of abuse of dominant position, be it seen that the Commission, having been equipped with the necessary wherewithal and having dealt with allegations of similar nature in a number of cases as also based on information in public domain found that there are other players offering taxi service/ transportation service/ service providers in transport sector and the Cab Aggregators in the instant case distinctly do not hold dominant position in the relevant market.

Decision of the Supreme Court

- This being the case, it is difficult to agree with the impugned judgment of the NCLAT in its narrow construction of section 19 of the Act, which therefore stands set aside.
- The Apex Court opined that when the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purpose of the Act.
- The Court observed that the concurrent findings of fact of the CCI and the NCLAT, wherein it has been found that Ola and Uber do not facilitate cartelization or anti competitive practices between drivers, who are independent individuals, who act independently of each other, so as to attract the application of section 3 of the Act, as has been held by both the CCI and the NCLAT and therefore, see no reason to interfere with these findings. Resultantly, the appeal is disposed of in terms of this judgment.

7. M/s. B. Himmatlal Agrawal Partner vs Competent Commission of India

(Citation: Supreme Court of India, CIVIL APPEAL NO. 5029 OF 2018, 18th May, 2018)

Facts

- The appellant firm participated in two tenders, bearing numbers 03/2014-15 and 06/201415 floated by the respondent No. 2 herein i.e. M/s. Western Coalfields Limited. The appellant firm was L-II and not the lowest bidder for allotment of the tenders.
- In June, 2015, the appellant firm received a notice from the Competition Commission of India, New Delhi (CCI) asking to show cause under Section 19(1)(a) read with Section 3 of the Competition Act, 2002 (the Act). In the said notice, it was alleged that the appellant firm was involved in anti-competitive and unfair trade practices in collusion with nine other firms.
- The appellant firm filed its reply. The CCI after considering the same passed orders under Section 26 of the Act and directed the inquiry to be conducted by the Director General (DG) of the CCI
- DG submitted its report after the inquiry giving his findings to the effect that the appellant had indulged in anti-competitive and unfair trade practices in collusion with the other firms.
- The appellant was given a chance to file its objections thereto. After considering those objections, the CCI passed orders dated September 14, 2017 affirming the findings of the DG and imposed penalties on the appellant firm as well as nine parties. Insofar as appellant is concerned, penalty of ₹ 3.61 crores has been imposed.
- The appellant filed the statutory appeal thereagainst before the Appellate Tribunal which was registered as Competition Appeal (AT) No. 24/2017. The appellant also prayed for interim stay of the penalty order.
- Vide orders dated November 20, 2017, Appellate Tribunal admitted the appeal. It also granted stay on the orders of the CCI with the condition of depositing 10% of the total penalty (i.e. a sum of ₹ 36,12,222/-) imposed by CCI, to be paid by the appellant, within two weeks i.e. by December 4, 2017.
- The appellant could not fulfill the said condition of deposit. When the matter was taken up on December 4, 2017, the appellant pleaded before the Appellate Tribunal that noncompliance because of financial crunch which the appellant was facing.
- The Appellate Tribunal, however, passed orders dated December 4, 2017 to the following effect: By way of last opportunity, the appellant is given time till 20th December, 2017 to deposit 10% of the penalty amount, failing which, the appeal stands disposed without referring further to the bench.
- As per the appellant, since it was in deep financial trouble, it could not deposit the amount by December 20, 2017 in spite of all bona fide intentions. The appellant accordingly filed I.A. No. 84 of 2017 on December 18, 2017 seeking modification of orders dated December 4, 2017.
- The request of the appellant was, however, not acceded to and vide orders dated December 21, 2017, the Appellate Tribunal has dismissed I.A. No. 84 of 2017. At the same time, it has dismissed the appeal of the appellant as well for non- compliance of its order dated December 4, 2017.
- A pure legal submission which is advanced by the learned counsel for the appellant is that even if the appellant could not comply with orders dated December 4, 2017 vide which conditional stay was granted directing the appellant to deposit 10% of the penalty amount, the maximum effect thereof was to vacate the stay granted and the Appellate Tribunal was not legally justified in dismissing the appeal itself. This submission of the appellant commends acceptance, having due force and substance in law.

Issue

Whether the order of the NCLAT dismissing the main appeal itself of the appellant herein for non-compliance of the direction to deposit the amount as a condition for grant of stay, is justified and legal.

Key Ratio Decidendi

- From the facts narrated above, it is apparent that order of the CCI was challenged by filing appeal under Section 53B of the Act. Along with this appeal, the appellant had also filed application for stay of the operation of the order of the CCI during the pendency of the appeal.

- Appeal was admitted insofar as stay is concerned, which was granted subject to the condition that the appellant deposits 10% of the amount of penalty imposed by the CCI.
- It needs to be understood, in this context, that the condition of deposit was attached to the order of stay. In case of non- compliance of the said condition, the consequence would be that stay has ceased to operate as the condition for stay is not fulfilled. However, non-compliance of the conditional order of stay would have no bearing insofar as the main appeal is concerned.
- The aforesaid provision, thus, confers a right upon any of the aggrieved parties mentioned therein to prefer an appeal to the Appellate Tribunal. This statutory provision does not impose any condition of pre-deposit for entertaining the appeal. Therefore, right to file the appeal and have the said appeal decided on merits, if it is filed within the period of limitation, is conferred by the statute and that cannot be taken away by imposing the condition of deposit of an amount leading to dismissal of the main appeal itself if the said condition is not satisfied. Position would have been different if the provision of appeal itself contained a condition of pre-deposit of certain amount.
- Sub-section (3) of Section 53B specifically cast a duty upon the Appellate Tribunal to pass order on appeal, as it thinks fit i.e. either confirming, modifying or setting aside the direction, decision or order appealed against. It is to be done after giving an oppo rtunity of hearing to the parties to the appeal. It, thus, clearly implies that appeal has to be decided on merits.
- The Appellate Tribunal, which is the creature of a statute, has to act within the domain prescribed by the law/statutory provision. This provision nowhere stipulates that the Appellate Tribunal can direct the appellant to deposit a certain amount as a condition precedent for hearing the appeal.
- In fact, that was not even done in the instant case. It is stated at the cost of repetition that the condition of deposit of 10% of the penalty was imposed insofar as stay of penalty order passed by the CCI is concerned. Therefore, at the most, stay could have been vacated. The Appellate Tribunal, thus, had no jurisdiction to dismiss the appeal itself.
- That was a case where the appellant had challenged the jurisdiction of the Appellate Tribunal to pass conditional order i.e. deposit of 10% of the penalty as a condition for grant of stay. It was argued that the Appellate Tribunal did not have any power to impose such a condition for grant of stay. This challenge was rejected by the Court holding that Appellate Tribunal could pass a conditional stay order. No such issue, that has arisen in the instant appeal, was raised therein, namely, whether the Tribunal could dismiss the appeal itself if the condition attached to the grant of stay is not complied with.
- Accordingly, we allow this appeal and set aside that part of the impugned order whereby the appeal of the appellant is dismissed and restore the appeal which shall be decided by the Appellate Tribunal on merits. We, however, make it clear that as far as stay of the penalty order is concerned, that stood vacated for non- 1 Civil Appeal Nos. 4766-4767 of 2013 with Ors. decided on June 12, 2013 compliance of the condition of deposit of 10% of the penalty and, thus, there is no stay of the CCI order in favour of the appellant.

8. Flipkart Internet Pvt Ltd. v/s Competition Commission of India & Orts
(Citation: Supreme Court, Petition for Special Leave to Appeal (C) No. 11558 dated 09.08.2021)

Facts

Matter before the CCI - Case No. 40 of 2019 at CCI, dated 13.01.2020

(Citation: https://www.cci.gov.in/sites/default/files/40-of-2019.pdf?download=1)

- The present information has been filed by Delhi Vyapar Mahasangh ('Informant'/'DVM'), under Section 19(1)(a) of the Competition Act, 2002 alleging contravention, of the relevant provisions of Section 3(4) read with Section 3(1) and Section 4(2) read with Section 4(1) of the Act, by Flipkart Internet Services Pvt. Ltd. and Amazon Seller Services Pvt. Ltd. (Flipkart and Amazon are, hereinafter, collectively referred to as 'Opposite Parties/'OPs'.)
- The Informant states that there are instances of several vertical agreements between (i) Flipkart with their preferred sellers on the platform and (ii) Amazon with their preferred sellers, respectively which have led to a foreclosure of other non-preferred traders or sellers from these online marketplaces. It has been alleged that most of these preferred sellers are affiliated with or controlled by Flipkart or Amazon, either directly or indirectly.
- The Commission observed that the exclusive arrangements between smartphone/mobile phone brands and e-commerce platform/select sellers selling exclusively on either of the platforms, as demonstrated in the information, coupled with the allegation of linkages between these preferred sellers and OPs alleged by the Informant merits an investigation. It needs to be investigated whether the alleged exclusive arrangements, deep-discounting and preferential listing by the OPs are being used as an exclusionary tactic to foreclose competition and are resulting in an appreciable adverse effect on competition contravening the provisions of Section 3 (1) read with Section 3(4) of the Act.
- The Commission opined that there exists a prima facie case which requires an investigation by the Director General ('DG'), to determine whether the conduct of the OPs have resulted in contravention of the provisions of Section 3(1) of the Act read with Section 3(4) thereof, as detailed in this order.
- Accordingly, the Commission directs the DG to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. The Commission also directs the DG to complete the investigation and submit the investigation report within a period of 60 days from the receipt of this order.
- It is also made clear that nothing stated in this order shall tantamount to a final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made therein.

Issue

- Whether the CCI's investigation into the matter amounts to an interference, and that the CCI's notice was as per the procedure stipulated in the Act.
- Whether the OPs did not want to be investigated by the CCI as per the Act, even though the investigation would offer them an opportunity to lead evidence that exonerates them.

Key Ratio Decidendi [CCI]

Matter before the Karnataka Hight Court: Writ Appeal No. 562 / 2021 dated 23rd July, 2021

Citation: https://indiankanoon.org/doc/144176021/ dated 23rd July, 2021

- The appellant-Flipkart has challenged the legality and validity of the order passed by the learned Single Judge and a main ground has been raised stating that the learned Single Judge has acted contrary to the judgment of the Supreme Court of India in the case of Competition Commission of India v. Steel Authority of India Ltd. & Anr., reported in (2010) 10 SCC 744, while upholding the order passed by the Competition Commission of India. It has been contended that the Hon'ble Supreme Court in CCI v. SAIL has held that the CCI while passing an order under Section 26(1) of the Competition Act, 2002 must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring general issuance of direction for investigation to the Director Genera.
- It has been further contended that the order passed by the CCI in the present case is merely speculative in nature and it has not given any finding on the contravention of the provisions of the Act of 2002. It

has been further contended that the learned Single Judge has erroneously upheld the order passed by the CCI on the basis that the order passed by the CCI is supported by some reasoning. Therefore, the impugned order upholding the order passed by the CCI is contrary to the judgment of the Hon'ble Supreme Court delivered in the case of CCI v. SAIL.

- The Court opined that, by no stretch of imagination, the process of enquiry can be crushed at this stage. In case, the appellants are not at all involved in violation of any statutory provisions of Act of 2002, they should not feel shy in facing an enquiry. On the contrary, they should welcome such an enquiry by the CCI. The writ petitions filed against the order dated 13.1.2021 and the present writ appeals are nothing but an attempt to ensure that the action initiated by the CCI under the Act of 2002 does not attain finality and the same is impermissible in law as the Act of 2002 itself provides the entire mechanism of holding an enquiry, granting an opportunity of hearing, passing of a final order as well as appeal against the order passed by the CCI. In the considered opinion of this Court, the present writ appeals filed by the appellants are devoid of merits and substance, hence, deserve to be dismissed and are accordingly, dismissed.

Matter before the Supreme Court Petition for Special Leave to Appeal (C) No.11558/2021 dated 9th August, 2021

Citation: **https://indiankanoon.org/doc/152538397/**

The Supreme Court opined that we see no reason to interfere with the impugned orders passed by the High Court of Karnataka dismissing the Writ Appeals of the petitioners. The Special Leave Petitions are, accordingly, dismissed. At this stage, Dr. A.M. Singhvi, learned Senior counsel submits that time to reply to the notice issued by the Office of the Director General, Competition Commission of India is going to expire on 9–8–2021 and prays for extension of time.

Conclusion

- The decision of the Apex Court reaffirms the position adopted by it in its landmark ruling CCI v. SAIL which set out clear jurisprudence on the nature of a prima facie order of the CCI.
- The Supreme Court in the SAIL Judgement had unequivocally expressed that a prima facie order is merely a direction to cause an investigation into the matter and to that extent, is an administrative direction to its own investigation arm which does not determine any right or obligation of the parties to the lis.
- That said, this decision also goes on to clarify that in the absence of a sectoral regulator, the CCI's jurisdiction is not precluded at least at the prima facie stage which implies that the CCI is now free to probe the stakeholders in the e-commerce space.

9. Uber India Systems Pvt Ltd V/s Competition Commission of India

(Citation: Supreme Court of India, CIVIL APPEAL NO. 641 of 2017, dated 3rd September, 2019)

Facts

- Ubers discount and incentive offered to consumer pale in comparison with the fidelity inducing discounts offered to drivers to keep them attached on CIVIL APPEAL NO. 641 OF 20171 etc. its network to the exclusion of other market players.
- Uber pays drivers/car owners attached on its network unreasonably high incentives over and above and in addition to the trip fare received from the passengers. A summary of the incentives provided to one fleet owner attached to Ubers network, having 4 cars, which were driven by 9 drivers is reproduced below:

  Statement period: 1st June to 28th June

  Total Trips - 1,135
- Billed to Consumer (Ubers Collection from Consumer) Fare 256,187 Surge 18,621 Surcharges & tolls 23.499 298,307 Operates Earning [Car Owners Earning] Operators Share out 100% 274,808 of Consumer Revenue Service Tax Surcharges & Tolls 4.94% (12.946) Reimbursed Incentives Received 230,464 from Uber Operators net earning 516,343 Ubers Earning Fare and Surge) Incentives Paid to (230,464) Drivers Other adjustments (518) Net earning (loss) 515,346 Ubers Earning Fare and Surge) Incentives Paid to (230,464) Drives CIVIL APPEAL NO. 641 OF 2017 etc. Other adjustments (518) Net earning (Loss) (230,982) Per trip Uber Net Loss (204) In light of the abovementioned statement, it can be seen that Uber was losing ₹ 204 per trip in respect of the every trip made by the cars of the fleet owners, which does not make any economic sense other than pointing to Ubers intent to eliminate competition in the market. Copies of the statements of aforesaid fleet owners along with a summary for the period June 1 to June 28,2015 is annexed herewith as Annexure A-15 Colly.

Issue

Whether the Uber has infringed the provsions of section 4 of Competition Act, 2002

Key Ratio Decidendi

- Based on this information alone, we are of the view that it would be very difficult to say that there is no prima facie case under Section 26(1) as to infringement of Section 4 (i.e. abuse of dominant position) of the Competition Act, 2002.
- Dominant position as defined in Explanation (a) refers to a position of strength, enjoyed by an enterprise, in the relevant market, which, in this case is the National Capital Region (NCR), which: (1) enables it to operate independently of the competitive forces prevailing; or (2) is something that would affect its competitors or the relevant market in its favour.
- Given the allegation made, as extracted above, it is clear that if, in fact, a loss is made for trips made, Explanation (a)(ii) would prima facie be attracted inasmuch as this would certainly affect the appellants competitors in the appellants favour or the relevant market in its favour.
- Insofar as abuse of dominant position is concerned, under Section 4(2)(a), so long as this dominant position, whether directly or indirectly, imposes an unfair price in purchase or sale including predatory price of services, abuse of dominant position also gets attracted. Explanation (b) which defines predatory price means sale of services at a price which is below cost.

Conclusion

- The Supreme Court held that, on the facts of this case, on this ground alone, we do not think it fit to interfere with the order made by the Appellate Tribunal.
- The appeals are dismissed with no orders as to costs.

10. Competition Commission of India V/s Thomas Cook (India) Ltd.

(Citation: Supreme Court of India, Civil Appeal No.13578 of 2015 dated 17th April, 2018)

Facts

Matter before the CCI

- The Thomas Cook India Ltd (TCIL) respondent No.1, Thomas Cook Insurance Services India Limited, (TCISIL) respondent No.2 and Sterling Holiday and Resorts India Limited (SHRIL) respondent No.3 is the companies registered under the Companies Act, 1956. The TCIL is engaged in travel and travel related services.
- The TCISIL is also engaged in travel and travel related services and is a subsidiary of the TCIL.
- SHRIL is engaged in the business of providing premium hotel services, vacation ownership services, normal hotel services like renting of rooms, restaurants, holiday activities etc.
- The Board of Directors of the aforesaid three companies on 7.2.2014 approved a Scheme for demerger/amalgamation and for the purpose of implementing the above transactions, the Respondents entered into a Merger Cooperation Agreement (MCA) on the same day i.e. on 07.2.2014.
- On the very same day i.e. 07.2.2014, by another resolution of the Boards of Directors of the respondents, the following transactions were approved and executed – (i) Share Subscription Agreement (SSA): TCISIL was to subscribe 2,06,50,000 shares of SHRIL pursuant to a preferential allotment (amounting to 22.86% of SHRIL of equity share capital of SHRIL on fully diluted basis); (ii) Share Purchase Agreement (SPA): TCISIL was to acquire 19.94% of equity share capital of SHRIL on the fully diluted basis from certain existing shareholders and promoters of SHRIL. (iii) Open Offer by TCIL and TCISIL to purchase 26% of the equity share capital from public shareholders of SHRIL, in terms of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (in short, the SEBIs Regulations).
- In addition to the above, TCISIL acquired 90,26,794 equity shares of SHRIL through purchase on the Bombay Stock Exchange. These purchases (market purchases) amounted to 9.93% of the equity share capital of SHRIL on the fully diluted basis. The market purchases were made between 10.2.2014 and 12.2.2014.

- On 14.2.2014, the respondents sent a notice under section 6(2) of the Act to the Appellant Commission, notifying only the Demerger' and Amalgamation'. Other transactions were, however, disclosed, while claiming exemption from section 5 of the Act.
- On 20.02.2014, the CCI asked the Respondents to remove certain defects in their application and provide further information, inter alia on, whether the notified and non–notified transactions were interrelated.
- On 5.3.2014, the CCI passed an approval order under section 31(1) of the Act. However, it observed that the same would not affect the action proposed under section 43(A) of the Act for imposition of penalty in separate proceedings.
- On 10.3.2014, the CCI issued a show cause notice asking the respondents as to why they should not be penalized under section 43A for failing in notifying the market purchase under section 6(2) of the Act.
- On 25.3.2014, the respondents filed their reply to the show cause. After hearing the respondents, on 21.5.2014, the CCI imposed a penalty of Rupees One crore under section 43A of the Act.
- Once a particular transaction or a series of transactions falls within the purview of combination, it is obligatory to report the same to the Commission under section 6 of the Act.

Matter before the CAT

The respondents preferred appeal before the Tribunal. (CAT). The CAT has allowed the appeal filed under section 53 B of the Act and has set aside the order passed by the CCI.

Matter before the Supreme Court

Aggrieved thereby, the appeal was been preferred by the CCI under section 53 B of the Act.

Issue

Whether CAT setting aside the order passed by the CCI under section 43A of the Competition Act, 2002, whereby penalty of Rupees One Crore was imposed on the respondents on the ground of non–compliance of provisions contained in section 6(2) of the Act is justifiable.

Key Ratio Decidendi

- On 4.3.2011, Central Government in the exercise of its powers under section 54(a) of the Act issued notification No. SO. 482 E dated 4.3.2011, commonly known as target–based exemptions, which reads as under:

  In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003) the Central Government, in public interest hereby exempt an enterprise, whose control, shares, voting rights or assets are being acquired has assets of the value of not more than INR 250 crores in India or turnover of not more than INR 750 crores in India from the provisions of Section 5 of the said Act for a period of 5 years.

- Section 64 of the Act confers upon the Commission power to make Regulations. Under section 64(3), the Regulations are to be placed before the Houses of Parliament. On 11.5.2011, the Commission framed the Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 (for short, the Regulations, 2011). Regulation 9(4) as it stood at the relevant time, is as under:–

  Regulaiton 9(4): Where the ultimate intended effect of a business transaction is achieved by way of a series of a steps or smaller individual transactions which are inter–connected or inter–dependent on each other, one or more of which may amount to a combination, a single notice, covering all these transactions, may be filed by the parties to the combination.

- It is relevant to note here that the Act and Regulations, 2011 clearly envisage that a combination can consist of one or more transactions. Under Regulation 9(4) of the Regulations, 2011, the parties have an option of giving either a single notice or multiple notices in respect of all the transactions. On 30.5.2011, sections 5 and 6 of the Act were brought into force.

- It is apparent that between the three respondent companies de– merger of the resort of SHRIL on time–share basis took place. It was to be transferred to TCISIL in view of the equity shares of TCIL were to be issued to shareholders of SHRIL as per the ratio provided in the scheme. There was an amalgamation of SHRIL with its residual business into TCIL. There was shares subsequent transfer agreement. The TCISIL was to subscribe 2,06,50,000 shares of SHRIL to preferential allotment amounting to 22.86 of the equity share capital.

- It is apparent that in the notification made under section 6(2) on 14.2.2014 notifiable transactions were shown regarding merger and amalgamation. It was also mentioned that parties have also contemplated certain other transactions in view of the notifiabl e transactions, they were the substitution of equity shares, SPA, open offer and market purchase. It is crystal clear from the aforesaid application itself that all these transactions were part of the same transactions and even before notifying the transactions of purchase from the market on 14.2.2014, it was consummated between 10.2.2014 to 12.2.2014. It is crystal clear that market purchases being a part of the composite combination was consummated before giving notice to the Commission. Joint Press Release dated 7.2.2014 clearly indicated SPA as an open offer. The Board of Directors of the respective parties authorized market purchases on the same day. All the said transactions are intrinsically connected and interdependent with each other and form part of one viable business transaction.

- If the ultimate objective test is applied, it is apparent that market purchases were within view of the scheme that was framed. As such the subsequent change of law also did not come to the rescue of the respondents considering the substance of the transaction. The market purchases were part of the same transaction of the combination.

- The mens rea assumes importance in case of criminal and quasi criminal liability. For the imposition of penalty under section 43A, the action may not be mala fide in case there is a breach of the statutory provisions of the civil law, penalty is attracted simpliciter on its violation.

- The imposition of penalty was permissible and it was rightly imposed. There was no requirement of mens rea under section 43A or intentional breach as an essential element for levy of penalty. Section 43A of the Act does not use the expression "the failure has to be willful or mala fide" for the purpose of imposition of penalty. The breach of the provision is punishable and considering the nature of the breach, it is open to impose the penalty.

- The imposition of penalty under section 43A is on account of breach of a civil obligation, and the proceedings are neither criminal nor quasi– criminal; the penalty has to follow. Only discretion in the provision under section 43A is with respect to quantum of penalty.

- We find that in the facts and circumstances of the case, the order passed by the Commission was just and proper and in accordance with law, which the Tribunal set aside on wrong premises. Thus, the order of the Tribunal cannot be said to be legally sustainable.
- The nominal penalty has been imposed by the CCI of Rupees One crore only considering the facts and circumstances of the case and that there was a violation of the provision.
- Thus, we find no ground to interfere with the nominal penalty that has been imposed in the instant case.

Conclusion

The appeal filed by the CCI is allowed, the order passed by the CAT is set aside, and passed by the CCI imposing penalty of Rupees One crore is hereby restored with no costs.

11. SCM Solifert Ltd. vs Competition Commission of India

(Citation: Supreme Court of India, CIVIL APPEAL NO(S). 10678 OF 2016,dated 17th April, 2018.)

Facts

- The CCI initiated the proceedings against the appellants on whom due to the failure to notify a proposed combination as required under section 6(2) of the Act, the penalty of Rupees Two crores was imposed under section 43A of the Act.
- On 3.07.2013, the appellants had purchased 2,89,91,150 shares of Mangalore Chemicals and Fertilisers Limited (MCFL) constituting 24.46 paid up share capital of the MCFL on the Bombay Stock Exchange.
- The first transaction of the acquisition of the shares was by way of the purchase of shares conducted through bulk and block deals. It was followed by press release dated 3.7.2013 by Deepak Fertiliser and Petrochemicals Corporation Limited filed with the Stock Exchanges, in compliance with the requirements of the Listing Agreement.

- On the second acquisition of the shares on 23.04.2014 the appellants made a purchase order in the open market for the purchase of up to 20 lacs equity shares representing 1.7 percent shares of the MCFL.
- Subsequently, an open offer in terms of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Regulations, 2011) was made for acquiring up to 26 percent of shares of the MCFL.
- The appellants filed a notice disclosing details of the first acquisition and notifying the second acquisition under Section 6(2) of the Act with the CCI on 22.04.2014 within thirty days of the public announcement pursuant to the Regulations, 2011 for the acquisition of 1.7 percent of the MCFL.
- The CCI vide its order dated 30.07.2014 under section 31(1) of the Act approved the proposed combination, however, directed to initiate penalty proceedings against the appellants under section 43A of the Act. Pursuant to that, a show cause notice was issued on the ground of failure to notify in accordance to section 6(2) of the Act, in regard to first and second acquisitions of shares.
- It was the case on behalf of the appellants that first acquisition was made solely for the purpose of investment under Entry I of Schedule I of the CCI (Procedure in regard to the Transaction of Business Relating to Combinations) Regulations, 2011, (the Competition Regulations). Thereby, it assumed exemption from the notification. It was also urged that the second acquisition was notified to the Commission within the stipulated time of 30 days as specified in section 6(2) of the Act. The purchase was not consummated because as per the Escrow Agreement dated 28.04.2014, the shares purchased in the second acquisition were credited to a specifically designated Escrow account of J.M. Financial Services Limited. The sole purpose of entering into an escrow agreement was that the transaction was not consummated prior to approval of the Commission.
- The CCI held that the appellants have violated section 6(2) of the Act by failing to notify the proposed combination, therefore it imposed a penalty of 2 crores.
- The Appellate Tribunal (CAT) affirmed the order of the CCI.

Issue

- Whether the appellants have violated section 6(2) of the Act by failing to notify the proposed combination.
- Whether the penalty imposed by the CCI was jusitifiable.

Key Ratio Decidendi

- The procedure for imposition of penalty is provided under Regulation 48 of the new Regulations. A show cause notice has to be given and thereafter if an oral hearing is granted, then the Commission is empowered to impose the penalty considering the facts and circumstances of the case.
- There was the acquisition of 24.46% equity share capital of MCFL on a single day of which 19.9% were acquired through the block and bulk deals. The contemporaneous Press Release dated 3.7.2013 issued by the appellants filed with the stock exchanges, in compliance with the requirement of the Listing Agreement indicated that the objective was not to make an investment in MCFL.
- The Press Release referred investment is very strategic and a good fit with the company's business. There was a pointer in the Press Release of its intent when it stated that DFPCL looks forward to working closely with MCFL to enhance long–term value for the shareholder of both companies. Not only the appellants but another player Zuari group also made a significant purchase of shares of MCFL i.e. 9.72% on 2.4.2013 is also not in dispute.
- Thus, it is apparent that the appellant's first acquisition was a part of the long– term plan to try and take over MCFL, which was simply not an investment. The purchase of 24.46% equity stake, vested power to exercise influence as was reflected in Press Release– II also.
- The acquisition of less than 10% of the total shares or voting rights of an enterprise is solely an investment. It also indicates that beyond this threshold, the transaction is required to be looked carefully.
- Thus, there was a failure to comply with the provisions of section 6(2) of the Act in regard to the acquisition of 24.46% of the shareholding. The provisions of section 6(2) were not at all complied with.
- The second acquisition of shares of 0.8% equity shares of MCFL, the dispute is as to whether the notifying within 30 days of the purchase was compliance of the provision as per provisions of section 6(2) it should have been notified before the acqui sition. As a corollary, it was also argued that the equity shares purchased second time were placed in the Escrow Account. The appellants could not have

exercised the beneficial rights until the Commission made the approval of the proposed combination. What was essential under section 2(e) was the voting rights and the appellants could not have exercised voting rights by placing shares in the escrow account.

- It is apparent from section 6(2) of the Act that the proposal to enter into combination is required to be notified to the CCI. The legislative mandate is apparent that the notification has to be made before entering into the combination.
- The Preamble of the Act contains that the Commission has been established to prevent practices having an adverse effect on the competition. The combination cannot be entered into and shall come into effect before order is passed by Commission or lapse of certain time from date of notice is also apparent from the terminology used in section 6(2A) which provides that no combination shall come into effect until 210 days have passed from the date of notice or passing of orders under section 31 by the Commission, whichever is earlier.
- The provisions made in Regulation 5(8) also buttresses the aforesaid conclusion. Notice of Section 6(2) is to be given prior to consummation of the acquisition. Ex post facto notice is not contemplated under the provisions of section 6(2). Same would be in violation of the provisions of the Act.
- The expression proposes to enter into a combination in section 6(2) and further details to be disclosed in the notice to the Commission are of the proposed combination and the specific provisions contained in section 6(2A) of the Act provides that no combination shall come into effect until 210 days have passed from the date on which notice has been given or passing of orders under section 31 by the Commission, whichever is earlier.
- The intent of the Act is that the Commission has to permit combination to be formed, and has an opportunity to assess whether the proposed combination would cause an appreciable adverse effect on competition. In case combination is to be notified ex–post facto for approval, it would defeat the very intendment of the provisions of the Act.
- When the transaction has been completed and acquisition has been made and the latter transaction has exceeded holding more than 25% by the second purchase, obviously prior permission was required, as discussed hereinabove, as its total shareholding increased to 25.3%. Thus, the notification under section 6(2) of the Act has to be exante.

- There was no requirement of mens rea under section 43A or an intentional breach as an essential element for levy of penalty. The Act does not use the expression "the failure has to be willful or mala fide for the purpose of imposition of penalty. The breach of the provisions of the Act is punishable and considering the nature of the breach, it is discretionary to impose the extent of penalty. Mens rea is important to adjudge criminal or quasi–criminal liability, not in case of violation of the civil statutory provision.
- The penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulation is established and hence intention of the parties committing such violation becomes wholly irrelevant.
- Unless the language of the statute indicates the need to establish the presence of men's rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15(D) (b) and Section 15–E of the Act, there is nothing which requires that men's rea must be proved before a penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow.

Conclusion

- The imposition of penalty under section 43A is on account of breach of a civil obligation, and the proceedings are neither criminal nor quasi–criminal. Thus, a penalty has to follow. Discretion in the provision under section 43A is with respect to quantum.
- The judgment and order passed by the Commission as affirmed by the appellate tribunal are in accordance with law. The appeal being devoid of merit, deserves dismissal and is hereby dismissed. No costs.

Significant Case Laws

CHAPTER-2

Real Estate (Regulation & Development) Act, 2016

Cases included under this Chapter

S. No	Title of the Case	Court/Date
1	M/s M3M India Pvt Ltd & Anr V/s dr Dinesh Sharma & Anr	Delhi High Court / 04.09.2019
2	Forum for People's Collective Efforts (FPCE) & Anr. V/s The State of West Bengal & Anr	Supreme Court / 04.05.2021
3	Lavasa Corporate Ltd V/s Jitendra Jagdish Tulsiani	Bombay High Court / 07.08.2018
4	Neelkamal Realtors Suburban Pvt Ltd and Anr V/s UOI	Bombay High Court / 0612.2017
5	Ireo Grace Realtech Pvt. Ltd. V/s ABHISHEK Khanna & Others	Supreme Court / 11.01.2021
6	Keystone Realtors Pvt. Ltd V/s Anil V Tharthare & Ors	Supreme Court / 03.12.2019
7	M/S. Imperia Structures Ltd V/s Anil Patni and Another	Supreme Court / 02.02.2020s
8	Ravinder Kaur Grewal V/s Manjit Kaur and Others	Supreme Court / 07.08.2019
9	Bikram Chatterji & Ors V/s Union of India & Ors	Supreme Court / 23.07.2019
10	Pioneer Urban Land And ... vs Union of India	Supreme Court / 09.08.2019

1. M/s M3M India Pvt. Ltd. & Anr. v. Dr. Dinesh Sharma & Anr

(Citation: Delhi HC, CM(M)--1249/2019 dated 04.09.2019)

Facts

These petitions under Article 227 of the Constitution involve a common question, viz. whether proceedings under the Consumer Protection Act, 1986 can be commenced by home buyers (or allottees of properties in proposed real estate development projects) against developers, after the commencement of the Real Estate (Development and Regulation) Act, 2016

Issue

Whether proceedings under the Consumer Protection Act (CPA) could be commenced by home buyers against developers, after the commencement of RERA?

Key Ratio Decidendi

The court was of the view that judgment in Pioneer Urban Land and Infrastructure Ltd. & Anr. vs. Union of India was binding on the high court with regard to the issue in question in as much as:

1. While it was correctly pointed out by the Respondent that the litigation before the Supreme Court principally raised the question of remedies under IBC and RERA, the issues arising out of CPA proceedings were also brought to the attention of the Court. In fact, it had recorded that "Remedies that are given to allottees of flats/apartments are therefore concurrent remedies and connected matters such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code." Thus, it could not be said that any of those conclusions are obiter dicta or made as passing observations, and not intended to be followed.
2. The high court could not disregard the judgment of the Supreme Court as being per incuriam based on its perception regarding the arguments considered therein. Reliance was placed on **Sundeep Kumar Bafna v. State of Maharashtra & Anr.**, wherein the Supreme Court gave a "salutary clarion caution to all courts, including the High Courts, to be extremely careful and circumspect in concluding a judgment of the Supreme Court to be per incuriam".

Thereby the court concluded that "remedies available to the respondents herein under CPA and RERA are concurrent, and there is no ground for interference with the view taken by the National Commission in these matters."

2. Forum for People's Collective Efforts (FPCE) & Anr. V/s The State of West Bengal & Anr.

(Citation: Supreme Court of India, Writ Petition (C) No. 116 of 2019 dated 4th May, 2021)

Facts

- The constitutional validity of the West Bengal Housing Industry Regulation Act, 2017 ("WB-HIRA"/the "State enactment") is challenged in a petition under Article 32. The basis of the challenge is that: o
  - Both WB-HIRA and a Parliamentary enactment – the Real Estate (Regulation and Development) Act, 2016 ("RERA"/the "Central enactment") are relatable to the legislative subjects contained in Entries 6 and 7 of the Concurrent List (interchangeably referred to as 'List III') of the Seventh Schedule to the Constitution;
  - WB-HIRA has neither been reserved for nor has it received Presidential assent under Article 254(2);
  - The State enactment contains certain provisions which are either: a.
    a. Directly inconsistent with the corresponding provisions of the Central enactment; or
    b. A virtual replica of the Central enactment; and
  - Parliament having legislated on a field covered by the Concurrent List, it is constitutionally impermissible for the State Legislature to enact a law over the same subject matter by setting up a parallel legislation.
- Before Parliament enacted the RERA in 2016, the state legislatures had enacted several laws to regulate the relationship between promoters and purchasers of real estate. Among them was the West Bengal (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993 (the "WB 1993 Act"). This legislation of the State of West Bengal was reserved for and received Presidential assent, following which it was published in the Official Gazette on 9 March 1994.

Issue

Whether the Entries 6 and 7 of the Concurrent List would cover the subject of the housing industry?

Whether a law made by the legislature of a State can be considered to be repugnant to a provision of a law made by Parliament with respect to one of the matters in the Concurrent List which Parliament is competent to enact?

Whether the application of other laws is barred after the enactment of the RERA?

Whether striking down the provisions of WB-HIRA will affect the registrations, sanctions and permissions previously granted under the legislation prior to the date of this judgment?

Key Ratio Decidendi

- The analysis of the constitutional challenge in the present case must therefore proceed on the basis that both the central legislation – RERA, and the state legislation – WBHIRA, fall within the subjects embodied in Entries 6 and 7 of List III of the Seventh Schedule. That indeed is the foundation on which submissions have been urged and the further analysis is based. In a matter involving the constitutional validity of its law the State of West Bengal has not been precluded by this court from urging the full line of its defense.

Doctrine of Repugnancy:

- The doctrine of repugnancy under Article 254(1) operates within the fold of the Concurrent List. Clause (1) of Article 254 envisages that the law enacted by Parliament will prevail and the law made by the legislature of the State shall be void "to the extent of repugnancy".
- Clause (1) does not define what is meant by repugnancy. The initial words of Clause (1) indicate that the provision deals with a repugnancy between a law enacted by the State legislature with: (i) A provision of a law made by Parliament which it is competent to enact; or (ii) To any provision of an existing law; and (iii) with respect to one of the matters enumerated in the Concurrent List.
- Section 88 stipulates that the application of other laws is not barred: the provisions of the legislation "shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force".

- At the same time, Section 89 provides for overriding effect to the provisions of the RERA when it stipulates that it "shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force".
- Sections 88 and 89 of the RERA did not implicitly permit the States to create their own legislation creating a parallel regime alongside the RERA which would have not required presidential assent. Hence, it is clear that WB-HIRA did not have presidential assent and was repugnant to RERA under Article 254.
- it is abundantly clear that the State of West Bengal would have had to seek the assent of the President before enacting WB-HIRA, where its specific repugnancy with respect to RERA and its reasons for enactment would have had to be specified. Evidently, this was not done. However, since we have already held WB-HIRA to be repugnant to RERA, this issue becomes moot.
- The provisions of WB-HIRA are repugnant to the corresponding provisions which are contained in the RERA. These provisions of the WB 1993 Act impliedly stand repealed upon the enactment of the RERA in 2016, in accordance with Sections 88 and 89 read with Article 254(1) of the Constitution. Hence, it is clarifyed with abundant caution that striking down of the provisions of WB-HIRA in the present judgment will not, in any manner, revive the WB 1993 Act, which was repealed upon the enactment of WB-HIRA since the WB 1993 Act is itself repugnant to the RERA, and would stand impliedly repealed.
- WB-HIRA is repugnant to the RERA, and is hence unconstitutional. The Court held and declared that as a consequence of the declaration by this Court of the invalidity of the provisions of WB-HIRA, there shall be no revival of the provisions of the WB 1993 Act, since it would stand impliedly repealed upon the enactment of the RERA.
- Since its enforcement in the State of West Bengal, the WB-HIRA would have been applied to building projects and implemented by the authorities constituted under the law in the state. In order to avoid uncertainty and disruption in respect of actions taken in the past, recourse to the jurisdiction of this Court under Article 142 is necessary. Hence, in exercise of the jurisdiction under Article 142, the Court directed that the striking down of WB-HIRA will not affect the registrations, sanctions and permissions previously granted under the legislation prior to the date of this judgment.

3. Lavasa Corporation Limited vs Jitendra Jagdish Tulsiani
(Citation: Bombay HC, Civil Second Appeal (Stamp) No.9717 of 2018 dated 07.08.2018)

Facts

- The Respondents-Allottees were bonafide purchasers of their respective apartments in the projects/buildings, in a township scheme of Lavasa in Pune. The allottees were given flats not under a transaction of 'sale', but under 'Agreements of Lease' where in the flats were leased out to the allotees for the period of 999 years. The Allottees had paid consideration to Lavasa almost, to the extent of 80% of the sale price and the lease rent was only ₹ 1 per annum. They also paid substantial amount towards the stamp-duty and the registration charges.
- As per the 'Agreements of Lease' executed between the parties, the project was to be completed and the possession of the apartments was to be handed over to the Allottees within a period of 24 months. However, after waiting for 6 to 7 years for getting the project completed and after making several enquiries with Lavasa about the progress of the said project, the Allottees found that there were no chances of the project being completed in a near future. Hence, after Lavasa registered itself with the RERA, the Allottees approached the 'Adjudicating Authority' under the MahaRERA with an application, under Section 18 of the RERA, for compensation with interest for every month of the delay in handing over possession of the apartments and for various other reliefs, to which they are entitled under the RERA.

Issue

1. Whether the provisions of the RERA would apply in case of an 'Agreement to Lease'?
2. Whether the definition of the term "Promoter", as provided in Section 2(zk) in the RERA, would include a 'Lessor', and 'whether the remedy provided to the 'Allottees' under Section 18 of the RERA can be available only against the 'Promoter', or, in that sense, also against a 'Lessor'?

Key Ratio Decidendi

- The Bombay High Court has held that provisions of the Real Estate (Regulation and Development) Act, would apply in case of agreements styled as 'Agreement to Lease' when the lease period is long (say 999 years) and when the 'lessee' has paid a substantial amount as consideration.
- "In an 'Agreement of Lease', the 'Lessee' does not pay more than 80% of the consideration amount towards the price of the said apartment. In an 'Agreement of Lease', the rent cannot be ₹1/- per annum only, for such an apartment, market rate of which is more than ₹40 lakhs. In an 'Agreement of Lease', parties do not pay the registration charges and stamp duty on the market value of the said apartment. The 'Agreement of Lease' also cannot be for such a long term for '999 years'. This long period of lease in itself is sufficient to hold that, it is not an 'Agreement of Lease', but, in reality, an 'Agreement of Sale'."
- The court observed that very object of the RERA is to protect the consumers, the persons, who have invested their hard-earned money by entering into an 'Agreement', which is in the nature of purchase of the apartment itself, mere nomenclature of the document as 'Agreement of Lease' will not in any way take away the rights given to them by the statute.
- "If the entire 'Agreement' is perused as such, then it becomes apparent on the face of it also, that it cannot be termed or treated as an 'Agreement of Lease', but, in its real purport, it is an 'Agreement of Sale'. The very fact that more than 80% of the entire consideration amount is already paid by the Respondents to the Appellant and the lease premium agreed is only of ₹1/- per annum, including the clause relating to the period of lease of 999 years, are self-speaking to prove that, in reality, the transaction entered into by the parties is an 'Agreement of Sale' and not an 'Agreement of Lease'; though it is titled as such. The law is well settled that the nomenclature of the document cannot be a true test of its real intent and the document has to be read as a whole to ascertain the intention of the parties. if the entire 'Agreement' is perused as such, then it becomes apparent on the face of it also, that it cannot be termed or treated as an 'Agreement of Lease', but, in its real purport, it is an 'Agreement of Sale'. The very fact that more than 80% of the entire consideration amount is already paid by the Respondents to the Appellant and the lease premium agreed is only of ₹1/- per annum, including the clause relating to the period of lease of 999 years, are self-speaking to prove that, in reality, the transaction entered into by the parties is an 'Agreement of Sale' and not an 'Agreement of Lease'; though it is titled as such. The law is well settled that the nomenclature of the document cannot be a true test of its real intent and the document has to be read as a whole to ascertain the intention of the parties."

4. Neelkamal Realtors Suburban Pvt. Ltd. and anr vs UOI
(Citation: Bombay HC, Original Writ Petition No. 2737 of 2017 dated 06.12.2017)

Facts

The petitioners are builders and developers who are aggrieved by the new provisions of the said Act which contains specific provisions to tackle problems like delay in possession, arbitrary interests levied on home buyers etc.

Petitioners had challenged Section 3, 5, 7, 8, 11(h), 14(3), 15, 16, 18, 22, 43(5),59,60,61,63 and 64 of the Real Estate (Regulations and Development) Act, 2016 and Rules 3(f), 4,5,6,7,8,18,19, 20 and 21 of the Registration of real estate projects, Registration of real estate agents, rates of interest and disclosures on website Rules, 2017.

Issue

Whether Sections 18, 38, 59, 60, 61, 63 and 64 of the RERA Act, are violative of Articles 14, 19(1)(g) and 20(1) of the Constitution of India and amount to unreasonable restrictions?

Key Ratio Decidendi

- The builders had challenged Section 18 of the Act, under which they will have to return monies received with interest, if they fail to hand over possession or complete the project in a time bound manner, if the allottee wishes to withdraw from a project. To this the Court said, "..... in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment with interest at such rate as may be prescribed in this behalf including compensation. If the allottee does not intend to withdraw from the project he shall be paid by the promoter interest for every month's delay till handing over of the possession. The requirement to pay interest is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee that has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money."
- In case the promoter establishes and the authority is convinced that there were compelling circumstances and reasons for the promoter in failing to complete the project during the stipulated time, the authority shall have to examine as to whether there were exceptional circumstances due to which the promoter failed to complete the project. Such an assessment has to be done by the authority on case to case basis and exercise its discretion to advance the purpose and object of RERA by balancing rights of both, the promoter and the allottee.
- The Bench, while upholding the provisions of RERA said, "RERA is not a law relating to only regulating concerns of the promoters but its object is to develop the real estate sector, particularly the incomplete projects, across the country."
- **Hence, the court held that the challenge to constitutional validity of first proviso to Section 3(1), Section 3(2)(a), explanation to Section 3, Section 4(2)(l)(C), Section 4(2)(l)(D), Section 5(3) and the first proviso to Section 6, Sections 7, 8, 18, 22, 38, 40, 59, 60, 61, 63, 64 of the Real Estate (Regulation and Development) Act, 2016 fails. These provisions are held to be constitutional, valid and legal."**
- However, Section 46 (b) of the Act was set aside as it included any officer who has held the post of Additional Secretary to be eligible for membership of the two-member tribunal. Court held that the majority of the total members of the tribunal should always be judicial members.

5. IREO Grace Realtech Pvt. Ltd. V/s Abhishek Khanna & Others
(Citation: Supreme Court of India, CIVIL APPEAL NO. 5785 OF 2019, dated 11th January, 2021)

Facts

The present batch of Appeals has been filed by the AppellantDeveloper, to challenge the judgment passed by the National Consumer Disputes Redressal Commission (National

Commission) directing refund of the amounts deposited by the Apartment Buyers in the project 'The Corridors developed' in Sector 67-A, Gurgaon, Haryana, on account of the inordinate delay in completing the construction and obtaining the Occupation Certificate. Aggrieved by the said Judgment, the Appellant-Developer has filed the present batch of Appeals under Section 23 of the Consumer Protection Act, 1986 (Consumer Protection Act).

Issue

Determination of the date from which the 42 months period for handing over possession is to be calculated under Clause 13.3, whether it would be from the date of issuance of the Fire NOC as contended by the Developer; or, from the date of sanction of the Building Plans, as contended by the Apartment Buyers

Whether the terms of the Apartment Buyer's Agreement were onesided, and the Apartment Buyers would not be bound by the same?

Whether the provisions of the Real Estate (Regulation and Development) Act, 2016 must be given primacy over the Consumer Protection Act, 1986?

Whether on account of the inordinate delay in handing over possession, the Apartment Buyers were entitled to terminate the agreement, and claim refund of the amounts deposited with interest?

Key Ratio Decidendi

The first issue which has been raised by the Appellant - Developer as also the Apartment Buyers, is the relevant date from which the 42 months' period is to be calculated for handing over possession.

The point of controversy is whether the 42 months' period is to be calculated from the date when the Fire NOC was granted by the concerned authority, as contended by the Developer; or the date on which the Building Plans were approved, as contended by the Apartment Buyers.

The computation of the period for handing over possession would be computed from the date of issuance of fire NOC. The Commitment Period of 42 months plus the Grace Period of 6 months from 27.11.2014, would be 27.11.2018, as being the relevant date for offer of possession. The aforesaid chronology for obtaining Fire NOC would indicate a delay of approximately 7 months in obtaining the Fire NOC by the Developer.

The second issue which has been raised by the Apartment Buyers is that the Agreement in this case, contains wholly one-sided clauses, and would not be bound by its terms.

The aforesaid clauses reflect the wholly one-sided terms of the Apartment Buyer's Agreement, which are entirely loaded in favour of the Developer, and against the allottee at every step. The terms of the Apartment Buyer's Agreement are oppressive and wholly one-sided and would constitute an unfair trade practice under the Consumer Protection Act, 1986.

We are of the view that the incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An ―unfair contract‖ has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.

In view of the above, we hold that the Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement.

The Consumer Protection Act, 1986 was enacted to protect the interests of consumers, and provide a remedy for better protection of the interests of consumers, including the right to seek redressal against unfair trade practices or unscrupulous exploitation. In a recent judgment delivered by this Court in M/s Imperia Structures Ltd. v. Anil Patni & Anr [(2020) 10 SCC 783.], it was held that remedies under the Consumer Protection Act were in addition to the remedies available under special statutes. The absence of a

bar under Section 79 of the RERA Act to the initiation of proceedings before a fora which is not a civil court, read with Section 88 of the RERA Act makes the position clear.

Conclusion

We direct the Developer to refund the entire amount deposited by this respondent alongwith Interest @ 9% S.I. p.a. within a period of 4 weeks from the date of this judgment. The failure to refund the amount within 4 weeks will make the Developer liable for payment of default interest @ 12% S.I. p.a. till the payment is made. The Civil Appeals are accordingly disposed of, with no order as to costs. All pending applications are disposed off.

6. Keystone Realtors Pvt. Ltd. vs. Anil V Tharthare & Ors.

(Citation : SC, Civil Appeal No.2435 of 2019 dated 03.12.2019)

Facts

The construction area of the Project was expanded from 32,395.17 square meters to 40,480.88 square meters, the Developer did not comply with the procedure under para 7(ii) of the Environmental Impact Assessment ("EIA") Notification but rather sought an amendment to the earlier environmental clearance.

Issue

1. What is exact interpretation of the EIA Notification?
2. Is there need for Fresh Environmental clearance for expansion beyond limits approved by prior EC?

Key Ratio Decidendi

It is only with industrial, thermal power and other such related operations that one can decide on parameters of pollution. Development projects like highways, airports and other infrastructure projects which seek to expand might have a detrimental impact due to factors such as change in land use despite this, the project proponent can certify that there is no change in pollution load and hence expansion is to be allowed. The current process seeks a detailed EIA report to determine whether impacts can be mitigated. If the amendment is brought into force, it will simply do away with this critical and necessary step in the environmental clearance process. Therefore, this amendment should not be allowed.

It was further noted that as on the date of the impugned order construction at the project site had already been completed. A core tenet underlying the entire scheme of the EIA Notification is that construction should not be executed until ample scientific evidence has been compiled so as to understand the true environmental impact of a project. By completing the construction of the project, the appellant had denied the third and fourth respondents' ability to evaluate the environmental impact and suggest methods to mitigate any environmental damage. At that stage, only remedial measures could have been taken. The NGT which had already directed the appellant to deposit Rupees one crore and has set up an expert committee to evaluate the impact of the appellants project and suggest remedial measures. In the view of these circumstances, the court uphold the directions of the NGT and directed that the committee continue its evaluation of the appellants project so as to bring its environmental impact as close as possible to that contemplated in the EC dated 2 May 2013 and also suggest the compensatory exaction to be imposed on the appellant.

Conclusion

As on the date of the impugned order, construction at the project site had already been completed. A core tenet underlying the entire scheme of the EIA Notification is that construction should not be executed until ample scientific evidence has been compiled so as to understand the true environmental impact of a project. By completing the construction of the project, the Appellant denied the third and fourth Respondents the ability to evaluate the environmental impact and suggest methods to mitigate any environmental damage. At this stage, only remedial measures may be taken. The NGT has already directed the Appellant to deposit Rupees one crore and has set up an expert committee to evaluate the impact of the Appellant's project and suggest remedial measures.

7. M/s. Imperia Structures Ltd. v/s Anil Patni and another
(Citation: Supreme Court of India, CIVIL APPEAL NO. 3581-3590 OF 2020, dated 2nd November, 2020)

Facts

- A Housing Scheme called "The ESFERA" in Sector 13C, Gurgaon, Haryana (hereinafter referred to as 'the Project') was launched by the Appellant sometime in 2011 and all the original Complainants booked their respective apartments by paying the booking amounts and thereafter each of them executed Builder Buyer Agreement (the Agreement) with the Appellant. The possession of the flats are to be handed over by the appellant within 3 years of execution of the agreement.
- Over a period of time the Respondents had paid substantial amount towards the cost of the flat. However, even after four years there were no signs of the Project getting completed. In the circumstances the respondents filed individual complaints before the National Commission in the year 2017 seeking refund of the sum with interest, which the National Commission allowed vide the impugned order. It is to be noted that RERA Act was enforced in the year 2016.
- The appellant challenged the impugned order, inter-alia, on the ground that once RERA Act has been enforced Consumer Protection Act, 1986 cannot be invoked for property related complaints.

Issue

- Whether the remedies available to the consumers under the provisions of the CP Act would be additional remedies?
- Whether the provisions of the RERA Act have made any change in the legal position an allottee placed in circumstances similar to that of the Complainants, could have initiated proceedings before the RERA Act came into force?
- Whether the remedy so provided under the RERA Act to an allottee is the only and exclusive modality to raise a grievance and whether the provisions of the RERA Act bar consideration of the grievance of an allottee by other fora?
- What is the effect of the registration of the Project under the RERA Act?

Key Ratio Decidendi

- It has consistently been held by this Court that the remedies available under the provisions of the CP Act are additional remedies over and above the other remedies including those made available under any special statutes; and that the availability of an alternate remedy is no bar in entertaining a complaint under the CP Act.
- In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the Promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is upto the allottee to proceed either under Section 18(1) or under proviso to Section 18(1). The case of Himanshu Giri came under the latter category. The RERA Act thus definitely provides a remedy to an allottee who wishes to withdraw from the Project or claim return on his investment.
- Section 79 of the RERA Act bars jurisdiction of a Civil Court to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered under the RERA Act to determine. Section 88 specifies that the provisions of the RERA Act would be in addition to and not in derogation of the provisions of any other law, while in terms of Section 89, the provisions of the RERA Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force.
- On plain reading of Section 79 of the RERA Act, an allottee described in category (B) stated in paragraph 22 hereinabove, would stand barred from invoking the jurisdiction of a Civil Court. However, as regards the allottees who can be called "consumers" within the meaning of the CP Act, two questions

would arise; a) whether the bar specified under Section 79 of the RERA Act would apply to proceedings initiated under the provisions of the CP Act; and b) whether there is anything inconsistent in the provisions of the CP Act with that of the RERA Act.

- Proviso to Section 71(1) of the RERA Act entitles a complainant who had initiated proceedings under the CP Act before the RERA Act came into force, to withdraw the proceedings under the CP Act with the permission of the Forum or Commission and file an appropriate application before the adjudicating officer under the RERA Act. The proviso thus gives a right or an option to the concerned complainant but does not statutorily force him to withdraw such complaint nor do the provisions of the RERA Act create any mechanism for transfer of such pending proceedings to authorities under the RERA Act. As against that the mandate in Section 12(4) of the CP Act to the contrary is quite significant.
- Again, insofar as cases where such proceedings under the CP Act are initiated after the provisions of the RERA Act came into force, there is nothing in the RERA Act which bars such initiation. The absence of bar under Section 79 to the initiation of proceedings before a fora which cannot be called a Civil Court and express saving under Section 88 of the RERA Act, make the position quite clear. Further, Section 18 itself specifies that the remedy under said Section is "without prejudice to any other remedy available". Thus, the parliamentary intent is clear that a choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the CP Act or file an application under the RERA Act.
- We may now consider the effect of the registration of the Project under the RERA Act. In the present case the apartments were booked by the Complainants in 2011-2012 and the Builder Buyer Agreements were entered into in November, 2013. As promised, the construction should have been completed in 42 months. The period had expired well before the Project was registered under the provisions of the RERA Act. Merely because the registration under the RERA Act is valid till 31.12.2020 does not mean that the entitlement of the concerned allottees to maintain an action stands deferred. It is relevant to note that even for the purposes of Section 18, the period has to be reckoned in terms of the agreement and not the registration. Condition no. (x) of the letter dated 17.11.2017 also entitles an allottee in same fashion. Therefore, the entitlement of the Complainants must be considered in the light of the terms of the Builder Buyer Agreements and was rightly dealt with by the Commission.

8. Ravinder Kaur Grewal vs Manjit Kaur and others

(Citation : SC, Civil Appeal No. 7764 of 2014, dated 07.08.2019)

Facts

The predecessor of the appellants herein - Harbans Singh, son of Niranjan Singh, resident of Sangrur, Punjab against his real brothers Mohan Singh (original defendant No. 1) and Sohan Singh (original defendant No. 2) for a declaration that he was the exclusive owner in respect of land admeasuring 11 kanals 17 marlas comprising khasra Nos. 935/1 and 935/2 situated at Mohalla Road and other properties referred to in the Schedule. He asserted that there was a family settlement with the intervention of respectable persons and family members, whereunder his ownership and possession in respect of the suit land including the constructions thereon (16 shops, a samadhi of his wife – Gurcharan Kaur and one service station with boundary wall) was accepted and acknowledged. Structures were erected by him in his capacity as owner of the suit land. It is stated that in the year 1970 after the purchase of suit land, some dispute arose between the brothers regarding the suit land and in a family settlement arrived at then, it was clearly understood that the plaintiff – Harbans Singh would be the owner of the suit property including constructions thereon and that the name of Mohan Singh (original defendant No. 1) and Sohan Singh (original defendant No. 2) respectively would continue to exist in the revenue record as owners to the extent of half share and the plaintiff would have no objection in that regard due to close relationship between the parties. However, the defendants raised dispute claiming half share in respect of which Harbans Singh (plaintiff) was accepted and acknowledged to be the exclusive owner and as a result of which it was decided to prepare a memorandum of family settlement incorporating the terms already settled between the parties, as referred to above. The stated memorandum was executed by all parties on 10.3.1988. However, after execution of the memorandum of family settlement dated 10.3.1988, the defendants once again raised new issues to resile from the family arrangement. As a result, Harbans Singh (plaintiff) decided to file suit for declaration on 9.5.1988, praying for a decree that he was the owner in possession of the land admeasuring 11 kanals 17 marlas comprising of khasra Nos. 935/1 and 935/2 situated at Mohalla Road. An alternative plea was also taken that since plaintiff was in possession of the whole suit property to the knowledge of the defendants openly and adversely for more than twelve years, he had acquired ownership rights by way of adverse possession.

Issue

1. Whether a person claiming the title by virtue of adverse possession can maintain a suit under Article 65 of Limitation Act for declaration and permanent injunction.
2. Whether Article 65 of the Limitation Act only enables a person to set up a plea of adverse possession as a defendant and cannot protect possession as a plaintiff?

Key Ratio Decidendi

A person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner as the case may be against whom he has prescribed. Once the right, title or interest is acquired it can be used as a sword by the plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession.

Conclusion

Article 65 of Limitation Act, 1963 not only enables a person to set up a plea of adverse possession as a shield as a defendant but also allows a plaintiff to use it as a sword to protect the possession of immovable property or to recover it in case of dispossession.

9. Bikram Chatterji & Ors. vs. Union of India & Ors.

(Citation : SC, Writ Petition Civil No.940/2017, dated 23.07.2019)

Facts

Amrapali Group of Companies proposed to construct 42,000 flats by assuring delivery of possession in 36 months to the home buyers on the land which was given on lease by Noida/Greater NOIDA Authority ("Authorities"). Later, Amarpali group were found in serious breach of their obligation to deliver the projects and the payment due to the Authorities and the Banks.

Issue

1. Whether the charges levied by officials, banks, home purchasers and development agencies are valid?
2. Whether the Amrapali Group's RERA registration be cancelled?

Key Ratio Decidendi

The Supreme Court ordered a forensic audit to look into the affairs of the Amrapali Group. The forensic report confirmed that

(i) there had been diversion of funds by the Group by incorporating shell/dummy companies;
(ii) the promoters had created a web of more than 150 companies for routing of funds & creating assets;
(iii) the homebuyer's funds along with the loans from the banks were diverted to other companies/directors, such funds were used by the promoters to acquire personal assets, properties and applied towards other business ventures.

The Supreme Court also observed that the mortgage created in favour of the lenders required an NOC from the Authorities which was issued subject to certain conditions such as full/ timely payment of the lease rents/premiums to the Authorities. The Court held that in the eyes of law, no valid mortgage had been created in favour of the banks on account of the conditional NOC which had not been fulfilled.

In light of the observations made and the findings of the forensic report, the Apex Court issued the following orders:

I The RERA registrations of the various projects of the Group were cancelled and the National Building Construction Corporation (NBCC) was assigned the task of completing the projects.
II The Court Receiver has been given the right of the lessee and is authorised to execute the tripartite agreement and ensure that the title is passed on to the home buyers, free from any encumbrances.
III The Supreme Court further directed that the Authorities and the banks will have to recover their dues from other properties and assets of the Group which have been attached.
IV The homebuyers have been directed to deposit the outstanding amount as per the payment schedule under the builder buyer agreement with the promoters/developers in a court administered bank account within three months. The amount deposited by the homebuyers will be disbursed by the Court order as per the stage-wise completion by NBCC.
V Further, the Court advised appropriate action to be taken against the leaseholders of similar projects not only in Noida and Greater Noida but in other cities as well. Central Govt. Ministries and State Govt. Agencies have been further directed to ensure completion of other projects in a time-bound manner as contemplated in RERA and ensure that the home buyers are not defrauded.
VI Lastly, the Noida and Greater Noida Authorities were further directed to issue completion certificate and registered conveyance deed to be executed within one month concerning the projects where the homebuyers were already residing.

Conclusion

RERA Amrapali Group registration under RERA Act shall be revoked and NBCC (India) Ltd is finalizing various projects.

The separate lease agreements issued for projects under consideration in favour of Amrapali Group Authorities are revoked and all the rights will now be vested in the Court Receiver who has authority to alienate, lease out or take any decision to raise funds. The Court Receiver will pay money raised to NBCC will complete the project with 8% profit margin (senior Adv., Shri R. Venkataramani).

The Authorities and Banks do not have the right to sell the property of the property buyers or the land leased for payment of their dues. They have to receive all their charges from the selling of other assets attached to the Amrapali Group.

The right of the lessee shall be enshrined in the Court Receiver (formerly with the Amrapali Group) and shall, by means of an authorized person on his behalf, conclude a tripartite agreement and perform all other acts as may be necessary and shall also make sure that the title is handed over to the home-buyers and that the possession is handed over to them.

10. Pioneer Urban Land and ... vs Union of India

(Citation: Supreme Court of India, WRIT PETITION (CIVIL) NO. 43 OF 2019, dated 9th August, 2019.)

Facts

The large number of writ petitions were filed in the Supreme Court challenging the constitutional validity of amendments made to the Insolvency and Bankruptcy Code, 2016 (Code /IBC), pursuant to a report prepared by the Insolvency Law Committee dated 26th March, 2018 (Insolvency Committee Report). The amendments so made deem allottees of real estate projects to be financial creditors so that they may trigger the Code, under Section 7 thereof, against the real estate developer. In addition, being financial creditors, they are entitled to be represented in the Committee of Creditors by authorised representatives.

These amendments in the IBC were even made, in view of the fact that there is a specific legislation, namely, the Real Estate (Regulation and Development) Act, 2016 (RERA), which deals in detail with the real estate sector, and provides for adjudication of disputes between allottees and the developer, together with a large number of safeguards in favour of the allottee, including agreements in statutory form, which would replace the agreements entered into between the developer and the allottees.

A reading of RERA would show that all concerns of the allottees would be addressed by this sector-specific legislation and that the enactment of a sledgehammer to kill a gnat would render the impugned amendments excessive, disproportionate and violative of Articles 14 and 19(1)(g) of the Constitution on this score also.

It was argued that home buyers would not fall within the category of either financial or operational creditors and should therefore be subsumed only within RERA, which is a complete code dealing with the real estate industry. He further argued that RERA is a special Act as opposed to the Code, which is a general Act and ought, therefore, to prevail.

Issue

- The contention of real estate companies was that the homebuyers already have a separate remedy under the RERA Act, 2016 and Consumer laws for the redressal of their grievance so their grievances need not be addressed under the IBC as the same leads to duplication of proceedings.

Key Ratio Decidendi

- The Apex Court went ahead to examine the recommendations made by the Insolvency Committee Report (the Committee) wherein it was stated that the delay in completion of under-construction apartments has become a common phenomenon.
- The Committee agreed that amounts raised under home buyer contracts is a significant amount, which contributes to the financing of the construction of an asset in the future.
- Finally, the Committee concluded that the current definition of 'financial debt' is sufficient to include the amounts raised from home buyers/allottees under a real estate project, and hence, they are to be treated as financial creditors under the Code. Thus, the Court observed that the legislative judgment in economic choices must be given a certain degree of deference by the courts.
- Section 238 of the IBC states that the provisions of the IBC to override other laws. However, it is significant to note that there is no provision similar to that of Section 88 of RERA, which is meant to be a complete and exhaustive statement of the law insofar as its subject matter is concerned. Also, the non-obstante clause of RERA came into force on 1st May, 2016, as opposed to the non-obstante clause of the Code which came into force on 1st December, 2016.
- Given these circumstances, it is a little difficult to accede to arguments made on behalf of learned senior counsel for the Petitioners, that RERA is a special enactment which deals with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally.
- From the introduction of the explanation to Section 5(8)(f) of the Code, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted. The fact that RERA is in addi tion to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Also, it is important to remember that as the authorities under RERA were to be set up within one year from 1st May, 2016, remedies before those

authorities would come into effect only on and from 1st May, 2017 making it clear that the provisions of the Code, which came into force on 1st December, 2016, would apply in addition to the RERA.

Conclusion

- The Supreme Court held that allottees/home buyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.
- The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.
- The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concur rent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.
- Section 5(8)(f) of the IBC as it originally appeared in the Code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the deeming fiction added by the Amendment Act is only clarificatory of this position in law.

Significant Case Laws

CHAPTER-3
Insolvency & Bankruptcy Code, 2016

Cases included under this Chapter

S. No.	Title of the Case	Court / Date
1.	Swiss Ribbons Pvt Ltd. & Anr V/s Union of India & Ors	Supreme Court of India / dated 25.02.2019
2.	Pioneer Urban Land and Infrastructure Ltd. and Anr V/s Union of India	Supreme Court of India / dated 09.08.2019
3.	Macquarie Bank Ltd V/s Shilpi Cable Technologies Ltd.	Supreme Court of India / dated 15.12.2017
4.	B.K.Educatonal Services Pvt. Ltd. V/s Parag Gupta and Associates	Supreme Court of India / dated 11.10.2018
5.	State Bank of India V/s Ramakrishnan	Supreme Court of India / dated 14.08.2018
6.	Mobilox Innovations Pvt Ltd. V/s Kirusa Software Pvt. Ltd.	Supreme Court of India / dated 21.09.2017
7.	K. Sashidhar V/s Indian Overseas Bank & Ors	Supreme Court of India / dated 05.02.2019
8.	Maharashtra Seamless Ltd. V/s Padmanabhan Ventakesh & Ors	Supreme Court of India / dated 22.01.2020
9.	Sagufa Ahmed V/s upper Assam Plywood Products Pvt. Ltd.	Supreme Court of India / dated 18.09.2020
10.	Rajendra Narottam Sheth & Anr V/s Chandra Prakash Jain & Anr	Supreme Court of India / dated 30.09.2021
11.	M/s Innoventive Industries Ltd. V/s ICICI Bank & Anr	Supreme Court of India / dated 31.08.2017
12.	Embassy Property Developments Pvt. Ltd. V/s State of Karnataka & Co.	Supreme Court of India / dated 03.12.2019

1. Swiss Ribbons Pvt. Ltd. & Anr. V. Union of India & Ors.
(Citation: Supreme Court, WP(C) No.99 of 2018, dated 25.01.2019)

Facts
The constitutional validity of the Insolvency and Bankruptcy Code, 2016 was challenged in various petitions before the Hon'ble Court.

Issue
Whether IBC was discriminatory and unfair to operational creditors as compared to financial creditors?

Key Ratio Decidendi
1. The court held that financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code. Referring to the Code, the bench explained the difference between Financial Creditor and Operational Creditor. It said: "A perusal of the definition of financial creditor and financial debt makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, and 'operational debt' would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority."

2. "The main thrust against the provision of Section 12A is the fact that ninety per cent of the committee of creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear, that under Section 60 of the Code, the committee of creditors do not have the last word on the subject. If the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that Section 12A also passes constitutional muster."

3. Under the Code, the resolution professional is given administrative as opposed to quasi-judicial powers. Even when the resolution professional is to make a 'determination' under Regulation 35A, he is only to apply to the Adjudicating Authority for appropriate relief based on the determination. "Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the committee of creditors under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority."

4. "Even the categories of persons who are ineligible under Section 29A, which includes persons who are malfeasant, or persons who have fallen foul of the law in some way, and persons who are unable to pay their debts in the grace period allowed, are further, by this proviso, interdicted from purchasing assets of the corporate debtor whose debts they have either wilfully not paid or have been unable to pay. The legislative purpose which permeates Section 29A continues to permeate the Section when it applies not merely to resolution applicants, but to liquidation also. Consequently, this plea is also rejected."

5. **It will be seen that the reason for differentiating between financial debts, which are secured, & operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the IBC. We have already seen that repayment of financial debts infuses capital into the economy in as much as banks & financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts & operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, also are unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted.**

2. Pioneer Urban Land & Infrastructure Ltd and Anr vs Union of India
(Citation: Supreme Court, WP(C) No.43 of 2019, dated 09.08.2019)

Facts

The challenge was primarily to the explanation added to Section 5(8)(f) of the Code that "any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing". Amounts having the commercial effect of borrowing are treated as 'financial debt' as per Section 5(8)(f). Therefore, any amount invested by a person in a real estate project for allotment of apartments will be deemed as "financial debt".

Issue

- Whether treating homebuyers as financial creditors amounts to treating unequal's as equals?
- Whether homebuyers have a separate remedy under the RERA Act for their grievance redressal?
- Whether giving advance payment for flat allotment can be regarded as 'financial lending'?

Key Ratio Decidendi

1. What is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor in as much as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found.

   Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor.

   One other important distinction is that in an operational debt, there is no consideration for the time value of money – the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services.

2. **The expression "borrow" is wide enough to include an advance given by the home buyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the home buyers.**

   The "something equivalent" in these matters is obviously the flat/apartment." Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender.

3. Referring to Section 88 of the RERA Act, the Court said that it was an additional remedy, which will not bar other remedies available to a homebuyer.

3. Macquarie Bank Limited vs Shilpi Cable Technologies Ltd
(Citation: Supreme Court, Civil Appeal No. 15135 of 2017, dated 15.12.2017)

Facts

- Hamera International Private Limited executed an agreement with the appellant, Macquarie Bank Limited, Singapore, on 27.7.2015, by which the appellant purchased the original supplier's right, title and interest in a supply agreement in favour of the respondent.
- The respondent entered into an agreement dated 2.12.2015 for supply of goods worth US $ 6,321,337.11 in accordance with the terms and conditions contained in the said sales contract. The supplier issued two invoices dated 21.12.2015 and 31.12.2015. Payment terms under the said invoices were 150 days from the date of bill of ladings dated 17.12.2015/19.12.2015.
- Since amounts under the said bills of lading were due for payment, the appellant sent an email dated 3.5.2016 to the contesting respondent for payment of the outstanding amounts. Several such emails by way of reminders were sent, and it is alleged that the contesting respondent stated that it will sort out pending matters.
- Ultimately, the appellant issued a statutory notice under Sections 433 and 434 of the Companies Act, 1956. A reply dated 5.10.2016 denied the fact that there was any outstanding amount.
- After the enactment of the Code, the appellant issued a demand notice under Section 8 of the Code on 14.2.2017 at the registered office of the contesting respondent, calling upon it to pay the outstanding amount of US$6,321,337.11. By a reply dated 22.2.2017, the contesting respondent stated that nothing was owed by them to the appellant. They further went on to question the validity of the purchase agreement dated 27.7.2015 in favour of the appellant.
- On 7.3.2017, the appellant initiated the insolvency proceedings by filing a petition under Section 9 of the Code. On 1.6.2017, the NCLT rejected the petition holding that Section 9(3)(c) of the Code was not complied with, in as much as no certificate, as required by the said provision, accompanied the application filed under Section 9. It, therefore, held that there being non-compliance of the mandatory provision of Section 9(3)(c) of the Code, the application would have to be dismissed at the threshold.

Issue

Whether an advocate/lawyer can issue a notice under Section 8 on behalf of the operational creditor?

Key Ratio Decidendi

1. On a conjoint reading of Section 30 of the Advocates Act, 1961 and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder, a notice sent on behalf of an operational creditor by a lawyer would be in order. "The expression "an operational creditor may on the occurrence of a default deliver a demand notice....." under Section 8 of the Code must be read as including an operational creditor's authorized agent and lawyer."
2. The expression "shall" in Section 9(3) does not take us much further when it is clear that Section 9(3)(c) becomes impossible of compliance in cases like the present. It would amount to a situation wherein serious general inconvenience would be caused to innocent persons, such as the appellant, without very much furthering the object of the Act... would have to be construed as being directory in nature.
3. Hence, the court concluded that a lawyer on behalf of the operational creditor can issue a demand notice of an unpaid operational debt. The court also held that the provision contained in Section 9(3)(c) of the Code is not mandatory for initiating insolvency proceedings.

4. B.K. Educational Services Pvt. Ltd. vs. Parag Gupta and Associates
(Citation: Supreme Court, Civil Appeal No.23988 of 2017, dated 11.10.2018)

Issue

Whether the Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018?

Key Ratio Decidendi

The Bench observed that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted.

"The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

Hence, the Limitation Act is applicable to applications filed under Sections 7 and 9 of Insolvency and Bankruptcy Code from the inception of the Code.

5. State Bank of India vs. V. Ramakrishnan
(Citation: Supreme Court, Civil Appeal No. 3595 of 2018 dated 14.08.2018)

Facts

- When the SARFAESI Proceedings were pending, the Corporate Debtor initiated the corporate insolvency resolution process against itself. Moratorium was imposed statutorily invoking Section 14 of the Code.
- In these proceedings, the Personal Guarantor, the Managing Director of the Corporate Debtor, filed an application contending that Section 14 of the Code would apply to the personal guarantor as well, as a result of which proceedings against the personal guarantor and his property would have to be stayed.
- NCLT allowed his plea observing that, since under Section 31 of the Code, a Resolution Plan made thereunder would bind the personal guarantor as well, and since, after the creditor is proceeded against, the guarantor stands in the shoes of the creditor, Section 14 would apply in favour of the personal guarantor as well. This view was upheld by NCLAT.

Issue

Whether section 14 moratorium would apply to a personal guarantor of a corporate debtor?

Key Ratio Decidendi

1. Section 60 of the Code, in sub-section (1) thereof, refers to insolvency resolution and liquidation for both corporate debtors and personal guarantors, the Adjudicating Authority for which shall be the National Company Law Tribunal, having territorial jurisdiction over the place where the registered office of the corporate person is located. This sub-section is only important in that it locates the Tribunal which has territorial jurisdiction in insolvency resolution processes against corporate debtors. So far as personal guarantors are concerned, we have seen that Part III has not been brought into force, and neither has Section 243, which repeals the Presidency-Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The net result of this is that so far as individual personal guarantors are concerned, they will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code. Indeed, by a Press Release dated 28.08.2017, the Government of India, through the Ministry of Finance, cautioned that Section 243 of the Code, which provides for the repeal of said enactments, has not been notified till date, and further, that the provisions relating to insolvency resolution and bankruptcy for individuals and partnerships as contained in Part III of the Code are yet to be notified. Hence, it was advised that stakeholders who intend to pursue their insolvency cases may approach the appropriate authority/court under the existing enactments, instead of approaching the Debt Recovery Tribunals.
2. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.
3. **Hence, Section 14 of the Insolvency and Bankruptcy Code, 2016, which provides for a moratorium for the limited period mentioned in the Code, on admission of an insolvency petition, would not apply to a personal guarantor of a corporate debtor.**

6. Mobilox Innovations Private Limited vs. Kirusa Software Private Limited.

(Citation: Supreme Court, Civil Appeal No. 9405 of 2017 dated 21.09.2017)

Facts

- Kirusa issued a demand notice to Mobilox as an Operational Creditor under the Code, demanding payment of certain dues. Mobilox issued a reply to the demand notice ("Mobilox Reply") inter alia stating that there exists certain serious and bona fide disputes between the parties and alleged a breach of the terms of a non-disclosure agreement by Kirusa. Kirusa filed an application under Section 9 of the Code ("Application") before the National Company Law Tribunal, Mumbai ("NCLT") for initiation of the corporate insolvency resolution process ("CIRP") against Mobilox. This was dismissed by the NCLT, which expanded the scope of an 'existing dispute' under the Code to hold that a valid notice of dispute had been issued by Mobilox.
- Kirusa filed an appeal before the National Company Law Appellate Tribunal ("NCLAT"), which allowed Kirusa's appeal and inter alia, held that the notice of dispute does not reveal a genuine dispute between the parties. Mobilox filed an appeal before the Supreme Court impugning the order of the NCLAT.

Issue

Whether and to what extent can the NCLT go into the question of "existence of a dispute"?

Key Ratio Decidendi

The Supreme Court held that once an operational creditor has filed an Application, which is otherwise procedurally complete, the Adjudicating Authority has to consider the following;

1. Whether there is an "operational debt", as defined under the Code, which exceeds INR 100,000;
2. Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid; and
3. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute;

While determining the third point above, the Supreme Court stated that the Adjudicating Authority must see is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble argument or an assertion of fact unsupported by evidence. On the basis of the above, the Supreme Court allowed the appeal and set aside the order of the NCLAT.

7. K. Sashidhar vs. Indian Overseas Bank & Ors
(Citation: Supreme Court, Civil Appeal No.10673 of 2018 dated 05.02.2019)

Facts

- In the case of the corporate debtor KS&PIPL, the resolution plan, when it was put to vote in the meeting of CoC held on 27th October, 2017, could garner approval of only 55.73% of voting share of the financial creditors and even if the subsequent approval accorded by email (by 10.94%) is taken into account, it did not fulfill the requisite vote of not less than 75% of voting share of the financial creditors. On the other hand, the resolution plan was expressly rejected by 15.15% in the CoC meeting and later additionally by 11.82% by email.
- Similarly, in the case of corporate debtor IIL, the resolution plan received approval of only 66.57% of voting share of the financial creditors and 33.43% voted against the resolution plan. This being the indisputable position, NCLAT opined that the resolution plan was deemed to be rejected by the CoC and the concomitant is to initiate liquidation process concerning the two corporate debtors.
- The Managing Director of the corporate debtor (KS&PIPL) appeared before the adjudicating authority (NCLT) on 6th November, 2017, and also filed a memo on 17th November, 2017, inter alia submitting that for the financial creditor who choose not to participate in the voting, the votes and the majority be counted without their vote.

Issue

What is the scope of NCLT jurisdiction to enquire into justness of rejection of the resolution plan?

Key Ratio Decidendi

"Neither the Adjudicating Authority (NCLT) nor the Appellate Authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 06.06.2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter- III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October, 2017) of voting share of the financial creditors.

Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified percent (25% in October, 2017; and now after the amendment w.e.f. 06.06.2018, 44%). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection"

The term "may" occurring in Section 30(4) of the Code, is ascribable to the discretion of the CoC to approve the resolution plan or not to approve the same. What is significant is the second part of the said provision, which stipulates the requisite threshold of "not less than seventy five percent of voting share of the financial creditors" to treat the resolution plan as duly approved by the CoC. That stipulation is the quintessence and made mandatory for approval of the resolution plan. Any other interpretation would result in rewriting of the provision and doing violence to the legislative intent.

"The amendment under consideration pertaining to Section 30(4), is to modify the voting share threshold for decisions of the CoC and cannot be treated as clarificatory in nature. It changes the qualifying standards for reckoning the decision of the CoC concerning the process of approval of a resolution plan. The rights/obligations crystallized between the parties and, in particular, the dissenting financial creditors in October 2017, in terms of the governing provisions can be divested or undone only by a law made in that behalf by the legislature. There is no indication either in the report of the Committee or in the Amendment Act of 2018 that the legislature intended to undo the decisions of the CoC already taken prior to 6th day of June, 2018. It is not possible to fathom how the provisions of the amendment Act 2018, reducing the threshold percent of voting share can be perceived as declaratory or clarificatory in nature. In such a situation, the NCLAT could not have examined the case on the basis of the amended provision. For the same reason, the NCLT could not have adopted a different approach in these matters. Hence, no fault can be found with the impugned decision of the NCLAT."

8. Maharasthra Seamless Limited vs. Padmanabhan Venkatesh & Ors.

(Citation : SC, Civil Appeal No. 4242 of 2019 dated 22.01.2020)

Facts

- The present application was filed by Financial Creditor Under Section 7 of IBC. The total debt of the corporate debtor was Rs. 1897 crores, out of which Rs. 1652 crores comprised of term loans from two entities DB International (Asia) Limited and Deutsche Bank AG, Singapore Branch. As per the process embedded in the Code for CIRP all the requisite actions were carried out by Interim Resolution Professional and Resolution Professional (RP).
- The Resolution Plans were placed before COC (Committee of Creditors). The plan submitted by Maharashtra Seamless Limited was approved by majority of the COC by 87.10% of the votes.
- In the present case the application was filed by Resolution Professional for the approval of Resolution Plan for Corporate Debtor under section 30(6) and 31 of IBC, 2016 along with regulation 39 (4) of IBBI (Insolvency Resolution for Corporate Persons) and Rule 11 of NCLT Rules, 2016. The approval was in respect with the Resolution Plan submitted by Resolution Applicant – M/s Maharashtra Seamless Limited.
- It was averred by the suspended Board of Directors that the COC meeting and the approval of Resolution Plan was in contravention to the Code. The Tribunal passed detailed order to re-determine the liquidation value of the Corporate Debtor and then placed the revised Resolution Plan before COC for voting which was not duly followed by the RP. The other Resolution Applicants were not given the opportunity to submit their revised plans. Therefore, it was prayed that the Resolution Plan be rejected.
- The Resolution Plan of MSL which was being approved by the COC in majority aggrieved by the order of tribunal to re-determine the liquidation value and the fair value appealed NCLAT. The Appellate Authority directed the Adjudicating Authority to pass order under section 31 of IBC, 2016 uninfluenced by the previous order.
- The RP filed an application under section 30 and 31 of IBC, 2016 along with regulation 39 (4) of IBBI (Insolvency Resolution for Corporate Persons). The RP also informed the tribunal about the order of the Adjudicating Authority to re determine the liquidation value was complied, which was now at Rs. 597.54 crores as compared to previous amount of Rs. 439.92 crores.
- Further suspended Board of Directors were permitted to attend the COC meeting and express their views which were recorded. The Resolution Plan of MSL was approved by 87.10% of the votes. The bid of the MSL of Rs. 477 crores were far more below the liquidation value of Rs. 597.54 crores.
- The RP contended that the Adjudicating Authority cannot sit in appeal over the commercial wisdom of the COC members in approving resolution plan.
- The Tribunal held that as per the orders of the Hon'ble NCLAT it has to pass order uninfluenced by the previous order and it has to test resolution plan in conformity with the provisions of section 30(2) of the IBC, 2016. The question regarding approval from CCI was also answered that it has already been discussed by the COC and it had come to the conclusion that it is not required, even if it is required then the RA has a time period of one year to get the desired permissions.
- The Resolution plan submitted by M/s MSL was approved.

Issue

1. Whether the scheme of the Insolvency and Bankruptcy Code, 2016 ("Code") contemplates that the sum forming part of the resolution plan should match the liquidation value?

2. Whether Section 12-A is the applicable route through which a successful Resolution Applicant can retreat

Key Ratio Decidendi

Issue 1:

- It has been held that the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors. The COC should make sure that the corporate debtor needs to keep going as a going concern because the rationale being that during resolution, the corporate debtor remains a going concern, whereby the financial creditors will have the opportunity to lend further money, the operational creditors will have a continued business and the workmen and employees will have job opportunities; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of during the insolvency resolution process.

- If the Adjudicating Authority finds the abovementioned parameters have not been taken care of, it may send a resolution plan back to the COC. If the adjudicating authority has been satisfied that the COC has taken care of the parameters mentioned then only it has to pass the resolution plan. Further the reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority.
- The Supreme Court held that no provision in the Code or Regulations has been brought to notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- While it may seem that release of assets at a value below its liquidation value is inequitable, the Court ought to rely on the commercial wisdom of the creditors.
- Further the main objective of the Code is maximisation of value of assets of stakeholders, and to balance the interests of all the stakeholders of the corporate debtor, the court observed that resolution of the corporate debtor should be given preference over liquidation of the corporate debtor.
- It was held that the object behind prescribing such valuation process is to assist the COC to take decision on a resolution plan properly. Once, a resolution plan is approved by the COC, the statutory mandate on the Adjudicating Authority under section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of section 30 thereof. Further in the present case AA has not found breach of these provision.
- Section 31(1) of the Code lays down that for final approval of a resolution plan, the Adjudicating Authority has to be satisfied that the requirement of sub-section (2) of section 30 of the Code has been complied with. The proviso to section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of Essar Steel. The Appellate Authority ought not to have interfered with the order of the Adjudicating Authority in directing the successful Resolution Applicant to enhance their fund inflow upfront.

Issue 2:

The Supreme Court held that the exit route prescribed in Section 12A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the Code. Accordingly, the Resolution Professional is directed to take physical possession of the assets of the corporate debtor and hand it over to the MSL (appellant) within a period of four weeks. The police and administrative authorities are directed to render assistance to the Resolution Professional to enable him to carry out these directions

Conclusion

There is no provision in the Code, or regulations which prescribe that the bid of any resolution applicant has to match the liquidation value arrived at, in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

9. Sagufa Ahmed Vs. Upper Assam Plywood Products Pvt. Ltd.

(Citation SC, Civil Appeal Nos.3007-3008 of 2020 dated 18.09.2020)

Facts

- ❖ Challenging an order passed by the NCLAT dismissing an application for condonation of delay as well as an appeal as time barred, the appellants have come up with the above appeals.
- ❖ The appellants' herein together claim to hold 24.89% of the shares of a company by name Upper Assam Plywood Products Private Limited, which is the first respondent herein. The appellants moved an application before the Guwahati Bench of the NCLT for the winding up of the company. The said petition was dismissed by the NCLT by an order dated 25.10.2019.

- According to the appellants, the certified copy of the order dated 25.10.2019 passed by the NCLT was received by their counsel on 19.12.2019, pursuant to the copy application made on 21.11.2019. Though the appellants admittedly received the certified copy of the order on 19.12.2019, they chose to file the statutory appeal before NCLAT on 20.07.2020. The appeal was filed along with an application for condonation of delay.
- By an order dated 04.08.2020, the Appellate Tribunal dismissed the application for condonation of delay on the ground that the Tribunal has no power to condone the delay beyond a period of 45 days. Consequently the appeal was also dismissed. It is against the dismissal of both the application for condonation of delay as well as the appeal, that the appellants have come up with the present appeals.
- The contentions raised by the learned counsel for the appellants are two-fold namely (i) that the Appellate Tribunal erred in computing the period of limitation from the date of the order of the NCLT, contrary to Section 421(3) of the Companies Act, 2013, and (ii) that the Appellate Tribunal failed to take note of the lockdown as well as the order passed by this Court on 23.03.2020 in Suo Motu Writ Petition (Civil) No.3 of 2020, extending the period of limitation for filing any proceeding with effect from 15.03.2020 until further orders.

Issue

1. The counsel for the appellants, Mr. Gunjan Singh, contended that the limitation for filing an appeal (45 days) would only start from the day when a party receives the order of a court.
2. Mr. Gunjan Singh also contended that due to the COVID 19 pandemic and in accordance with SC order 23.03.2020 which was "limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order" so their application for condonation of delay should be allowed.

Key Ratio Decidendi

- The period of limitation of 45 days prescribed in Section 421(3) of Companies Act, 2013 would start running only from the date on which a copy of the order of the Tribunal is made available to the person aggrieved.
- The law of limitation finds its root in two latin maxims, one of which is Vigilantibus Non Dormientibus Jura Subveniunt which means that the law will assist only those who are vigilant about their rights and not those who sleep over them.
- The principle forming the basis of Section 10(1) of the General Clauses Act, also finds a place in Section 4 of the Limitation Act, 1963.
- The words "prescribed period" appear in several Sections of the Limitation Act, 1963. Though these words "prescribed period" are not defined in Section 2 of the Limitation Act, 1963, the expression is used throughout, only to denote the period of limitation.
- The expression "prescribed period" appearing in Section 4 of the Limitation Act, 1963 cannot be construed to mean anything other than the period of limitation. Any period beyond the prescribed period, during which the Court or Tribunal has the discretion to allow a person to institute the proceedings, cannot be taken to be "prescribed period".
- From 19.12.2019, the date on which the counsel for the appellants received the copy of the order, the appellants had a period of 45 days to file an appeal. This period expired on 02.02.2020. The appellants did not file the appeal on or before 18.03.2020, but filed it on 20.07.2020. To get over their failure to file an appeal on or before 18.03.2020, the appellants relied upon SC order dated 23.03.2020.

What was extended by the above order of this Court was only "the period of limitation" and not the period upto which delay can be condoned in exercise of discretion conferred by the statute.

Conclusion

The Hon'ble SC held that the Appellate Tribunal did not err in computing the period of limitation from the date of the order of NCLT and that it was the failure of appellants themselves to file an appeal on or before the stipulated period of time got over. With respect to the second contention, SC held that the order passed by the SC on 23.03.2020 was only for extension of period of limitation and not the extension of period upto which delay can be condoned in exercise of discretion conferred by the statute.

10. Rajendra Narottamdas Sheth & Anr. Vs. Chandra Prakash Jain & Anr

(Citation: SC, Civil Appeal No.4222 of 2020 dated 30th September, 2021)

Facts

- R.K. Infratel Ltd. (the Corporate Debtor) availed loan from the Union Bank of India (Respondent No.2) which was classified by the Bank as NPA on 30.09.2014. The Bank issued notice to CD for recovery of loan on 01.10.2014.
- Pursuant to the Notice, the Bank filed an application before the DRT under section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (the RDB Act), which is still pending for consideration.
- The Bank filed application under 7 of the IBC against the CD on 25.04.2019, which was admitted by the NCLT on 01.06.2020. The Bank averred in the application that the Corporate Debtor owed an amount of Rs 24.62. crores as on 31.03.2019. The Bank submitted that a debit confirmation letter dated 07.04.2016 was signed by the Corporate Debtor.
- The Corporate Debtor's plea is that application under section 7filed by the Bank is time barred and legally not tenable as proceedings before the DRT including a counter claim by the corporate debtor were still pending consideration.
- The NCLT observed that debit balance confirmation letter dated 07.04.2016 and regular credit entries made after 07.04.2016 till May 2018 to come to the conclusion that the application was not time barred.
- The NCLT also rejected the contention of the Corporate Debtor that the application filed by the power of attorney holder on behalf of the Bank was not maintainable.
- The Corporate Debtor preferred appeal before the NCLAT and submitted that the payments made by it to the Bank after its account was declared as NPA could not extend the period of limitation.
- It was further contended by the Corporate Debtor that the "cut back offer" cannot be taken into account for attracting Section 19 and Section 18 is also not applicable to the facts of this case. of the Limitation Act, 1963. The CD further argued that the power of attorney in favour of the individual who has signed the application under Section 7 of the Code had been granted prior to the Code coming into force without any specific authorisation to initiate proceedings under the Code, and therefore, the application was not maintainable.
- The NCLAT examined the power of attorney given by the Bank to Mr. Praveen Kumar Gupta and found no merit in the argument of the Corporate Debtor that the application under Section 7 of the Code was not maintainable as it was filed by a power of attorney holder
- The NCLAT opined that the Corporate Debtor could not demonstrate any error in the order of the NCLT and accordingly dismissed the appeal of the Corporate Debtor.
- The Corporate Debtor preferred appeal before the Supreme Court.

Issue

- Whether a Power of Attorney Holder can maintain the application for initiation of CIRP under section 7 of the IBC.
- Whether Section 18 of the Limitation Act is applicable to the facts of this case.
- Whether "cut back offer" be taken into account for attracting Section 19 of the Limitation Act, 1963.

Key Ratio Decidendi

Power of Attorney / Authorisation

- The Supreme Court observed that in the present case, Mr. Praveen Kumar Gupta has been given general authorisation by the Bank with respect to all the business and affairs of the Bank, including commencement of legal proceedings before any court or tribunal with respect to any demand and filing of all necessary applications in this regard.
- Such authorisation, having been granted by way of a power of attorney pursuant to a resolution passed by the Bank's board of directors on 06.12.2008, does not impair Mr. Gupta's authority to file an application under Section 7 of the Code.

- It is therefore clear that the application has been filed by an authorised person on behalf of the Financial Creditor and the objection of the Appellants on the maintainability of the application on this ground is untenable.

Limitation

- The Supreme Court observed that a copy of the debit balance confirmation letter dated 07.04.2016 was filed along with the application.
- As the application was filed only on 25.04.2019, which is beyond a period of three years even after taking into account the debit balance confirmation letter dated 07.04.2016, the application was barred by limitation. However, the Corporate Debtor had, in its reply before the Adjudicating Authority, placed on record a letter dated 17.11.2018, which detailed the amount repaid till 30.09.2018 and acknowledged the amount outstanding as on 30.09.2018.
- On the basis of this letter and the record showing that the Corporate Debtor had executed various documents amounting to acknowledgement of the debt even in the financial year 2019-20, the NCLT was of the opinion that the application was filed within the period of limitation. The said view was upheld by the NCLAT.

Conclusion

- The Supreme Court held that the power of attorney granted to bank officer pursuant to resolution passed by the Bank's board of directors on 06.12.2008, does not impair Mr. Gupta's authority to file an application under Section 7 of the Code.
- The acknowledgement of debt by the CD has extended the period of limitation, so the filing of the application of CIRP under section 7 was within the limitation period.

11. M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr
(Citation: Supreme Court, Civil Appeal No. 8337-8338 of 2017, August 31, 2017)

Facts

- In this case M/s Innoventive Industries Ltd. (the Appellant) proposed for Corporate Debt Restructuring (CDR), which the Joint Lenders Forum approved the same in June 2014.
- As per CDR funds were to be infused by the creditors and the restructuring plan was to be implementable over a period of 2 years.
- In December, 2016 the ICICI Bank Ltd. stated that the Innoventive Industries Ltd being a defaulter, the CIRP ought to be set in motion.
- The Innoventive Industries Ltd stated that two notifications issued under the Maharashtra Relief Undertakings (Special Provisions Act), 1958 (MRU Act), all liabilities of the appellant and remedies for enforcement thereof were temporarily suspended.
- The appellant pleaded that owing to non-release of funds under the MRU Act, the appellant was unable to pay back its debts as envisaged and no default was committed by it.
- The NCLT held that the Code would prevail against the Maharashtra Act in view of the non-obstante clause in Section 238 of the Code. Hence, the application was admitted and a moratorium was declared.

Issue

- Whether after enactment, the IBC would prevail over the Maharashtra Relief Undertaking (Special Provisions Act), 1958 (MRU Act).
- Whether MRU Act, which is State Act, is repugnant to IBC as under MRU Act, State Government may take over management of undertaking and impose moratorium in same manner as contained in IBC.

Key Ratio Decidendi

- The Supreme Court opined that for triggering section 7(1) of IBC, a default could be in respect of default of financial debt owed to any financial creditor of corporate debtor and it need not be a debt owed to applicant financial creditor.
- The moment, NCLT is satisfied that a default has occurred, application of financial creditor must be admitted.
- The MRU Act is repugnant to IBC since in MRU Act, the State Government may take over management of undertaking and impose moratorium in the same manner as contained in IBC.
- The moratorium imposed under MRU Act is discretionary, whereas moratorium imposed under IBC relates to all matters listed in section 14 and follows as a matter of course.
- The non-obstante clause of IBC will prevail over non-obstante clause in MRU Act, hence MRU Act cannot stand in way of CIRP under IBC. Therefore, application filed by respondent bank had rightly been admitted.
- Once an insolvency professional is appointed to manage company, erstwhile directors of company who are no longer in management cannot maintain an appeal on behalf of company.

12. M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Ors.

(Citation: Supreme Court of India, Civil Appeal No. 9170 of 2019, dated 3rd December, 2019)

Facts

There are three appeals on hand, one filed by the Resolution Applicant, the second filed by the Corporate Debtor through the Resolution Professional and the third filed by the Committee of Creditor, all of which challenge an Interim Order passed by the Division Bench of High Court of Karnataka in a writ petition, staying the operation of a direction contained in the order of the NCLT on a Miscellaneous Application file by the Resolution Professional.

Issue

- Whether the High Court ought to interfere, under Article 226/227 of the Constitution, with an Order passed by the National Company Law Tribunal in a proceeding under the IBC ignoring the availability of a statutory remedy of appeal to the NCLAT and if s under what circumstances
- Whether questions of fraud can be inquired into by the NCLT / NCLAT in the proceedings initiated under the IBC.

Key Ratio Decidendi

- The decision of the government of Karnataka to refuse the benefit of deemed extension of lease is in the public law domain. Hence, the correctness of the decision can be called into question only in a superior court that is vested with the power of judicial review over administrative action. As the NCLT has a special statute to discharge certain specific functions, it cannot be elevated to the status of a superior court with the power of judicial review over administrative action.
- Section 60(2) deals with a situation where the insolvency resolution, liquidation, or bankruptcy of a corporate guarantor or personal guarantor of a corporate debtor is taken up when a CIRP or liquidation proceeding of such a CD is already pending before the NCLT. The purpose of subsection (2) is to group together (A) the CIRP or liquidation proceeding of a CD and (B) the insolvency resolution, liquidation, or bankruptcy of a corporate guarantor or personal guarantor of the very same CD so that a single forum may deal with both. This is to ensure that the CIRP of a CD and the insolvency resolution of the individual guarantors of the same CD do not proceed on different tracks, before different forums, leading to a conflict of interests, situations, or decision.
- In light of the statutory scheme, as culled from various provisions of the IBC, it is clear that wherever the CD has to exercise a right that falls outside the purview of the IBC, especially in the realm of public law, it cannot, through the RP, take a bypass and go before the NCLT for the enforcement of such a right. Though the NCLT and NCLAT have jurisdiction to enquire into questions of fraud, they do not have jurisdiction to adjudicate on disputes such as those arising under the Mines and Minerals (Development and Regulation) Act, 1957, and the rules issued under it, especially when the disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action.

Conclusion

The NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arisding under MMDR Act, 1957 and the rules issued thereunder, especially when the disputes revolve around decisions or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence the High Court was justified in entertaining the writ petition and we see no reason to interfere with the decision of the High Court. Therefore, appeals are dismissed.

Significant Case Laws

CHAPTER-4 Prevention of Money Laundering, 2002

Cases included under this Chapter

S. No.	Title of the Case	Court / Date
1.	Directorate of Enforcement V/s Deepak Mahajan	Supreme Court / 31.01.1994
2.	Chhagan Chandrakant Bhujbal V/s Union of India	Bombay High Court /14.12.2016
3.	Dalmia Cement Bharat Ltd. V/s State of AP, Hyderabad	Telangana High Court/29.02.2016
4.	Financial Intelligence Unit-IND V/s Corporate Bank	Delhi High Court /04.09.2019
5.	Smt K Sowbaghya V/s Union of India	Karnataka High Court/28.01.2016
6.	B. Rama Raju V/s Union of India	Andhra Pradesh High Court / 04.03.2011
7.	J.Sekar and Others V/s ED Bank	Delhi High Court / 11.01.2018
8.	Opto Circuit India Ltd. V/s Axis	Supreme Court of India / dated 03.02.2021
9.	Gautam Kundu V/s Manoj Kumar, Assistant Director, DOE	Supreme Court of India / dated 16.12.2015
10.	Sachin Joshi V/s Directorate of Enforcement	Supreme Court of India / dated 28.09.2021

1. Directorate of Enforcement v. Deepak Mahajan

(Citation: SC, Criminal Appeal No. 537 of 1990 dated 31.01.1994)

Facts

- Deepak Mahajan, the respondent was arrested by the officers of the Enforcement Directorate for an offence punishable under the provisions of FERA and taken before the Additional Chief Metropolitan Magistrate, New Delhi on the next date as per the mandate of sub-section (2) of Section 35 of the said Act.
- An application under Section 167(2) of the Code of Criminal Procedure Code was moved by the Enforcement Officer seeking petitioner's 'judicial remand' on the ground that it was necessary to complete the investigation. On the very same day, the respondent unsuccessfully moved the court for bail.
- The Magistrate remanded the first respondent to judicial custody for fourteen days and subsequently extended the detention period. The first respondent challenged the jurisdiction of the Magistrate in authorising the detention (remand) and the subsequent consecutive extensions. But his plea was rejected on the basis of the decision in Gupta case.
- The case ultimately reached the Supreme Court.

Issue

1. Whether the Special Leave Petition is maintainable?
2. Whether the Magistrate before whom a person arrested under subsection (1) of Section 35 of the Foreign Exchange Regulation Act of 1973 which is in pari materia with sub- section (1) of Section 104 of the Customs Act of 1962, is produced under sub-section (2) of Section 35 of the Foreign Exchange Regulation Act, has jurisdiction to authorize detention of that person under Section 167(2) of the Code of Criminal Procedure?
3. Whether Enforcement Directorate under FERA (now FEMA) or Custom's Act are competent person to take judicial remand of an arrested person?

Rule of Law

- Section 167(2)[iii] of Criminal Procedure Code
- Section 35 of Foreign Exchange Regulation Act
- Section 104 of Customs Act
- Section 35 of Indian Penal Code
- Article 136 of Constitution of India

Key Ratio Decidendi

1. The petition is maintainable under Article 136 of Constitution. Article 136 provides that the aggrieved party requires a special permission to be heard by the Apex Court in appeal against any judgement or order of any court /tribunal in the territory of India.

   However the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree or order made by any court or tribunal in India. Art. 136 can only be applicable in special cases only and gross violation of principles of natural justice, gross miscarriage of justice, decision shocking the conscience of the court, when concerned point of law cannot be decided by ordinary law and other forums are the examples of such extraordinary and special circumstances. Even in the instant case there may be a grave violation of principles of natural justice and gross miscarriage of justice if the Magistrate does not have power to try cases under FERA and Customs Act Further another important question that has been raised under this case is whether the Directorate of Enforcement or Customs Officer fall within the definition of 'Police Officer' under Section 167(2) of CrPC. Since such important Issue has to be answered, hence the petition is validly brought under Special Leave Appeal.

2. The question is not what the words in the relevant provision mean but whether there are certain grounds for inferring that the legislature intended to exclude jurisdiction of the courts from authorizing the detention of an arrestee whose arrest was effected on the ground that there is reason to believe that the said person has been guilty of an offence punishable under the provisions of FERA or the Customs Act which kind of offences seriously create a dent on the economy of the nation and lead to hazardous consequences. Further the Supreme Court stated that to invoke Section 167(1), it is not an indispensable pre- requisite that in all circumstances, the arrest should have been effected only by a police officer and no one else and that there must necessarily be records of entries of a case diary. Hence the Supreme Court stated that the Enforcement Officer or Custom Officer can be termed as 'police officer' for the purpose of arrest.

3. The Supreme Court held that "sub-sections (1) and (2) of Section 167 are squarely applicable with regard to the production and detention of a person arrested under the provisions of Section 35 of FERA and Section 104 of Customs Act and that the Magistrate has jurisdiction under Section 167(2) to authorize detention of a person arrested by any authorized officer of the Enforcement under FERA and taken to the Magistrate in compliance of Section 35(2) of FERA."

2. Chhagan Chandrakant Bhujbal vs. Union of India and Ors
(Citation: Bombay HC, Criminal Writ Petition No. 3931 of 2016 dated 14.12.2016)

Facts

- The Petitioner being former PWD Minister of Maharashtra was accused of generating huge illicit funds to the tune of Rs.840.16 crores that were money laundered.
- While holding official position as the PWD Minister, the Petitioner allegedly awarded contracts of public works for self-gains.
- As per the provisions laid down in the PMLA, 2002 the Petitioner was arrested and the Special Court took cognizance of the offence and passed a detailed Order sending him to custody.
- The Petitioner moved the Hon'ble Bombay High Court under Article 226 of the Constitution of India seeking Writ of Habeas Corpus.

Issue

1. The amendment of Section 45 of the Prevention of Money Laundering Act in 2005 made all offences under the Act non-cognizable and therefore procedure under section 155 (2) of the Criminal Procedure Code should have been followed. Unless cognizance of the offence is taken by the Magistrate or the Special Court, the arrest of the Petitioner could not have been effected. Therefore, requisite procedure for arrest of the Petitioner was not followed.
2. The grounds of arrest were not mentioned in writing in the Arrest Warrant.
3. The Assistant Director, being an authority established under section 48(c) of the Prevention of Money Laundering Act, without any notification issued by Central Government under section 49(3) imposing any conditions or limitations on his powers, cannot be held as 'competent' to exercise its powers under section 19 of the Act. Therefore, the Assistant Director, Directorate of Enforcement was not competent and had no authority to arrest the Petitioner.

Rule of Law

- Section 19 of the Prevention of Money Laundering Act, 2002

Key Ratio Decidendi

1. The Assistant Director's power to arrest under section 19 does not depend upon the question as to whether offence is cognizable or non-cognizable. It was pertinently noted that while amending section 45 of the Act, the Legislature had not changed the heading, thereby giving clear indication that it did not intend to make the offence "non- cognizable" but only wanted to clear the conflict between the power of the Police Officer, who can arrest, in cognizable offence, without warrant and the authority established under Section 19 of the PML Act, who can arrest on conditions being satisfied, as laid down in the Act.
2. It was further held that Section 19 of the PMLA does not contemplate either registration of FIR, on receipt of information relating to cognizable offence or permission of the Magistrate in case of non-cognizable offence before taking cognizance or before effecting arrest of the accused in respect of obtaining of any offence punishable under this Act. The only conditions, which are laid down under Section 19 of the Act, pertain to the reasonable belief of the authority, which is on the basis of the material in its possession.
3. Further, sections 48 and 49 of the PMLA give the officers of the Directorate of Enforcement powers to investigate cases of money laundering. The enlisted officers have also been authorised to arrest and initiate proceedings for attachment of property and to launch prosecution in the designated Special Court for the offence of money laundering. It was held that the law is well settled that the definition given in the Rules must be read in conformity with the provisions of Section 19 of PML Act and hence appropriate interpretation would be that as far as Directors, Deputy Directors and Assistant Directors are concerned, no authorization of the Central Government is required; whereas, in respect of other officers, such authorization may be necessary.

3. Dalmia Cement Bharat Ltd. Vs State of AP, Hyderabad
(Citation: Telangana HC, Writ Petition No. 36838 of 2014 dated 29.02.2016)

Facts

- The first petitioner is a company registered under the Companies Act and the second petitioner is its Managing Director. Petitioners state that the Central Bureau of Investigation (CBI) filed a charge sheet before the Special Court for CBI Cases.
- Based on the allegations in the said charge sheet, the first respondent registered a case on 30.08.2011 for scheduled offences under the Prevention of Money-Laundering Act, 2002 in which the first petitioner is shown as accused at Sl. No. 26, alleging that the same, prima facie, discloses an offence under Section 3 of the PMLA.

Issue

Whether a Statement made before Enforcement Directorate (PMLA) is binding on the Accused without proof/as Admission?

Whether the summons issued to the second petitioner under Section 50 (2) and (3) of PMLA is violative of the Constitutional protection and guarantee under Article 20(3) of the Constitution of India.

Rule of Law

- Section 50 of the Prevention of Money Laundering Act, 2002
- Section 171-A of the Sea Customs Act.

Key Ratio Decidendi

1. Under PMLA, a person is required to give truthful statement if such person is summoned by the Director. This power to the director is given under section 50(2) of PMLA which provides that Director (or additional director, joint director, deputy director or assistant director) has the power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding. All such summoned persons are bound to state the truth or make statements, and produce such documents as may be required [(Section 50(3) of PMLA)].
2. The Court noticed that the ECIR is not filed before any jurisdictional Magistrate and is only an information report with the Directorate of Enforcement. The stage of filing of complaint for prosecution under PMLA is envisaged under Section 44(1)(b) of PMLA. Admittedly, that stage has not yet reached. Thus, though the charge sheet filed by the CBI is to the extent of predicate offences, so far as offence under Section 3 of PMLA is concerned, the matter is clearly at the investigation stage.
3. At this stage, therefore, investigation is only for the purpose of collecting evidence with regard to proceeds of crime in the hands of the persons suspected and their involvement, if any, in the offence under Section 3 of PMLA. The court mentioned that they are unable to equate ECIR registered by the first respondent to an FIR under Section 154 Cr.P.C and consequently, agree with the learned Additional Solicitor General that under PMLA the petitioners are not accused at present. Consequently, therefore, the submission on behalf of the petitioners on the assumption that petitioners are accused under PMLA is liable to be rejected. Point is accordingly answered in the negative.
4. Statements made under Section 171-A of the Sea Customs Act are not confessions recorded by a Magistrate under Section 164 of the Code of Criminal Procedure but are statements made in answer to a notice under sec.171-A of the Sea Customs Act. As they are not made subject to the safeguards under which confessions are recorded by Magistrates they must be specially scrutinized to finding out if they were made under threat or promise from someone in authority. If after such scrutiny they are considered to be voluntary, they may be received against the maker and in the same way as confessions are received.
5. The Supreme Court had an occasion to interpret Section 108 of the Customs Act, which is in parameteria with Section 171-A of the Sea Customs Act. Hence, at this stage, it is relevant to notice the decision of the Supreme Court in ASSTT. CCE v. DUNCAN AGRO INDUSTRIES LTD.
6. These statements are not confessions recorded by a Magistrate under Section 164 of the Code of Criminal Procedure but are statements made in answer to a notice under sec.171-A of the Sea Customs Act. As they are not made subject to the safeguards under which confessions are recorded by Magistrates they must be specially scrutinised to finding out if they were made under threat or promise from some one in authority. If after such scrutiny they are considered to be voluntary, they may be

received against the maker and in the same way as confessions are received, also against a co-accused jointly tried with him

7. Furthermore, the court held that "The protection under Article 20(3) of the Constitution of India is available at the stage of investigation the court held that the provisions of Section 50 of PMLA are required to be read down so as to ensure that petitioners are not prejudiced in the CBI case as well as under PMLA."
8. The Court held that in view of the point already answered that petitioners are not accused under PMLA, in my view, the reading down of Section 50 of PMLA, even if permissible, would not arise on the facts and circumstances of the case. Point No.3 is accordingly answered. Consequently the writ petition fails and is accordingly dismissed.

4. Financial Intelligence Unit-IND vs Corporation Bank

(Citation: Delhi HC, CRL.A. 877/2017 dated 04.09.2019)

Facts

- A sting operation was conducted by online media portal named "Cobrapost.com" on various banks. During the sting, undercover reporters approached employees of various banks representing themselves to be customers who required opening of accounts to deposit black money belonging to a Minister and for laundering the same. The video indicated that officials of the banks had expressed willingness to accept deposits of black money.
- Consequently, FIU issued letters to the respondent banks asking them to provide certain information u/S 12(a) of the PML Act, 2002 (the Act), in reference to the sting operation and held hearings, all of which culminated into issuance of show cause notices u/S 13 of the Act, alleging non-compliance of provisions of Section 12 of the Act read with PML (Maintenance and Records) Rules, 2005 (the Rules). Section 12 of the Act envisages reporting obligations of banks against 'suspicious transactions'.
- The FIU proceeded on the basis that the conversations recorded in the sting operation constituted 'suspicious transactions' within the meaning of Rule 2(g) of the Rules, and imposed monetary fines under Section 13 of the Act.
- This order of the FIU was modified by the Appellate Tribunal, PMLA stating that violation of the reporting obligations on part of the respondent banks warranted issuance of a warning in writing under Section 13(2)(a) of the Act, instead of a monetary penalty as imposed under Section 13(2)(d) of the Act.
- Hence, the present appeal titled "Financial Intelligence Unit- Ind v. Corporation Bank" along with other appeals was filed under Section 42 of the Act.

Issue

Whether Appellate Tribunal could modify the order passed by Director, FIU by reducing penalty imposed.

Rule of Law

- Section 13 of the Prevention of Money Laundering Act, 2002

Key Ratio Decidendi

1. The court noted that there was nothing on record to establish that the sting operation had been conducted prior to 15.02.2013. Therefore, FIU's contention that unamended provisions were applicable to the Banks was bereft of any factual foundation.
2. Thus the only question for consideration was whether the amended provisions of Section 13 of the Act, which provide for a lesser punitive measure, were applicable retrospectively.
3. In this regard, the court relied on T. Barai v. Henry Ah Hoe & Anr., wherein the Supreme Court had explained that insofar as a new enactment creates new offences or enhances punishment for a particular type of offence, no person can be convicted by such ex post facto law nor can the enhanced punishment prescribed by the amendment, be imposed. However, if a punishment for an offence is reduced, "there is no reason why the accused should not have the benefit of the reduced punishment"
4. FIU's contention in this regard that in the present cases the respondent banks had suffered a civil liability and the aforesaid precedent was applicable only to criminal laws was rejected by the court. It was held that *"Even if it is assumed that the liability imposed on the respondent banks is a civil liability, no distinction can be drawn on the aforesaid ground so as to deprive the respondents of the rule of beneficial construction"*.
5. Reliance was placed upon Commissioner of Tax (Central)-I, New Delhi v. Vatika Township Pvt. Ltd., wherein the Supreme Court had held that *if a legislation confers the benefit on some persons without inflicting a corresponding detriment on some other person or where it appears that the intention of legislature is to confer such benefit, the rule of purposive construction would be applicable and the said legislation would be construed as applicable with retrospective effect.*
6. In these circumstances, the court held that *"even if it is assumed that the sting operation was conducted prior to 15.02.2013, there is no infirmity in the decision of the Appellate Tribunal to modify the punishment from a monetary fine to a warning in writing, in terms of Section 13(2)(a) of the Act"*.
7. Hence, the rule that the enactment must be construed as prospective is not applicable in cases of a beneficial legislation. In such cases, the same must be construed retrospectively. It would be unfair to impose a higher punishment then as prescribed under a statute as currently in force, merely because the person visited with such punishment has committed the offence / default prior to the legislation being enacted.

5. Smt. K. Sowbaghya vs Union of India

(Citation: Karnataka HC, Writ Petition No. 14649 of 2014 dated 28.01.2016)

Facts

- The petitioner's husband and son are politicians and businessmen. The Karnataka Lokayukta Police are said to have registered a case in Crime no. 57/2010 against the petitioner's husband, her son and several others alleging offences punishable under Sections 7, 8, 12, 13 (1) & (2) of the Prevention of Corruption Act, 1988, read with Sections 419, 420, 465, 468,471 read with Section 120 B of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC', for brevity).
- The petitioner contends that inspite of a restraint order passed in the first of these petitions, restraining the respondent from proceeding to take action pursuant to the Amendment no. 2 / 2013 of the PML Act, the respondent having instituted a complaint before the Special Court, before the restraint order could be served on the respondent, and the Special Court having taken cognizance of the offences alleged, has sought to file the second of these petitions, with an additional prayer seeking the quashing of the order of the Special Court, taking cognizance.

Issue

The petitioners has challenged the validity of Sections 17, 18 and 19, of the Act, which provide for Search and seizure, Search of persons and Arrest, respectively.

Rule of Law

- Section 24 of PMLA
- Section 44 of PMLA

Key Ratio Decidendi

1. The Court held that "Money laundering is an independent stand-alone offence." This was on the reasoning that, although, under sections 3 & 4 of the PML Act, it is not possible to envision an offence under PML Act as a 'stand-alone' offence without the guilt of the offender in the Scheduled offence being established, the expression "proceeds of crime" has been defined to include "property" of all kinds as defined under clause (v) of Section 2(1). Hence, it is possible to extend the definition of 'proceeds of crime' to property used in the commission of an offence under the Act or any of the Scheduled offences. Thus, money laundering can also be treated as a 'stand-alone' offence, de hors, a scheduled offence, if circumstances warrant.
2. Furthermore, merely because the provisions contemplate measures relating to search, seizure and arrest, the same cannot be considered draconian.
3. The Court held that "the provisions of the Act which clearly and unambiguously enable initiation of proceedings for attachment and eventual confiscation of property in possession of a person not accused of having committed an offence under Section 3 as well, do not violate the provisions of the Constitution including Articles 14, 21 and 300-A and are operative proprio vigore [of or by its own force independently.]"
4. Section 24 as amended by the Amendment Act of 2013 is held to be constitutionally valid. And so far as Section 44 of the Act is concerned it is sought to be contended that Section 44 mandates that the offence under this Act shall be triable by a Special Court. The entire scheme of this section is vague, violates the right to speedy trial and also is ambiguous, vague oppressive, arbitrary, discriminatory, unconstitutional and offending Articles, 14, 20, 21 and Article 300 of the Constitution of India and is ultra-vires.
5. And so far as Section 44 of the Act is concerned it is sought to be contended that Section 44 mandates that the offence under this Act shall be triable by a Special Court. The entire scheme of this section is vague, violates the right to speedy trial and also is ambiguous, vague oppressive, arbitrary, discriminatory, unconstitutional and offending Articles, 14, 20, 21 and Article 300 of the Constitution of India and is ultra-vires.
6. The power of search, seizure and arrest are considered an important tool in any investigation. Such power being available in matters relating to economic offences is not unusual. Identical provisions are found in the Customs Act, 1962, the Prevention of Food Adulteration Act, 1954, the Railway Property (Unlawful Possession Act, 1966, etc. Further, as investigation precedes the filing of a charge sheet under Section 173 Cr.P.C , the exercise of power of search, seizure and arrest as part of investigation would not prejudice any person as such measures are controlled by other provisions of the Cr.P.C. Section 65 of

the PML Act does provide that the provisions of the Cr.P.C. would be applicable including the provisions for investigation under the Act. Section 19 is assailed also on the ground that there is no judicial body provided to scrutinize the initial action as in the case of scheduled offences. However, Section 19 (3) itself provides that every person arrested under the Act would be produced before a Magistrate within 24 hours of such arrest. Further, the contention that such arrest may not be warranted by an officer under the Act, may not be tenable. If the authorized officer, on the basis of material in his possession has reason to believe that the person is guilty of an offence punishable under the Act , he being empowered to arrest is akin to powers conferred on authorized officers under other legislation which power of arrest has been upheld by the Apex court in the case of Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440

6. B. Rama Raju v. Union of India

(Citation: Andhra Pradesh HC, Writ Petition No. 10765 of 2010 dated 04.03.2011)

Facts

In this case, a writ petition was filed challenging certain provisions of the Prevention of Money Laundering Act, 2002 including its amendments. The provision of attachment and confiscation under Section 2(1) of the PMLA 2002 was challenged.

Issue

- Whether property owned by or in possession of person, other than person charged of having committed a scheduled offence is liable to attachment and confiscation proceedings? And if so whether Section 2(1)(u) was invalid?
- The issue was whether provisions of second proviso of Section 5 were applicable to property acquired prior to enforcement of this provision and if so, whether provision is invalid for retrospective penalization?
- Whether provisions of Section 8 were invalid for procedural vagueness and for exclusion of mens rea of criminality in acquisition of such property and for enjoining deprivation of possession of immovable property even before conclusion of guilt/conviction in prosecution for an offence of money laundering?
- Whether presumption enjoined by Section 23 was unreasonably restrictive, excessively disproportionate?
- Whether shifting/imposition of the burden of proof, by Section 24 is arbitrary and invalid and was applicable only to trial of offence under Section 3?

Rule of Law

- Section 3 of PMLA
- Section 5 of PMLA
- Section 8 of PMLA
- Section 23 of PMLA

Key Ratio Decidendi

1. It was held that "object of Act is to prevent money laundering and connected activities and confiscation of "proceeds of crime" and preventing legitimizing of money earned through illegal and criminal activities by investments in movable and immovable properties often involving layering of money generated through illegal activities. Therefore, the Act defines expression "proceeds of crime" expansively to sub-serve broad objectives of Act. Thus property owned or in possession of a person, other than a person charged of having committed scheduled offence was equally liable to attachment and confiscation proceedings under Chapter III".
2. It was held that "Parliament has authority to legislate and provide for forfeiture of proceeds of crime which is a produce of specified criminality acquired prior to enactment of Act as well. It has also authority to recognize degrees of harm such conduct has on fabric of society and to determine appropriate remedy. Thus provisions of second proviso to Section 5 were applicable to property acquired even prior to coming into force of this provision and even so were not invalid for retrospective penalization."
3. It was held that "considering object and scheme of Act, provisions of Section 8 could not be held invalid for vagueness; incoherence as to onus and standard of proof; ambiguity as regards criteria for determination of nexus between property targeted for attachment/confirmation and offence of money-laundering; or for exclusion of mens rea/ knowledge of criminality in acquisition of such property. Section 8(4) which enjoined deprivation of possession of immovable property pursuant to order confirming provisional attachment and before conviction of accused for offence of money-laundering, was valid."
4. It was held that "Section 23 enjoins a rule of evidence and rebuttable presumption considered essential and integral to effectuation of purposes of Act in legislative wisdom. Thus, validity of provision was upheld."
5. It was held that "where property is in ownership, control or possession of person not accused of having committed an offence under Section 3 and where such property is part of inter-connected transactions involved in money laundering, then and in such event presumption enjoined in Section 23 comes into operation and not inherence of burden of proof under Section 24 of the Act. Therefore person other than one accused of having committed offence under Section 3 is not imposed the burden of proof enjoined by Section 24. On person accused of offence under Section 3, burden applies, also for attachment and confiscation proceedings."

7. J. Sekar and others v. ED

(Citation: Delhi HC, Writ Petition (C) No. 5320 of 2017 dated 11.01.2018)

Facts

All the writ petitions under Article 226 of the Constitution of India in the present case, only one prayer is for a declaration that the second proviso to Section 5 (1) of the Prevention of Money- Laundering Act, 2002 (PMLA) is ultra vires to Article 14 of the Constitution of India

Issue

Constitutional validity of proviso to Section 5(1) of the PMLA

Rule of Law

- Section 3 of PMLA
- Section 5 of PMLA
- Section 8 of PMLA
- Section 23 of PMLA

Key Ratio Decidendi

1. The second proviso to Section 5(1) of the PMLA is not violative of Article 14 of the Constitution of India; the challenge in that regard in these petitions is hereby negatived.
2. The expression reasons to believe has to meet the safeguards inbuilt in the second proviso to Section 5(1) of PMLA read with Section 5(1) of PMLA.
3. The expression reasons to believe' in Section 8(1) of PMLA again has to satisfy the requirement of law as explained in this decision.
4. There has to be a communication of the 'reasons to believe' at every stage to the noticee under Section 8(1) of PMLA.
5. The noticee under Section 8(1) of PMLA is entitled access to the materials on record that constituted the basis for reasons to believe subject to redaction in the manner explained hereinbefore, for reasons to be recorded in writing.
6. If there is a violation of the legal requirements outlined hereinbefore, the order of the provisional attachment would be rendered illegal.
7. There can be single-member benches of the AA and the Administrative Tribunal under the PMLA. Such single-member benches need not mandatorily have to be Judicial Member and can be Administrative Members as well.

8. Opto Circuit India Ltd. vs Axis Bank

(Citation: Supreme Court of India, CRIMINAL APPEAL NO.102 OF 2021 (Arising out of SLP (Criminal) No.4171 of 2020), dated 3 February, 2021)

Facts

- The appellant is before this Court assailing the order dated 13.08.2020 passed by the High Court of Karnataka in WP No. 8031 of 2020. Through the said common order the High Court has disposed of two writ petitions but the consideration herein relates to the issue raised in Writ Petition No.8031 of 2020 which was filed before the High Court, by the appellant herein raising the issue relating to the freezing of their bank account.
- When the Special Leave Petition was listed for admission, the learned senior counsel for the appellant while assailing the order passed by the High Court, inter alia contended that the freezing of the bank accounts maintained by the appellant company has prejudiced the appellant, inasmuch as, the amount in the account which belongs to the appellant is made unavailable to them due to which statutory payments to be made to the Competent Authorities under various enactments is withheld and the payment of salary which is due to the employees is also prevented.
- In that background, this Court though had not found any reason to interfere with the initiation of the proceedings under the Prevention of Money–Laundering Act, 2002 (PMLA) had, however, limited the scope of consideration in this appeal on the issue of defreezing the bank account so as to enable the appellant to make the statutory payments. In that view, notice had been issued to the respondent through the order dated 11.09.2020 in the following manner – issue notice restricted to the purpose of enabling necessary payment returnable within two weeks. The respondent on being served, having appeared has filed the counter affidavit on behalf of respondent No.4.
- The instant appeal arises out of the proceedings initiated by respondent No.4 against the appellant under the PMLA. The analogous matter, which was considered by the High Court along with the writ petition which is the subject matter herein related to the action initiated by the Central Bureau of Investigation (CBI) for the alleged predicate offence and the instant proceedings is a fall out of the same.
- It is in that background the Enforcement Directorate in order to track the money trail relating to the predicate offence and prevent layering of the same has initiated the proceedings under the PMLA. In the said process the Deputy Director, Directorate of Enforcement through the communication dated 15.05.2020 addressed to the Anti Money–Laundering Officer (AML) of Respondents No.1 to 3 Banks instructed them that the accounts maintained by the appellant company be debit freezed/stop operations until further orders, with immediate effect.

Matter before the High Court:

- It is in that light the appellant claiming to be aggrieved filed WP No. 8031 of 2020 before the High Court seeking for issue of an appropriate writ to quash the communication dated 15.05.2020 issued for debit freezing the account No.914020014786978 maintained with the respondent No.1, account No.200006044354 maintained with the respondent No.2 and the account No. 39305709999 maintained with the respondent No.3. The appellant in that regard also prayed that the respondents be directed to defreeze the accounts to which reference is made.
- The High Court considered the matter in detail and has taken into consideration the object with which the PMLA was enacted and the validity of the Act being considered by the High Court in the decisions referred to in the course of the order. The permissibility and scope of parallel proceedings under Section 3 and 4 of PMLA was adverted to in detail and upheld the action. Insofar as the reasoning adopted and the conclusion reached by the High Court with regard to the power and competence to initiate the proceedings under the PMLA in view of the action taken for predicate offence, the High Court was very much justified. However, the High Court having held that the impugned communication was with competence or justification ought to have examined whether the due process as contemplated under the PMLA was complied so as to make it valid and sustainable in law, though the power under the Act was available. As already noticed, the consideration to be made in this appeal is therefore limited to the aspect of freezing/defreezing the account, more particularly keeping in view the requirement of the appellant to make the statutory payments even if the freezing of the account is found justified.

Issue

Whether the power available to the competent authority under the PML Act has been exercised in the manner as is contemplated under PMLA.

Rule of Law

Seciton 2(v) and (w), 17 of PMLA

Key Ratio Decidendi

- The Directorate of Enforcement (Respondent No.4) in their counter affidavit has taken contradictory stand inasmuch as, while explaining the need to freeze the account has stated that the stop operation was requested to stop the further layering/diversion of proceeds of crime and to safeguard the proceeds of crime, which it is noticed is a power available under PMLA. But in the counter affidavit it is strangely stated that the same has not been done under Section 17(1) of the PMLA. However, in contrast it has been further averred with regard to the power available under PMLA and that PMLA being a stand–alone enactment and independent process whereunder Section 71 of PMLA has an overriding affect over other laws. Irrespective of the stand taken, the power exercised by the Competent Authority should be shown to be in the manner as has been provided in law, in this case under PMLA.
- A perusal of section 17 would indicate that the pre–requisite is that the Director or such other Authorised Officer in order to exercise the power under Section 17 of PMLA, should on the basis of information in his possession, have reason to believe that such person has committed acts relating to money laundering and there is need to seize any record or property found in the search. Such belief of the officer should be recorded in writing.
- For the purpose of clarity, it is emphasised that the freezing of the account will also require the same procedure since a bank account having alleged proceeds of crime would fall both under the ambit property and records. In that regard it would be appropriate to take note of Section 2(v) and (w) of PMLA which defines property and records.
- The scheme of the PMLA is well intended. While it seeks to achieve the object of preventing money laundering and bring to book the offenders, it also safeguards the rights of the persons who would be proceeded against under the Act by ensuring fairness in procedure. Hence a procedure, including timeline is provided so as to ensure that power is exercised for the purpose to which the officer is vested with such power and the Adjudicating Authority is also kept in the loop. In the instant case, the procedure contemplated under Section 17 of PMLA to which reference is made above has not been followed by the Officer Authorised. Except issuing the impugned communication dated 15.05.2020 to AML Officer to seek freezing, no other procedure contemplated in law is followed. In fact, the impugned communication does not even refer to the belief of the Authorised Officer even if the same was recorded separately. It only states that the Officer is investigating the case and seeks for relevant document s, but in the tabular column abruptly states that the accounts have to be debit freezed/stop operations. It certainly is not the requirement that the communication addressed to the Bank itself should contain all the details. But what is necessary is an order in the file recording the belief as provided under Section 17(1) of PMLA before the communication is issued and thereafter the requirement of Section 17(2) of PMLA after the freezing is made is complied. There is no other material placed before the Court to indicate compliance of Section 17 of PMLA, more particularly recording the belief of commission of the act of money laundering and placing it before the Adjudicating Authority or for filing application after securing the freezing of the account to be made. In that view, the freezing or the continuation thereof is without due compliance of the legal requirement and, therefore, not sustainable.
- The respondent No.4 in the counter affidavit has stated that the action initiated against the appellant is based on the complaint dated 02.11.2019 made by the State Bank of India alleging that the appellant, its Chairman and the Promoter Directors have conspired and cheated them to tune of Rs. 354.32 crores by diversion of funds abroad. In that regard the CBI has registered the case in FIR No. RC 18(A)/2019 dated 04.11.2019 under Section 120(B) read with Section 420, 468 and 471 IPC and under Section 13(2) read with section 13(1)(d) of Prevention of Corruption Act, 1988. Since the said offences are also schedule offences under Section 2(1)(x) and (y) of PMLA, the case in ECIR– BGZO/01/2020 was recorded by the Directorate on 02.01.2020 and action is taken to safeguard the alleged proceeds of crime. On that aspect we have already indicated that the High Court was justified in upholding the action initiated under the PMLA but the consideration herein was only with regard to freezing of the bank account and as to whether while doing so the due process had been complied by adhering to the procedure prescribed under Section 17 of PMLA.
- This Court has time and again emphasised that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and in no other manner. Among others, in a matter relating to the presentation of an Election Petition, as per the procedure prescribed under the Patna High Court Rules, this Court had an occasion to consider the Rules to find out as to what would be a

valid presentation of an Election Petition in the case of Chandra Kishor Jha vs. Mahavi r Prasad and Ors. (1999) 8 SCC 266 and in the course of consideration observed as hereunder:

- **It is a well settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner.**
- Therefore, if the salutary principle is kept in perspective, in the instant case, though the Authorised Officer is vested with sufficient power; such power is circumscribed by a procedure laid down under the statute. As such the power is to be exercised in that manner alone, failing which it would fall foul of the requirement of complying due process under law. We have found fault with the Authorised Officer and declared the action bad only in so far as not following the legal requirement before and after freezing the account. This shall not be construed as an opinion expressed on the merit of the allegation or any other aspect relating to the matter and the action initiated against the appellant and its Directors which is a matter to be taken note in appropriate proceedings if at all any issue is raised by the aggrieved party.
- Apart from the above consideration, what has also engaged the attention of this Court is with regard to the plea put forth on behalf of the appellant regarding the need to defreeze the account to enable the appellant to pay the statutory dues. The appellant in that regard has relied on the certificate issued by the Chartered Accountant, which indicates the amount payable towards ITDS, PF, ESI, Professional Tax, Gratuity and LIC employees deductions, in all amounting to Rs.79,93,124/–. Since the court have indicated that the freezing has been done without due compliance of law, it is necessary to direct the respondents No.1 to 3 to defreeze the respective accounts and clear the cheques issued by the appellant, drawn in favour of the Competent Authority towards the ITDS, PF, ESI, Professional Tax, Gratuity and LIC employees deductions, subject to availability of the funds in the account concerned. Needless to mention that if any further amount is available in the account after payment of the statutory dues and with regard to the same any action is to be taken by the respondent No.4 within a reasonable time, it would open to them to do so subject to compliance of the required procedure afresh, as contemplated in law.

Conclusion:

- In terms of the above, the communication dated 15.05.2020 is quashed. The Supreme Court directed that the respondents shall defreeze the accounts bearing Nos. 914020014786978, 200006044354 and 39305709999 and honour payments advised by the appellant towards statutory dues stated supra. Liberty is reserved to Respondent No.4 thereafter to initiate action afresh in accordance with law, if they so desire.
- The appeal is allowed to the above extent with no order as to costs.

9. Gautam Kundu V/s. Manoj Kumar, Assistant Director, DOE
(Citation: Supreme Court of India, CRIMINAL APPEAL NO. 1706 OF 2015 (Arising out of SLP(Crl.) No.6701 of 2015), dated 16th December, 2015)

Facts

- This appeal, by special leave, is directed against the judgment and order dated 21st July, 2015 passed by the High Court of Calcutta, whereby the High Court has rejected appellant's application for bail under Section 439 of the Code of Criminal Procedure, 1973. The appellant was arrested on 25.03.2015 in relation to an offence alleged to have been committed under Section 3 of the Prevention of Money Laundering Act, 2002, (PMLA).
- The appellant is the Chairman of Rose Valley Real Estate Construction Ltd. (Rose Valley), a public company incorporated in the year 1999 and registered under the Companies Act, 1956. Certain non-convertible debentures were issued by the Rose Valley by 'private placement method.' No advertisements etc. were issued to the public. The said debentures were issued to the employees of the Company and to their friends and associates after fulfilling the formalities for private placement of debentures. Thus, the appellant collected money by issuing secured debentures by way of private placement in compliance with the guidelines issued by the Securities and Exchange Board of India from time to time.
- Further the appellant had floated as much as 27 companies and routed the monies collected by his front companies through these companies.
- On 26.03.2013, the Adjudicating Officer, SEBI, passed an order imposing a penalty of Rs.1 crore upon the Rose Valley for violation of the provisions of Sections 11(C) of the SEBI Act which was reduced to Rs.10 lakhs by the Securities Appellate Tribunal, Mumbai. A letter was issued on 26.06.2013 by the SEBI to the appellant Rose Valley informing the appellant about the offences alleged to have been committed by it under the Companies Act, SEBI Act & Regulations, and Section 405 of the Indian Penal Code. The appeal filed by the appellant before the Securities Appellate Tribunal (SAT) was allowed on 12.12.2013, holding that the appellant Company has repaid all the money collected from the investors. It was further held by the SAT that there are no grounds for violation of Section 11(C)(3) of the SEBI Act.
- On the basis of the aforementioned letter dated 26.06.2013 issued by SEBI, the respondent filed a report being ECIR No.KIZO/02/2014 dated 27.02.2014, alleging commission of offence by the Rose Valley and its officers, punishable under Section 24 of the SEBI Act. Thereafter, search and seizure was conducted at the offices of the Rose Valley.
- A complaint was filed by the respondent authorities, being C/14214 of 2013, alleging that the Rose Valley transferred the money raised by issue of debentures from the account of one company to that of another company. It is also alleged that the money collected by issuing the debentures for the purpose of one business has been invested in some other business. The proceedings under Section 24 of the SEBI Act has been challenged in the High Court by way of revision and the said revision is pending for hearing and further proceeding of the complaint case, being C/14214 of 2013, has been stayed by the High Court. The High Court also directed the respondent not to take any coercive measure against the appellant.
- Vide its order dated 18.06.2014, SEBI directed the appellant Rose Valley to refund the money to the customers of the Ashirbad Scheme. This order was challenged before the SAT by way of Appeal No.233 of 2014. On 19.06.2014, a Show Cause Notice under Section 8(1) of the PMLA was served upon Rose Valley and its officials. Rose Valley filed a writ petition before the High Court of Calcutta challenging the said Show Cause Notice which was dismissed by the Single Judge of the High Court.
- Thereafter, the matter was taken in appeal before the Division Bench of the Calcutta High Court, being AST No.345 of 2014. The Division Bench of the High Court dismissed the said appeal and directed the appellant Rose Valley to appear before the Adjudicating Authority under Section 8 of the PMLA and directed the Adjudicating Authority to decide the preliminary objections as may be raised by the Rose Valley, including the applicability of the PMLA as also the validity of the search and seizure against Rose Valley. It was further directed that the Adjudicating Authority should pass a reasoned order in the matter and communicate the same to the appellant Rose Valley within two days from the date of passing such order.
- A complaint was filed by the respondent on April 2, 2015, in the Court of learned Chief Judge, City Sessions Court at Kolkata, against the appellant under Section 4 of PMLA, though no offence is made out against the appellant under Section 3 of the PMLA. The said complaint has been registered as ML

Case No.3 of 2015. Despite having fully cooperated with the investigation, the appellant was arrested on 25.03.2015 on suspicion of having committed an offence punishable under the provisions of the PMLA and is detained in custody since then.

- On 06.07.2015, the appellant filed a fresh bail application under Section 439 of the Code of Criminal Procedure before the High Court of Calcutta, being CRM No.6285 of 2015. Vide impugned judgment and order the High Court has rejected the said application of the appellant holding that no order has yet been passed by any competent Court of law that no offence is made out against the appellant under Section 24 of the SEBI Act. It is pertinent to mention here that a criminal revision praying for quashing of the proceedings initiated against the appellant under Section 24 of the SEBI Act is still pending for decision before the High Court.
- Aggrieved by the rejection of the bail application filed under Section 439 of the Code of Criminal Procedure, the appellant has approached this Court through this appeal by special leave

Issue

Whether Section 45 of the PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them?

Whether the appellant had done offence under Section 24 of the SEBI Act, which is a scheduled offence under the PMLA?

Rule of Law

- Section 5, 439 of the Code of Criminal Procedure, 1973
- Section 405 of the Indian Penal Code, 1860
- Section 2(u), 3, 4, 8, 44, 45, 45A, 71 of the Prevention of Money Laundering Act, 2002
- Section 11(C)(3), 12A, 24. 26 of the SEBI Act.

Key Ratio Decidendi

- The Supreme Court heard the learned counsel for the parties. At this stage the Court refrained itself from deciding the questions tried to be raised at this stage since it is nothing but a bail application. The Court observed that this case is relating to Money Laundering which is a serious threat to the national economy and national interest. It cannot brush aside the fact that the schemes have been prepared in a calculative manner with a deliberative design and motive of personal gain, regardless of the consequence to the members of the society.
- Aggrieved by the rejection of the bail application filed under Section 439 of the Code of
- Criminal Procedure, the appellant has approached this Court through this appeal by special leave.
- With regard to the questions raised by the appellant, at this stage, the Court do not think that it would answer or deal with the same in view of the fact that the matter is pending before a Division Bench of the High Court in writ jurisdiction, as has been pointed out before us. Hence, any observation or remarks made by the Court may cause prejudice to the case of both the sides. Therefore, it would be proper for the Court to only to deal with the matter concerning bail. The Court noted that admittedly the complaint is filed against the appellant on the allegations of committing the offence punishable under Section 4 of the PMLA. The contention raised on behalf of the appellant that no offence under Section 24 of the SEBI Act is made out against the appellant, which is a scheduled offence under the PMLA, needs to be considered from the materials collected during the investigation by the respondents. There is no order as yet passed by a competent court of law, holding that no offence is made out against the appellant under Section 24 of the SEBI Act and it would be noteworthy that a criminal revision praying for quashing the proceedings initiated against the appellant under Section 24 of SEBI Act is still pending for hearing before the High Court.
- The Court noted that Section 45 of the PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. As mentioned earlier, Section 45 of the PMLA imposes two conditions for grant of bail, specified under the said Act. The Court have not missed the proviso to Section 45 of the said Act which indicates that the legislature has carved out an exception for grant of bail by a Special Court when any person is under the age of 16 years or is a woman or is a sick or infirm. **Therefore, there is no doubt that the conditions laid down under Section 45A of the PMLA, would bind the High Court as the provisions of special law having overriding effect on the provisions of Section 439 of the Code of Criminal Procedure for**

grant of bail to any person accused of committing offence punishable under Section 4 of the PMLA, even when the application for bail is considered under Section 439 of the Code of Criminal Procedure.

- The Court further noted the directions given by this Court in Subrata Chattoraj v. Union of India and Ors., (2014) 8 SCC 768, in particular to paragraph 35.4.
- Para 35: We cannot brush aside the fact that the appellant floated as many as 27 companies to allure the investors to invest in their different companies on a promise of high returns and funds were collected from the public at large which were subsequently laundered in associated companies of Rose Valley Group and were used for purchasing moveable and immoveable properties.
- The Court do not intend to further state the other facts excepting the fact that admittedly the complaint was filed against the appellant on the allegation of committing offence punishable under Section 4 of the PMLA. The contention made on behalf of the appellant that no offence under Section 24 of the SEBI Act is made out against the appellant, which is a scheduled offence under the PMLA, needs to be considered from the material collected during the investigation and further to be considered by the competent court of law. The Court do not intend to express itself at this stage with regard to the same as it may cause prejudice the case of the parties in other proceedings. The Court is sure that it is not expected at this stage that the guilt of the accused has to be established beyond reasonable doubt through evidences.
- In the case of Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation, (2013) 7 SCC 439, this Court has observed that the economic offences having deep rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of country.
- In Union of India v. Hassan Ali Khan, (2011) 10 SCC 235, this Court has laid down that what will be the burden of proof when attempt is made to project the proceeds of crime as untainted money. It is held in the said paragraph that allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifted on the accused persons under Section 24 of the PML Act, 2002. The same proposition of law is reiterated and followed by the Orissa High Court in the unreported decision of Smt. Janata Jha v. Assistant Director, Directorate of Enforcement (CRLMC No. 114 of 2011 decided on December 16, 2013). Therefore, taking into account all these propositions of law, we feel that the application for bail of the appellant should be seen at this stage while the appellant is involved in the economic offence, in general, and for the offence punishable under Section 4 of the PMLA, in particular.
- The Court further noted that the High Court at the time of refusing the bail application, duly considered this fact and further considered the statement of the Assistant General Manager of RBI, Kolkata, seizure list, statements of directors of Rose Valley, statements of officer bearers of Rose Valley, statements of debenture trustees of Rose Valley, statements of debenture holders of Rose Valley, statements of AGM of Accounts of Rose Valley and statements of Regional Managers of Rose Valley for formation of opinion whether the appellant is involved in the offence of money laundering and on consideration of the said statements and other materials collected during the investigation, the High Court specifically stated as follows:
- By making a pragmatic approach to the provision of Section 45(1) of the P.M.L. Act and on consideration of the antecedents of the petitioner in collection of money from open market for issuing secured debentures in violation of the guidelines of SEBI and on further consideration of the manner of keeping accounts of Rose Valley, the Court is unable to hold that the petitioner is not likely to commit any offence while on bail. As a result, the Court cannot persuade itself to grant bail to the petitioner at this stage. So, prayer for bail is rejected. The application is dismissed.
- In these circumstances, the Court do not find that the High Court has exercised its discretion capriciously or arbitrarily in the facts and circumstances of this case. The Court further noted that the High Court has called for all the relevant papers and duly taken note of that and thereafter after satisfying its conscience, refused the bail. Therefore, we do not find that the High Court has committed any wrong in refusing bail in the given circumstances. Accordingly, the Court do not find any reason to interfere with the impugned order so passed by the High Court and the bail, as prayed before it challenging the said order is refused. Consequently the appeal is dismissed.

10. Sachin Joshi vs Directorate of Enforcement

(Citation: Supreme Court of India, Petition(s) for Special Leave to Appeal (Crl.) No(s). 4482/2021, 28th September, 2021.)

Facts

The petitioner has moved an application under Section 439 Cr.P.C. read with Section 45 of the Prevention of Money Laundering Act, 2002 (PML Act) seeking release on bail in an offence registered against him in PMLA Special Case No.377/2021.

The Sessions Court, Mumbai, by an Order dated 03.04.2021, allowed the bail application of the petitioner and directed his release on bail, subject to certain conditions. The Directorate of Enforcement challenged the Order dated 03.04.2021 in the Bombay High Court.

The High Court disposed of the application filed by the Directorate of Enforcement by keeping the order granting bail to the petitioner in abeyance. The petitioner was granted temporary bail for a period of two months, subject to the conditions mentioned in the order.

The Sessions Court granted bail to the petitioner on medical grounds by taking note of the first proviso to Section 45 (1) of the PML Act. The Sessions Court opined that there was no need to discuss the merits of the allegations made against the petitioner, as bail was being granted on medical grounds. The High Court directed the petitioner to be examined by a medical board consisting of a neurologist, an endocrinologist and a general physician by an Order dated 09.04.2021. The report of the medical board was submitted to the Court on 19.04.2021.

After a detailed consideration of the report of the medical board, the High Court was of the considered view that the petitioner was not entitled to grant of permanent bail. However, temporary bail for two months was granted to enable the petitioner to receive treatment for his ailments.

The Counsel for the petitioner, has contended that the High Court committed a serious error in interfering with the order passed by the Sessions Court, without taking into consideration the first proviso to Section 45(1) of the PML Act. The Counsel submitted that the medical record which was placed before the High Court clearly shows that the petitioner has to be under constant treatment aside from the several procedures he has to undergo, including spinal surgery. He submitted that an accused who is sick is entitled to be released on permanent bail without any restrictions, as contemplated in the first proviso to Section 45(1) of the PML Act.

On the other hand, the Additional Solicitor General, referred to the medical record relied upon by the petitioner and argued that the surgical interventions required are all minor and the petitioner is not entitled to be released on permanent bail.

Issue

Whether the granting of bail by the Session Court, to the petitioner on medical grounds by taking note of the first proviso to Section 45 (1) of the PML Act is valid, without discussing the merits of the allegations made against the petitioner?

Rule of Law

- Section 45 of the PML Act.

Key Ratio Decidendi

Having considered the submissions made by both sides and the material on record, the Supreme Court opined that there is no error committed by the High Court in interfering with the order passed by the Sessions Court. However, taking note of the submissions made by counsel for petitioner about the treatment of the petitioner, the Court granted temporary bail to the petitioner for a period of four months. It is made clear that no application for extension of bail shall be entertained by this Court. The temporary bail granted to the petitioner is subject to the conditions that were imposed by the High Court in its Order dated 05.05.2021.

Signicant Case Laws

CHAPTER-5 Foreign Exchange Management Act, 1999

Cases included under this Chapter

S. No.	Title of the Case	Court / Date
1.	IDBI Trusteeship Services Ltd V/s Hubtown Ltd.	Supreme Court of India / 15.11.2016
2.	Cruz City I Mauritius Holdings V/s Unitech Ltd	Delhi High Court / 11.04.2017
3.	NTT Docomo Inc. V/s Tata Sons Ltd.	Delhi High Court / 28.04.2017
4.	Venture Global V/s Tech Mahindra	Supreme Court / 01.11.2017
5.	Mr. S. Bhaskar V/s Enforcement Directorate FEMA	Karnataka High Court 17.03.2011
6.	Unit of India & Ors V/s Premier Ltd.	Supreme Court
7.	Vodafone International Holding *VIH) V/s Union of India (UOI)	Supreme Court of India / dated 20.01.2021
8.	Kanwar Natwar Singh V/s Director of Enforcement & Anr	Supreme Court of India / dated 05.10.2010
9.	S.K.Sinha Chief Enforcement Officer V/s Videocon International Ltd.	Supreme Court of India / dated 25.01.2008
10.	Suborno Bose vs Enforcement Directorate and Anr	Supreme Court of India / dated 05.03.2020

1. IDBI Trusteeship Services Limited v. Hubtown Ltd

(Citation: Supreme Court, Civil Appeal No.10860 of 2016 dated 15.11.2016)

Facts

- FMO, a non-resident foreign entity, made an investment into an Indian company, Vinca Developer Private Limited (Vinca) by way of compulsorily convertible debentures (CCPS) and equity shares.
- The CCPS were to convert into 99% of the voting shares of Vinca. The proceeds of the investment were further invested by Vinca in its wholly owned subsidiaries, Amazia Developers Private Limited (Amazia) and Rubix Trading Private Limited (Rubix) by way of optionally convertible debentures (OPCDs) bearing a fixed rate of interest.
- IDBI Trusteeship Services Ltd. (Debenture Trustee) was appointed as a debenture trustee in relation to the OPCDs, acting for the benefit of Vinca. Hubtown Limited (Hubtown) also issued a corporate guarantee in favour of the Debenture Trustee to secure the OPCDs.
- Amazia and Rubix defaulted on the OPCDs and Hubtown, being called upon to pay under the guarantee, failed to do so. Accordingly the Debenture Trustee filed a summary suit against Hubtown in the Bombay High Court.

Issue

Under which circumstances a defendant may be granted leave to defend in a suit for summary judgment?

Bombay HC

1. The Bombay High Court granted Hubtown an unconditional leave to defend in the summary suit.
2. The order of the High Court proceeded on the premise that the various transactions including the CCPS and OPCDs should be construed as a whole, since the court was of the view that they constituted a colourable device for providing assured return to the foreign investor, which according to the High Court was violative of the FEMA guidelines.

3. The Bombay High Court found that since Vinca would be owned by FMO upon conversion of the CCDs, by virtue of the fixed return on the OPCDs, FMO was indirectly obtaining a fixed return on its investment (which is not allowed under certain circumstances in the FEMA guidelines).
4. The court further held that the investors, having participated in the illegality, could not seek the assistance of the court to recover amounts invested illegally.

Supreme Court

1. The court noted that the investment was made by FMO in Vinca for subscription to shares as well as compulsorily convertible debentures. This transaction was not violative of the FEMA regulations.
2. The investment made by Vinca in Amazia and Rubix by way of OPCDs was also prima facie in compliance with FEMA regulations. Further, once the corporate guarantee was invoked, a payment made under the corporate guarantee would be a transaction between residents. At this stage also prima facie again, there was no infraction of the FEMA regulations.
3. The court further held since FMO was to become a 99% holder of Vinca after the requisite time period had elapsed, FMO would at that stage have the ability to utilise the funds received pursuant to the overall structure in India. Again prima facie there would have been no breach of FEMA regulations. At the stage that FMO wishes to repatriate such funds, RBI permission would be necessary. If RBI permission were not granted (and therefore the amounts were retained in India), then again there would be no infraction of FEMA regulations.
4. The Supreme Court further examined the different categories of defences that a judge should keep in mind before granting an unconditional leave to defend in a summary suit. The court held that in the present case, the defence of the defendant was in the realm of 'plausible but improbable' as the defendants had initially serviced the OPCDs before occurrence of the default and also there was no prima facie breach of the FEMA regulations. The court accordingly directed Hubtown to deposit the principal amount claimed under the guarantee as a precondition to defend the suit.

2. Cruz City I Mauritius Holdings v. Unitech Limited

(Citation: Delhi High Court, EX.P.132/2014, dated 11.04.2017)

Facts

- Cruz City 1 Mauritius Holdings (Cruz City) filed a petition in the Delhi High Court for enforcement of an arbitral award rendered under the rules of the London Court of International Arbitration (Award).
- This required Unitech Limited (Unitech) and Burley Holding Limited (Burley), a wholly owned subsidiary of Unitech, to pay Cruz City the pre-determined purchase price of all of Cruz City's equity shares in a joint venture (incorporated in Mauritius) pursuant to:
  1. A "put option" exercised by Cruz City against Burley.
  2. A keep-well agreement (which was in the nature of a guarantee) whereby Unitech was to make the necessary financial contribution in Burley to enable it to meet its obligations.
- However, when that award was sought to be enforced before the Delhi High Court, Unitech claimed that the enforcement of award is impressible under FEMA as it is against public policy.

Issue

Whether violation of any regulation or any provision of FEMA would ipso jure offend the public policy of India?

Key Ratio Decidendi

The Delhi High Court critically examined the scope of the "public policy" exception under section 48 of the Arbitration & Conciliation Act, 1996 and considered "whether violation of any regulation or any provision of FEMA would ipso jure offend the public policy of India".

The court held that "the width of the public policy defense to resist enforcement of a foreign award, is extremely narrow. And the same cannot be equated to offending any particular provision or a statute."

"It plainly follows from the above that a contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression "fundamental policy" connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country. The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment."

Hence, foreign arbitral award can be enforced in India pertaining to put options, exit at assured return, and guarantee arrangements and the provisions of FEMA and related regulations cannot be claimed as defense by Indian parties

3. NTT Docomo Inc. v. Tata Sons Ltd

(Citation: Delhi High Court, O.M.P.(EFA)(COMM.) 7/2016, dated 28.04.2017)

Facts

- In 2009, NTT Docomo Inc. (Docomo), Tata Sons Ltd. (Tata) and Tata Teleservices Ltd. (TTSL) entered into a shareholders' agreement. Under the agreement, Tata was required to find a buyer for Docomo's shares in TTSL, in the event that TTSL failed to meet certain performance parameters.
- The sale price was required to be the higher of (i) the fair value of the shares; or (ii) 50% of the price at which Docomo had purchased the shares. The clause was intended to give Docomo downside protection on its investment.

- In 2014, Docomo exercised this right and called upon Tata to find a buyer for its shares in TTSL. Tata argued that it was not under an unconditional obligation, and that it had the option to decide whether to find a buyer or to buy the shares itself. Having chosen to buy the shares itself, the 'special permission' of the RBI was required, since the value of the shares had fallen. Tata argued that since the 'special permission' of the RBI was not forthcoming, it was not liable to purchase the shares under the contract.
- In a unanimous award, a three-member arbitral tribunal rejected this argument and held that Tata was under an unqualified obligation to perform. It held that the impediment to Tata's performance was factual rather than legal, and that the contract could be performed even without the special permission of the RBI. The tribunal then proceeded to award damages to Docomo to the extent of USD 1.17 billion along with interest and costs.
- The amount of damages represented the amount that Docomo would have received had Tata performed the contract. Since Tata did not pay the amounts awarded, Docomo filed an enforcement petition in the Delhi High Court.
- While Tata resisted the enforcement initially, the parties ultimately reached a compromise, and filed consent terms with the Court, essentially giving effect to the award. During the course of the proceedings, the RBI impleaded itself in these proceedings, and argued that neither the award nor the consent terms should be given effect since it would lead to a violation of foreign exchange regulations.

Issue

The primary issue in dispute before the Delhi High Court was the legitimacy of RBI's objections to the Award's enforcement.

Delhi High Court

1. The Court analysed Section 48(1) along with Section 2(h) of the Arbitration and Conciliation Act, 1996 (the "Arbitration Act") and concluded that there is no provision envisaged under the Arbitration Act which permits intervention by an entity that is not a party to the award, to oppose enforcement of an arbitral award.
2. The Court then considered Order XXIII Rule 3 of the CPC which provides that a compromise must be lawful. The Court held that the mere fact that a statutory body's power and jurisdiction might be discussed in an adjudication or an Award will not confer locus standi on such body or entity to intervene in those proceedings. At the same time, the RBI will, just as any other entity, be bound by an award interpreting the scope of its powers and any of its regulations subject to it being upheld by a Court when challenged by a party to the award. It also held that the RBI does not have the locus to challenge the decision of a court / arbitral tribunal interpreting Indian regulations in a contractual dispute. Thus, for instance, if an arbitral tribunal determined that the RBI's permission was not required for a particular payment, it was not open to the RBI to challenge such determination.
3. The Court then went on to examine the validity of the arbitral award. It agreed with the interpretation of the tribunal in holding that Tata's obligations were capable of performance without the special permission of the RBI. It also held that the tribunal's interpretation of FEMA was not improbable, and did not violate Indian public policy. The Court opined that there were no provisions in FEMA that absolutely prohibited a contractual obligation from being performed. It only envisaged a grant of special permission of the RBI.
4. The Court held that it was correctly observed by the AT that Clause 5.7.2 of SHA was legally capable of performance even without the special permission of the RBI because such permission could be generally obtained under sub-regulation 9(2) of FEMA where shares of an Indian company are transferred between two non-resident entities. With regard to the legality of the Award, the Court agreed with the AT and stated that it was rightly pointed by the AT that the clauses of SHA were in consonance with the provisions of Indian law and therefore the grounds under Section 48 of Arbitration Act could also not be attracted. Docomo invested US $2.5 billion and would just receive half of that amount as Award, thus making it neither perverse nor improbable.
5. Lastly, the Court examined the validity of the compromise terms agreed between the parties, and held that they were enforceable as well. In coming to this finding, the Court placed considerable emphasis on the importance of giving effect to contracts entered into by Indian entities while attracting international investors and building goodwill in the international arena.

4. Venture Global v. Tech Mahindra
(Citation: Supreme Court, Civil Appeal No. 17753-17755 of 2017 dated 01.11.2017)

Facts

The case arose out of an international commercial arbitral award rendered in London in 2006, pursuant to a Joint Venture Agreement (JV) between Venture Global, an American company and Tech Mahindra. In keeping with the terms of this JV, the award held that there was an 'event of default' at Venture Global's behest and directed that it transfer its 50% share in the JV to Tech Mahindra at book value. Following enforcement proceedings at the High Court level, the matter was taken up on appeal by the Supreme Court. Two main issues were framed

- whether the patent illegality standard was to be applied in this case and
- whether a violation of the Foreign Exchange Management Act (FEMA) arising out of the share transfer directed by the arbitral tribunal would render the award unenforceable in India on public policy grounds.

Issue

- ❖ What is the applicability of the "patent illegality" limb of public policy to international commercial arbitrations?
- ❖ Whether an award that merely violates Indian municipal law would be rendered unenforceable under this ground?

Key Ratio Decindi

The 2015 Amendment to the Arbitration Act which provided that the patent illegality standard would not apply to international commercial arbitrations did not apply to this case, since proceedings commenced much before the Amendment (which applies only prospectively).

With the patent illegality standard therefore applicable to the foreign award in this case, *the Associate Builders standard (that is only applicable to domestic awards post-2015)* was applied in this case.

Violation of certain provisions of the Foreign Exchange Management Act ('FEMA'), the Indian Penal Code ('IPC') and the Companies Act themselves would also render the award unenforceable on public policy grounds raises alarm bells.

The court relied on the judgement of Renusagar v. General Electric wherein it was held that any FERA violation, however technical, would render an international commercial arbitral award unenforceable on public policy grounds.

5. Mr. S. Bhaskar vs Enforcement Directorate FEMA
(Citation: Karnataka High Court, M.F.A. No. 4546/2004 (FEMA) dated 17.03.2011)

Facts

On 9.10.2002, the appellant was found in illegal possession of US $20,000/-. The Deputy Director, Enforcement Directorate after holding an enquiry found the appellant guilty of contravening Section 3(a) of the Act and accordingly passed the order dated 29.01.2003 referred to above by imposing a penalty of ₹ 50,000/- on the appellant under Section 13(1) of the Act; the penalty of ₹ 50,000/- imposed was directed to be adjusted from the seized US $20,000/- and the balance amount was ordered to be released to the appellant. The Deputy Director thought it fit not to exercise the power under Section 13(2) of the Act to confiscate the foreign currency involved in the offence.

Being aggrieved by the aforesaid order, the respondent-Enforcement Directorate carried the matter to the Appellate Tribunal for Foreign Exchange, New Delhi by filing a Revision Petition under Section 19(6) of the Act. The Appellate Tribunal, on consideration of the matter, found that the power exercised by the Deputy Director was contrary to law and accordingly by the order impugned herein has set aside the order of the Deputy Director in so far as it related to release of the foreign currency by ordering confiscation of the seized currency of US $20,000/- after adjustment of the penalty of ₹ 50,000/- imposed by the Deputy Director

Issue

Whether the Appellate Tribunal was justified in law in modifying the order of the Deputy Director dated 29.01.2003 by directing confiscation of the foreign currency of US $20,000/- after adjusting the penalty of ₹ 50,000/- therefrom?

Key Ratio Decidendi

Section 13 of the Act speaks of penalties; both the sub-Sections provide for imposition of different kinds of penalty. A plain reading of the Section would show that imposition of a penalty under sub-Section (1) will not bar exercise of power under sub-Section (2) to confiscate any currency in respect of which the contravention has taken place. The power of confiscation conferred under sub-Section (2) is in addition to the power to impose penalty under sub-Section (1). Therefore, it is perfectly open to the Adjudicating Authority to exercise power under sub-Section (2) in addition to exercise of power under sub-Section (1). In other words, it is open to the Adjudicating Authority to impose any penalty as provided under sub-Section (1) as well as directing confiscation of currency/security/money or property in respect of which the contravention has taken place.

On the facts of the case, the Deputy Director was not right in exercising his discretion in ordering release of the seized foreign currency. It is relevant to state that possession of the foreign currency of US $20,000/- by the appellant was admittedly illegal; he had not traced his possession of the foreign currency to any legitimate source of acquisition.

6. Union of India & Ors vs M/s Premier Limited

(Citation: Supreme Court, Civil Appeal No. 3529 of 2008, dated)

Facts

- On 01.05.1991, a memorandum to show cause notice was issued by the Special Director to respondent Nos. 2, 3 and 4, namely, M/s. Godrej Industries Ltd and its two Directors (R-3 and R-4) for allegedly committing contravention of Sections 9(1)(a), 9(1)(c) and Section 16(1) of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "FERA") in respect of imports and exports of certain commodities made with two foreign parties, viz., M/s. Fingrain, S.A., Geneva and M/s. Continental Grain Export Corporation, New York during the year 1977-78.
- During the pendency of the proceedings, FERA was repealed with effect from 01.06.2000. It was, however, replaced by Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA").
- On 05.12.2003, an adjudication order was passed by the Deputy Director of Enforcement under FEMA read with FERA in relation to the show cause notice dated 01.05.1991. By this order, penalty of ₹ 15,50,000/- was imposed on M/s. Godrej Industries Ltd. and its two Directors for contravening the provisions of Sections 9(1)(a) and 9(1)(c) read with Section 16(1) of FERA.
- On 15.01.2004, the respondent Nos. 2 to 4 felt aggrieved by the adjudication order dated 05.12.2003 and filed appeal before the Special Director (Appeals) under Section 17 of FEMA.
- On 08.09.2004 and 08.11.2004, the Special Director (Appeals) dismissed the appeals as being not maintainable. He held that the Special Director (Appeals) has no jurisdiction to hear the appeals against the adjudication order passed under Section 51 of FERA.
- Respondent Nos. 2 to 4 felt aggrieved by orders dated 08.09.2004 and 08.11.2004 and filed writ petitions before the High Court of Bombay at Mumbai. By impugned common order, the High Court allowed the writ petitions and quashed the orders of the Special Director (Appeals). The High Court held that the appeals filed by respondent Nos. 2 to 4 before the Special Director (Appeals) against the adjudication order dated 05.12.2003 were maintainable in as much as the Special Director (Appeals) possessed the jurisdiction to decide the appeals on merits.

Issue

If the Adjudicating Officer has passed an order after the repeal of FERA in the proceedings initiated prior to 01.06.2000, whether an appeal against such order will lie before the "Special Director (Appeals)" under Section 17 of FEMA or before the "Appellate Tribunal" under Section 19 of FEMA.

Key Ratio Decidendi

Section 49(5)(b) of FEMA deals with repeal and saving in relation to the action taken and to be taken under FERA, 1973. Reading of this Section shows that the legislature has equated the Appellate Board constituted under FERA with the Appellate Tribunal constituted under FEMA for disposal of the appeals filed under Section 52(2) of FERA against an order passed under Section 51 of FERA which were pending before the Appellate Board as on 01.06.2000. Such appeals stood transferred from the Appellate Board to the Appellate Tribunal for their disposal in accordance with law.

The reason as to why a specific provision for transfer of such pending appeals was made for their disposal from the Appellate Board to the Appellate Tribunal was that the Appellate Board constituted under FERA stood dissolved by Section 49(1) of FEMA with effect from 01.06.2000.

It is this dissolution of the Appellate Board, which necessitated the legislature to make a corresponding provision in the new Act (FEMA) so that the consequences arising out of the dissolution of the Appellate Board constituted under FERA is taken care of by another appellate authority constituted under the FEMA and all pending appeals are automatically transferred to the Appellate Board for their disposal under FEMA.

- So far as Section 49(5)(b) of FEMA is concerned it specifically provides that the appeals filed under Section 52(2) of FERA against the order passed under Section 51 of FERA will be decided by the Appellate Tribunal under FEMA.
- So far as Section 81(c) of FERA, 1973 is concerned, it deals with Repeal and Saving of FERA, 1947. Clause (c) of Section 81 specifically provides that all the appeals filed under Section 23 of FERA, 1947, whether pending on the date of Repeal or/and those filed after the repeal of FERA, 1947, shall be disposed of by the Appellate Board constituted under FERA, 1973.

While Section 49(5)(b) of FEMA is not worded alike Section 81(c) of FERA, yet, in our view, it shows the intention of the legislature that all such appeals have to be heard by the Appellate Board under the FERA. The legislative intent contained in Section 81(c) can be taken into account for interpreting the relevant provisions of FERA and FEMA for deciding the question which is the subject matter of this appeal.

7. Vodafone International Holding (VIH) v. Union of India (UOI)
(Citation: Supreme Court, Civil Appeal No. 733 of 2012 dated 20.01.2012)

Facts

Vodafone International Holding (VIH) and Hutchison telecommunication international limited or HTIL are two non-resident companies. These companies entered into transaction by which HTIL transferred the share capital of its subsidiary company based in Cayman Island i.e. CGP international or CGP to VIH. VIH or Vodafone by virtue of this transaction acquired a controlling interest of 67 percent in Hutch is on Essar Limited or HEL that was an Indian Joint venture company (between Hutchinson and Essar) because CGP was holding the above 67 percent interest prior to the above deal. The Indian Revenue authorities issued a show cause notice to VIH as to why it should not be considered as "assesse in default" and thereby sought an explanation as to why the tax was not deducted on the sale consideration of this transaction. The Indian revenue authorities thereby through this sought to tax capital gain arising from sale of share capital of CGP on the ground that CGP had underlying Indian Assets. VIH filed a writ petition in the High Court challenging the jurisdiction of Indian revenue authorities. This writ petition was dismissed by the High Court and VIH appealed to the Supreme Court which sent the matter to Revenue authorities to decide whether the revenue had the jurisdiction over the matter. The revenue authorities decided that it had the jurisdiction over the matter and then matter went to High Court which was also decided in favour of Revenue and then finally Special Leave petition was filed in the Supreme Court.

Issue

Whether the Indian revenue authorities had the jurisdiction to tax an offshore transaction of transfer of shares between two non-resident companies whereby the controlling interest of an Indian resident company is acquired by virtue of this transaction?

Key Ratio Decidendi

Corporate structures

- Multinational companies often establish corporate structures or affiliate subsidiaries or joint ventures for various business and commercial purposes and these are primarily aimed to yield better returns to the investors and help in progress of the company.
- And therefore the burden is entirely upon the revenue to show that such incorporation, consolidation, restructuring has been affected for fraudulent purpose so as to defeat the law or evade the taxes.

Overseas companies

- Many overseas companies invest in countries like Mauritius, Cayman Island due to better opportunities of investment and these are undertaken for sound commercial and sound legitimate tax planning and not to conceal their income or assets from home country tax jurisdiction and India have recognised such structures.
- These offshore transactions or these offshore financial centres do not necessarily lead to the conclusion that these are involved in tax evasion.

Holding and Subsidiary Companies

- The companies act have recognized that subsidiary company is a separate legal entity and though holding company control the subsidiary companies and respective business of the company within a group but it is settled principle that business of subsidiary is separate from the Holding company.
- The assets of subsidiary companies can be kept as collateral by the parent company but still these two are distinct entities and the holding company is not legally liable for the acts of subsidiaries except in few circumstances where the subsidiary company is a sham.
- The Holding company and subsidiary companies may form pyramid of structures whereby the subsidiary company may hold controlling interest in other companies forming parent company.

Shares and controlling interest

- The transfer of shares and shifting of controlling interest cannot be seen as two separate transactions of transfer of shares and transfer of controlling interest.

- The controlling interest is not an identifiable or a distinct capital asset independent of holding of shares and is inherently a contractual right and not property right and cannot be considered as transfer of property and capital assets unless the Statue stipulates otherwise.
- The acquisition of shares may carry acquisition of controlling interest which is purely commercial concept and tax is levied on transaction and not on its effect.

Role of CGP

- CGP was already part of HTIL corporate structure and sale of CGP share was a genuine business transaction and commercial decision taken interest of investors and corporate entity and not a dubious one.

The site of shares of CGP

- Shares of CGP were registered in Cayman Island and law of Cayman also does not recognize multiplicity of registers and hence site of shares and transfer of shares is situated in Cayman and shall not shift to India.

Extinguishment of rights of HTIL in HEL

- The transfer of CGP share automatically resulted in host of consequences that included transfer of controlling interest and controlling interest cannot be dissected from CGP share without legislative intervention.
- Upon transfer of shares of the holding Company, the controlling interest may also pass on to the purchaser along with the shares and this Controlling interest might have percolated down the line to the operating companies but that controlling interest is still inherently remains contractual and not a property right unless otherwise is provided by the statue.

- The acquisition of shares may carry the acquisition of controlling interest and this is purely a commercial concept and the tax can be levied only on the transaction and not on its effect and hence, consequently, on transfer of CGP share to Vodafone, Vodafone got control over eight Mauritian Company and this does not mean that the site of CGP share has shifted to India for the purpose of charging capital gains tax.

Hence, Sale of CGP share by HTIL to Vodafone or VIH does not amount to transfer of capital assets within the meaning of Section 2 (14) of the Income Tax Act and thereby all the rights and entitlements that flow from shareholder agreement etc. that form integral part of share of CGP do not attract capital gains tax.

8. Kanwar Natwar Singh vs Director Of Enforcement & Anr.

(Citation: Supreme Court, Civil Appeal No. 8601 of 2010 dated 05.10.2010)

Facts

Natwar Singh & Jagat Singh were alleged to have dealt in and acquired Foreign Exchange totaling US $8,98,027 in respect of some Iraq oil contracts in contravention of FEMA.

A notice was issued asking Natwar Singh to show-cause why an inquiry should not be held against them. In response, Natwar Singh demanded that the Adjudicating Authority furnish "copies of all documents in ... possession in respect of the instant case, including the 83000 documents allegedly procured by one Virender Dayal".

The Adjudicating Authority furnished copies of the documents as were relied upon by it but declined to furnish copies of other documents and decided to hold an inquiry in accordance with FEMA. This non-furnishing of "all documents" was challenged by Natwar Singh in the Delhi High Court which dismissed the challenge.

Issue

Whether a noticee served with show cause notice under Rule 4(1) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (hereinafter referred to as 'the Rules') is entitled to demand to furnish all the documents in possession of the Adjudicating Authority including those documents upon which no reliance has been placed to issue a notice requiring him to show cause why an inquiry should not be held against him?

Key Ratio Decidendi

The extent of applicability of principles of natural justice depends upon the nature of inquiry, the consequences that may visit a person after such inquiry from out of the decision pursuant to such inquiry. The right to fair hearing is a guaranteed right. Every person before an Authority exercising the adjudicatory powers has a right to know the evidence to be used against him. However, the principles of natural justice do not require supply of documents upon which no reliance has been placed by the Authority to set the law into motion. Supply of relied on documents based on which the law has been set into motion would meet the requirements of principles of natural justice.

The concept of fairness is not a one way street. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. Duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of the fairness and it has its own limitations. The extent of its applicability depends upon the statutory framework.

The only object of Natwar Singh's unreasonable insistence for supply of all documents was obviously to obstruct the proceedings and he has been able to achieve that object as is evident from the fact that the inquiry initiated as early as in the year 2006 still did not even commence.

Furthermore, observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. The observations must be read in the context in which they appear. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision to impute a different meaning to the observations.

9. S.K. Sinha, Chief Enforcement Officer vs Videocon International Ltd.

(Citation: Supreme Court, Appeal (crl.) 175 of 2007 dated 25.01.2008)

Facts

The Foreign Exchange Regulation Act, 1973 (FERA) was repealed with effect from 01.06.2000 on coming into force of the Foreign Exchange Management Act, 1999 (FEMA). Section 49(3) of FEMA says that "notwithstanding in any other law...., no Court shall take cognizance of an offence under the repealed Act.....after expiry of a period of two years from the date of coming into force of FEMA."

A complaint under FERA was filed, taken cognizance of on May 24, 2002 and issue of summons also was ordered on the same day making the process returnable on 07.02.2003. Process, however was issued on February 3, 2003.

On these facts the High Court equated taking cognizance with issue of process and held the complaint to be barred under Section 49(3) of FEMA

Issue

Whether issuance of process in a criminal case is one and the same thing or can be equated with taking cognizance by a Criminal Court? And if the period of initiation of criminal proceedings has elapsed at the time of issue of process by a Court, the proceedings should be quashed as barred by limitation?

Key Ratio Decidendi

The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.

The Supreme Court further held that "taking cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.

In the case on hand, it is amply clear that cognizance of the offence was taken by the Chief Metropolitan Magistrate, Mumbai on May 24, 2002, i.e., the day on which the complaint was filed, the Magistrate, after hearing the counsel for the department, took cognizance of the offence and passed the necessary order. Undoubtedly, the process was issued on February 3, 2003. In our judgment, however, it was in pursuance of the cognizance taken by the Court on May 24, 2002 that a subsequent action was taken under Section 204 under Chapter XVI.

Taking cognizance of offence was entirely different from initiating proceedings; rather it was the condition precedent to the initiation of the proceedings. Order of issuance of process on February 3, 2003 by the Court was in pursuance of and consequent to taking cognizance of an offence on May 24, 2002.

The High Court, in our view, therefore, was not right in equating taking cognizance with issuance of process and in holding that the complaint was barred by law and criminal proceedings were liable to be quashed. The order passed by the High Court, thus, deserves to be quashed and set aside.

10. Suborno Bose V/s Enforcement Directorate & Anr
(Citation: Supreme Court, CIVIL APPEAL NO. 6267 OF 2020, dated 5th March, 2020)

Facts

- A show–cause notice dated 19.5.2004 was issued to the appellant, stating that there was a prima facie contravention of Section 10(6) of the FEMA Act read with Sections 46 and 47 of the Act and paragraphs A–10 and A–11 (Current Account Transaction) of the Foreign Exchange Manual 2003–04 in the complaint filed against the company named M/s. Zoom Enterprises Limited of which, the appellant was the Managing Director.
- The appellant contended that the Company had purchased 2 Nos. of Water Cooled Screw Chiller Unit Model and other accessories for a cost of 374000 FRF from Carrier S.A. of France and Air Handling and Fan Coil Unit for US$ 35766 from Carrier Corporation, Syracuse, New York.
- The import was done under Export Promotion Capital Goods (EPCG) Licence under Open General Licence (OGL). The goods were imported, but kept in warehouse, as the Company, which at the relevant time was under Mr. Aniruddha Roy Chowdhury and others, failed to take steps to get the goods released.
- The adjudicating authority concluded that the noticee Company and the appellant had violated the provisions of FEMA and having found that the goods had arrived in India, but the Company failed to submit Bill of Entry and did not take delivery of the goods.
- The import formalities would have had completed only after submission of Bill of Entry. Thus, though the goods for which foreign exchange was remitted had reached the destination of the users, but the same were not released and as such kept in bonded warehouse. That resulted in contravention warranting issuance of show–cause notice to the Company and the appellant. Resultantly, the adjudicating authority passed the following order: –
- M/s Zoom enterprises Ltd., and their Managing Director Sri Suborno Bose are guilty of the charge and imposed on them the following amount of penalty:

  M/s Zoom Enterprise Ltd.: ₹ 10,00,000/–

  Sri Suborno Bose: ₹ 10,00,000/–

Appeal before the Special Director (Appeals)

- The Company, as well as, the appellant carried the matter in appeal before the Special Director (Appeals), FEMA & Commissioner of Income–Tax, Delhi. The appellate authority vide order dated 13.6.2005 dismissed both the appeals and was pleased to uphold the decision of the adjudicating authority.
- As per the requirements of section 10(6) of FEMA RBI regulation dt. 3.5.2000 and circular dt. 24.8.2000, the formalities for import have to be completed within six months of remittance of foreign exchange.If the appellant is unable to comply with these requirements under FEMA and the RBI, necessary approval of the authorized dealer and the RBI is necessary. Though the imports were made in 2000 but no steps have been taken till 2005 either to take delivery of the goods so imported and warehoused or for taking necessary extension/approval from RBI/authorized dealer.
- As far as the change in management of the company is concerned, the change took place in late 2001 but even after the change in management, the then Chairman, Sh. Anirudh Rai Choudhary, remained Director of the new company up to 2004, as is mentioned in the annual report for the year 2003–04, a copy enclosed with the appeal petition. The Managing Director of the changed company was well aware of the goods so imported and warehoused as a reply were submitted to the Enforcement Authorities as early as in July, 2002.
- The appellant company and its Managing Director responsible for running the company did not take reasonable steps of delivery of the imported goods so warehoused and thereafter to submit bill of entry to the authorized dealer.
- Even when the show cause notice was issued by the AA steps were not taken to take delivery of the goods from the warehouse and to submit the bill of entry to the authorized dealer. It is therefore held that the appellant company is guilty of contravening these provisions of FEMA and guidelines issued by the RBI supra. The AA is justified in imposing the penalty at ₹ 10 lakhs on the appellant company which is confirmed. The appeal filed by the appellant company is accordingly dismissed.

As far as the other appellant is concerned Sh. Suborno Bose was the Managing Director and responsible for the conduct of business of the company. He is so guilty of contravention of provisions of FEMA and guidelines of RBI thereof, supra. It is therefore held that AA is justified in imposing the penalty of ₹ 10 lakhs on the appellant Managing Director which is confirmed. The appeal filed by the Managing Director is accordingly dismissed.

Matter before the High Court

Being aggrieved, the Company, as well as the appellant carried the matter before the High Court at Calcutta. Both appeals were dismissed by the High Court vide judgment and order dated 17.9.2008.

Issue

Whether the appellant could be made liable for the contravention committed by the erstwhile management of the Company.

Key Ratio Decidendi

- The Supreme Court observed that the contravention relates to the period of the year 2000, whereas, the appellant took over the management of the Company The appellant wanted to argue that there was no contravention of Section 10(5) of the FEMA Act or any other provision necessitating action under Section 10(6) of the said Act muchless initiating complaint procedure.
- Ordinarily, the appellant could have been allowed to pursue such argument, but for the dismissal of the special leave petition filed by the Company. In that, consequent to the dismissal of the petition filed by the Company, the finding and conclusion recorded by the adjudicating authority as upheld by the first appellate authority, and of the High Court recording contravention committed by the Company and for which complaint action was just and proper including the imposition of penalty as awarded against the Company and the appellant has attained finality. That cannot be reopened muchless at the instance of the present appellant. This is reinforced by the order issuing notice on the special leave petition filed by the present appellant, dated 30.3.2009. It is indicative of the fact that the contentions specific to absolve the appellant from the complaint action could be examined.
- The real provision which needs to be reckoned for answering the controversy brought before this Court is Section 10(6) of the FEMA Act. This provision is a deeming provision pointing towards the specified circumstances, which would result in having committed contravention of the provisions of the FEMA Act or for the purpose of the stated Section.
- The specified circumstances are

  (i) when a person acquires or purchases foreign exchange for any purpose mentioned in the declaration made by him to authorised person does not use it for such purpose;

  (ii) that person does not surrender the acquired or purchased foreign exchange to authorised person within the specified period, and

  (iii)the person uses the acquired or purchased foreign exchange for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the FEMA Act or the rules or regulations or direction or order made thereunder. Each of these are standalone circumstances.
- In the present case, the finding of fact is that the import of goods for which the foreign exchange was procured and remitted was not completed as the Bill of Entry remained to be submitted and the goods were kept in the bonded warehouse and the Company took no steps to clear the same.
- As a result, Section 10(6) of the FEMA Act is clearly attracted being a case of not using the procured foreign exchange for completing the import procedure. It is also possible to take the view that the Company should have taken steps to surrender the foreign exchange to the authorised person within the specified time as provided in Regulation 6 of the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000 (for short, the FEMA Regulations) issued by the Reserve Bank of India.
- The High Court has opined that the contravention referred to in Section 10(6) by its very nature is a continuing offence. We agree with that view. It is indisputable that the penalty provided for such contravention is on account of civil obligation under the FEMA Act or the rules or regulations or direction or order made thereunder. If the delinquency is a civil obligation, the defaulter is obligated to make efforts by payment of the penalty imposed for such contravention. So long as the imported goods

remained uncleared and obligation provided under the rules and regulations to submit Bill of Entry was not discharged, the contravention would continue to operate until corrective steps were taken by the Company and the persons in charge of the affairs of the Company.

- It is not the case of the appellant that he is not an officer or a person in charge of and responsible to the Company for the conduct of the business of the Company, as well as, the Company on or after 22.10.2001. Considering the fact that the appellant admittedly became aware of the contravention yet failed to take corrective measures until the action to impose penalty for such contravention was initiated, he cannot be permitted to invoke the only defence available in terms of proviso to sub–Section (1) of Section 42 of the FEMA Act that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. In the reply filed to the show– cause notice by the appellant, no such specific plea has been taken.
- The appellant then invited our attention to the reply filed on behalf of the Company on 27.1.2004 in which it is vaguely asserted that on the date when the Memorandum of Understanding was signed, no disclosure was made that the import was done under EPCG licence and the obligations under the said licence remained to be fulfilled. To get benefit of the proviso to Section 42(1), the appellant should have pleaded and proved that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention and made every effort to rectify the contravention in right earnest.
- Be that as it may, once it is held that the contravention is a continuing offence, the fact that the appellant was not looking after the affairs of the Company in the year 2000 would be of no avail to the appellant until corrective steps were taken in right earnest after his taking over the management of the Company and in particular after becoming aware about the contraventions

Conclusion

The Apex Court held that no error has been committed by the adjudicating authority in finding that the appellant was also liable to be proceeded with for the contravention by the Company of which he became the Managing Director and for penalty therefor as prescribed for the contravention of Section 10(6) read with Sections 46 and 47 of the FEMA Act read with paragraphs A–10 and A–11 (Current Account Transaction) of the Foreign Exchange Manual 2003–04. The first appellate authority and the High Court justly affirmed the view so taken by the adjudicating authority.

Significant Case Laws

CHAPTER-6
Prohibition of Benami Property Transactions Act, 1988

Cases included under this Chapter

S. No.	Title of the Case	Court / Date
1.	Mangathai Ammal (Dies) through Lrs V/s Rajeshwari	Supreme Court / 09.05.2019
2.	Smt. P.Leelavathi V/s Shankarnarayan Rao	Supreme Court / 09.04.2019
3.	G. Mahalingappa V/s G.M. Savitha	Supreme Court / 09.08.2005
4.	Meenakshi Mills, Madurai V/s CIT	Supreme Court / 26.09.1956
5.	Sh. Amar N. Gugnani V/s Naresh Kumar Gugnani (Through Legal Heirs)	Supreme Court / 30.08.2005
6.	Pawan Kumar Gupta V/s Rochiram Nagdeo	Supreme Court / 20.04.1999
7.	Bhim Singh V/s Kan Singh	Supreme Court / 01.01.1970
8.	Valliammal (D) by Lrs V/s Subramaniam & Ors.	Supreme Court / 31.08.2004
9.	Niharika Jain w/o Andesh Jain V/s Union of India	Supreme Court / 12.07.2019
10.	M/s Fair Communication and Consultants & Anr V/s Surendra Kerdile	Supreme Court / 20.01.2020

1. Mangathai Ammal (Died) Through Lrs vs Rajeswari
(Citation: Supreme Court, Civil Appeal no. 4805 of 2019 dated 09.05.2019)

Facts

The Supreme Court was considering an appeal against Trial Court and High Court orders which held that the suit properties are benami transactions as the part sale consideration was paid by another person (Narayanasamy Mudaliar) at the time of the purchase of the property. It was also found that the stamp duty at the time of the execution of the Sale Deed was purchased by Mudaliar.

Issue

- Whether the transactions/Sale Deeds in favour of defendant no.1 can be said to be benami transactions or not?
- The defendants also contended was that since by Benami Amendment Act, 2016, Section 3 (2) of the Benami Transaction Act, 1988 the statutory presumption, which was rebuttable, has been omitted, the plea of statutory transaction that the purchase made in the name of wife or children is for their benefit would not be available in the present case?

Key Ratio Decidendi

"While considering a particular transaction as benami, the intention of the person who contributed the purchase money is determinative of the nature of transaction. The intention of the person, who contributed the purchase money, has to be decided on the basis of the surrounding circumstances; the relationship of the parties; the motives governing their action in bringing about the transaction and their subsequent conduct etc."

"To hold that a particular transaction is benami in nature these six circumstances can be taken as a guide:

1. The source from which the purchase money came;
2. the nature and possession of the property, after the purchase;
3. Motive, if any, for giving the transaction a benami colour;
4. Position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
5. Custody of the title deeds after the sale;
6. Conduct of the parties concerned in dealing with the property after the sale."

"Furthermore, the court held that the Benami Transaction (Prohibition) Act would not be applicable retrospectively"

The Apex Court opined that as per Section 3 of the Benami Transaction (Prohibition) Act 1988, there was a presumption that the transaction made in the name of the wife and children is for their benefit. By Benami Amendment Act, 2016, Section 3 (2) of the Benami Transaction Act, 1988 the statutory presumption, which was rebuttable, has been omitted. It is the case on behalf of the respondents that therefore in view of omission of Section 3(2) of the Benami Transaction Act, the plea of statutory transaction that the purchase made in the name of wife or children is for their benefit would not be available in the present case. Aforesaid cannot be accepted. The Benami Transaction (Prohibition) Act would not be applicable retrospectively. Even otherwise and as observed hereinabove, the plaintiff has miserably failed to discharge his onus to prove that the Sale Deeds executed in favour of defendant no.1 were benami transactions and the same properties were purchased in the name of defendant no.1 by Narayanasamy Mudaliar from the amount received by him from the sale of other ancestral properties.

Once it is held that the Sale Deeds in favour of defendant no.1 were not benami transactions, in that case, suit properties, except property nos. 1 and 3, which were purchased in her name and the same can be said to be her self–acquired properties and therefore cannot be said to be Joint Family Properties, the plaintiffs cannot be said to have any share in the suit properties (except property nos. 1 and 3). At this stage, it is required to be noted that the learned Counsel appearing on behalf of defendant no.1 has specifically stated and admitted that the suit property Item nos. 1 and 3 can be said to be the ancestral properties and according to him even before the High Court also it was the case on behal f of the defendant no.1 that item nos. 1 and 3 of the suit properties are ancestral.

In view of the above and for the reasons stated above, the present appeal is partly allowed.

2. Smt. P.Leelavathi vs V.Shankarnarayana Rao
(Citation: Supreme Court, Civil Appeal No. 1099 of 2008 dated 09.04.2019)

Facts

- Late G. Venkata Rao was an Estate Agent and he was doing money lending business in his name and also in the names of his sons and he was purchasing properties in the names of his sons, though his father was funding those properties.
- According to the plaintiff, at the time of his death, G. Venkata Rao was in possession of a large estate comprising of immoveable properties, bank deposits etc.
- It was the case that the suit schedule properties were as such joint family properties and/or they were purchased in fact by their late father G. Venkata Rao and the same was funded by their father.
- That, the plaintiff was entitled to 1/4th share in all the said properties belonging to her father.

Issue

Whether the transactions can be said to be benami in nature merely because some financial assistance has been given by the father (Late G. Venkata Rao) to the sons (defendants) to purchase the properties, subject matter of the suit (filed by his daughter, claiming share in these properties)

Key Ratio Decidendi

In the case of Binapani Paul v. Pratima Ghosh the court had held that "the source of money had never been the sole consideration, and is only merely one of the relevant considerations but not determinative in character."

In Valliammal v. Subramaniam, the court had delineated six circumstances to check whether the transaction is benami or not. These are: (a) The source from which the purchase money came; (b) the nature and possession of the property, after the purchase; (c) Motive, if any, for giving the transaction a benami color; (d) Position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (e) Custody of the title deeds after the sale; and (f) Conduct of the parties concerned in dealing with the property after the sale.

"It is true that, at the time of purchase of the suit properties, some financial assistance was given by Late G. Venkata Rao. However, as observed by this Court in the aforesaid decisions, that cannot be the sole determinative factor/circumstance to hold the transaction as benami in nature. The plaintiff has miserably failed to establish and prove the intention of the father to purchase the suit properties for and on behalf of the family, which were purchased in the names of defendant Nos. 1 to 3.....Therefore, the intention of Late G. Venkata Rao to give the financial assistance to purchase the properties in the names of defendant Nos. 1 to 3 cannot be said to be to purchase the properties for himself and/or his family members and, therefore, as rightly observed by the High Court, the transactions of purchase of the suit properties – Item Nos. I(a) to I(c) in the names of the defendant Nos. 1 to 3 cannot be said to be benami in nature. The intention of Late G. Venkata Rao was to provide the financial assistance for the welfare of his sons and not beyond that."

3. G. Mahalingappa vs G.M. Savitha
(Citation: Supreme Court, Civil Appeal no. 2867 of 2000 dated 09.08.2005)

Facts

- The appellant was the father of the respondent. The appellant purchased a suit property in the name of the respondent by a registered sale deed dated 24th of August, 1970 when the respondent was a minor of seven years of age.
- After her marriage, the respondent asked for vacation of the suit property not only from the appellant & his family but also from the tenants who were also defendants in the suit and for payment of rent to her.
- The respondent filed a suit or declaration of title and recovery of possession in respect of the suit property on the averment that since the suit property stood in her name and the same was purchased for the benefit of the respondent and as a security for her marriage she was entitled to a decree for declaration and possession after the appellant and the tenants refused to move and to pay rents to her.

Issue

1. Does the plaintiff prove that she is the owner of the suit property?

2. Is she entitled to possession of the suit property as contended by her?
3. Is she entitled for damages as claimed by her?
4. To what relief the plaintiff was entitled, if any?

Key Ratio Decidendi

The Supreme Court noted the essential features of a Benami transaction:

- The real owner should have purchased the property in the name of the ostensible owner;
- The property should have been purchased by the benamidar for his own benefit - in the case in hand the fact that the real owner, the father of the benamidar daughter, bought the property for his own benefit supported the inference that the father was the real owner;
- The fact that the father and mortgaged the property to raise a loan also supported this inference;
- That he had let out the property also shows that he was in control of the same.

The apex Court observed that the presumption that the suit property was purchased for the benefit of the respondent only was amply rebutted by the appellant by adducing evidence that the suit property, though purchased in the name of the respondent, was so purchased for the benefit of the appellant and his family. As noted here in earlier, the appellate court as well as the trial court on consideration of all the materials including oral and documentary evidence and on a sound reasoning after considering the pleadings of the parties came to concurrent findings of fact that purchase of the suit property by the appellant in the name of the respondent was benami in nature. As noted herein earlier, the following findings of fact were arrived at by the appellate court and the trial court to conclude that the transaction in question was benami in nature:

1. the appellant had paid the purchase money.
2. the original title deed was with the appellant. And
3. the appellant had mortgaged the suit property for raising loan to improve the same.
4. he paid taxes for the suit property.
5. he had let out the suit property to defendant Nos. 2 to 5 and collecting rents from them.
6. the motive for purchasing the suit property in the name of plaintiff was that the plaintiff was born on an auspicious nakshatra and the appellant believed that if the property was purchased in the name of plaintiff/respondent, the appellant would prosper.
7. the circumstances surrounding the transaction, relationship of the parties and subsequent conduct of the appellant tend to show that the transaction was benami in nature.

Keeping these concurrent findings of fact in our mind which would conclusively prove that the transaction in question was benami in nature, let us now consider whether the appellant was entitled to raise the plea of benami in view of introduction of the Benami Transaction (Prohibition) Act, 1988 (the Act) and whether the Act was retrospective in operation. If so, in view of Section 4(2) of the Act, plea of benami in the defence of the appellant was not available to him.

Section 3(2) makes it abundantly clear that if a property is purchased in the name of an unmarried daughter for her benefit, that would only be a presumption but the presumption can be rebutted by the person who is alleging to be the real owner of the property by production of evidences or other materials before the court. In this case, the trial court as well as the appellate court concurrently found that although the suit property was purchased in the name of the respondent but the same was purchased for the interest of the appellant. We are therefore of the opinion that even if the presumption under section 3(2) of the Act arose because of purchase of the suit property by the father (in this case appellant) in the name of his daughter (in this case respondent), that presumption got rebutted as the appellant had successfully succeeded by production of cogent evidence to prove that the suit property was purchased in the benami of the respondent for his own benefit.

The Court held that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the appellate court as well as the trial court which findings were rendered on consideration of the pleadings as well as the material (oral and documentary) evidence on record.

For the reasons aforesaid this appeal is allowed. The judgment of the High Court impugned in this Court is set aside and the judgments of the trial court as well as the appellate court are affirmed. The suit filed by the respondent shall stand dismissed. There will be no order as to costs.

4. Meenakshi Mills, Madurai v. CIT

(Citation: Supreme Court, Civil Appeal No. 124 of 1954 dated 26.09.1956)

Facts

The assessee's Managing Agents are the firm of Messrs K. R. Thyagaraja Chettiar and Co., whose partners are Mr. Thyagaraja Chettiar and his two sons. It carries on business in the manufacture and sale of yarn, and for the purpose of that business it purchases cotton and occasionally sells it. Its profits arise for the most part from the sale of yarn and to some extent from the re-sale of cotton. According to the account books of the company, its profits from business for the account year 1941-42 were Rs. 9,25,364, for 1942-43 Rs. 24,09,832 and for 1943-44 Rs. 29,13,881. In its returns, the appellant showed these amounts as its income chargeable to tax for the respective years. The Department contended that the Company had earned more profits than were disclosed in its accounts, and that it had contrived to suppress them by resort to certain devices. The contention of the Department was that the amounts shown as profits made by the intermediaries [Meenakshi and Co., Sivagami and Co., Mangayarkarasi and Co., and Alagu and Co.] represented in fact the profits actually earned by the appellant, and that they should be added to the figures shown in its accounts as its profits.

Issue

Whether on the facts and in the circumstances of the case there is any legal evidence to support the finding that the four firms, Meenakshi and Co., Sivagami and Co., Mangayarkarasi and Co., and Alagu and Co., were benamidars for the appellant and that the profits made by these firms were profits made by the appellant?

Key Ratio Decidendi

A question of benami was one of mixed law and fact, and that accordingly a finding thereon was open to review under section 66(1). Whether that is a correct reading of what the Tribunal had found will presently be considered. Assuming that such is the finding, what is the ground for holding that a finding of benami is one of mixed law and fact? The only basis for such a contention is that the finding that a transaction is benami is a matter of inference from various primary basic facts such as who paid the consideration, who is in enjoyment of the properties and the like. But that is not sufficient to make the question one of mixed law and fact unless, as already stated, there are legal principles to be applied to the basic findings before the ultimate conclusion is drawn. But no such principles arise for application to the determination of the question of benami, which is purely one of fact, and none has been suggested by the appellant.

An important test for determining whether a transaction is benami is to discover the source of consideration for the transfer. When the question is whether firms and companies are benamidars for another person, what has to be found is whether it was the latter who found the capital of those concerns. The firms and companies had according to their books had their own capital, and there is no finding that the appellant subscribed it. Another important test of benami is to find who has been in enjoyment of the benefits of the transaction. It has not been shown that the profits of the intermediaries had been uti lised by the appellant. Therefore, the finding that the intermediaries were benamidars of the appellant could not stand.

5. Sh. Amar N. Gugnani Vs. Naresh Kumar Gugnani (Through Legal Heirs)

(Citation: Delhi High Court, CS(OS) No. 478/2004 dated 30.08.2005)

Facts

- The plaintiff and Defendant are brothers. The Plaintiff was living with his father, mother and younger brother as well as sisters in a rented house.

- That in February/March 1969, the Plaintiff visited India and gave substantial funds to his father to keep it by way of deposit in India for the benefit of the Plaintiff. Again in the year September 1970, the Plaintiff handed over substantial funds to his father to keep in deposit in trust for and on behalf of the Plaintiff and for his benefit.
- That after marriage of the Plaintiff, the Plaintiff's father suggested that as the Plaintiff's substantial funds are in deposit with him and he is doing well for himself in USA, he should purchase a plot of land to build a house thereon in New Delhi.
- That on 4th May, 1973 the Plaintiff came to India and handed over further funds to his father for acquiring the plot that had already been identified on perpetual lease. The said deposit was made so that including the funds deposited from time to time, the Plaintiff's father had sufficient funds for the acquisition, registration of lease deed and incidental expenses.
- That in view of the said, understanding the Plaintiff's father in his capacity as trustee obtained perpetual lease of the aforesaid plot benami in his name to endure to the exclusive benefits of the Plaintiff. All the funds in purchase of the plot were availed by the Plaintiff's father from the money deposited with father and given to him from time to time. The possession of the plot was obtained by the Plaintiff's father for and on behalf of Plaintiff in his capacity as a trustee and, a perpetual lease deed was executed by the DDA, which was registered.
- The Plaintiff entrusted the title deed of the land in question to his father for safe custody in his capacity, as a benami and the real ownership always vested in the Plaintiff.

Issue

Whether the claim in the suit is barred by the provisions of Benami Transactions Prohibition Act, 1988?

Key Ratio Decidendi

- "I would at this stage refer to a judgment delivered by this Court in the case of J M Kohli Vs. Madan Mohan Sahni & Anr in RFA No.207/2012 decided on 07.05.2012. In this judgment this Court has had an occasion to consider the intendment of the passing of the Benami Act as reflected from Section 7 of the Benami Act. Section 7 of the Benami Act repealed the provisions of Sections 81, 82 and 94 of the Indian Trusts Act, 1882 (in short 'the Trusts Act') and which provisions of the Trusts Act gave statutory recognition and protection to the benami transactions by calling such transactions protected by a relationship of a trust. It bears note that benami transactions were very much legal within this country before the passing of the Benami Act and the relationship of a benamidar to the owner was in the nature of a trust/fiduciary relationship because it was the Trusts Act which contained the provisions of Sections 81, 82 and 94 giving statutory recognition to the benami ownership of the properties being in the nature of trust."
- The expression "fiduciary relationship" and a relationship of a trustee cannot be so interpreted so as to in fact negate the Benami Act itself because all benami transactions actually are in the nature of trust and create a fiduciary relationship and if the expression "trustee" or "fiduciary relationship" is interpreted liberally to even include within its fold a typical benami transaction, then it would amount to holding that there is no Benami Act at all.
- In determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, the Court shall have to take into consideration the factual context in which the question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case. Having said that, let us turn to the facts of the present case once more to determine whether the Appellant stood in a fiduciary capacity vis-à-vis the respondentplaintiffs.
- The Court opined that, since the plaintiff in the plaint himself states that the property was purchased as a benami property in the name of the father, late Sh. Jai Gopal Gugnani, merely and although the plaintiff has used the expressions fiduciary relationship and trustee, yet these expressions of fiduciary relationship and trustee are not those expressions which will cause the transaction to fall under the exception of Section 4(3)(b) of the Benami Act, but these expressions are those expressions which fall under Sections 81, 82, and 94 of the Trusts Act and which have been repealed by Section 7 of the Benami Act. In view of the above, the court held that the suit is barred by the provision of Section 4(1) of the Benami Transactions (Prohibition) Act, 1988. The suit is accordingly dismissed.

6. Pawan Kumar Gupta Vs. Rochiram Nagdeo
(Citation: Supreme Court, Civil Appeal No. 2369 of 1999 dated 20.04.1999)

Facts

- Respondent was the tenant of the suit building (consisting of a shop room and godown premises) which belonged to one Narain Prasad. As per a sale deed, Narain Prasad transferred his rights in the suit building to the appellant.
- On its footing appellant filed Civil Suit for eviction of the respondent under Section 12(1)(a) of the M.P. Accommodation Act, 1961 (for short "the Act") on the ground that respondent has not paid rent to the appellant.
- That suit was contested by the respondent raising the contention that the building was actually purchased by Pyarelal (father of the appellant) as per Ext.P11-sale deed and appellant is only a name-lender therein, and hence appellant is not entitled to get the eviction order or the rent of the building.
- In that suit the court found that appellant is the real owner of the building pursuant to sale- deed and that he was entitled to receive rent of the building. However, the suit was dismissed as the respondent deposited the arrears of rent in court during pendency of the suit but appellant was permitted to withdraw the arrears of rent so deposited by the respondent as per the judgment rendered in that suit.

Issue

1. Whether the plaintiff is owner of the suit premises?
2. Whether the defendant is tenant of plaintiff of disputed premises @ Rs.210/- p.m.?"

Key Ratio Decidendi

Section 2(a) of the Benami Act defines benami transaction as "any transaction in which property is transferred to one person for a consideration paid or provided by another person**." The word "provided" in the said clause cannot be construed in relation to the source or sources from which the real transferee made up funds for buying the sale consideration. The words "paid or provided" are disjunctively employed in the clause and each has to be tagged with the word "consideration". The correct interpretation would be to read it as "consideration paid or consideration provided". If consideration was paid to the transferor then the word provided has no application as for the said sale.** Only if the consideration was not paid in regard to a sale transaction the question of providing the consideration would arise. In some cases of sale transaction ready payment of consideration might not have been effected and then provision would be made for such consideration. The word "provided" in Section 2(a) of Benami Act cannot be understood in a different sense. Any other interpretation is likely to harm the interest of persons involved in genuine transactions, e.g., a purchaser of land might have availed himself of loan facilities from banks to make up purchase money.

We are, therefore, not inclined to accept the narrow construction of the word "provided" in Section 2(a) of the Benami Act. So even if appellant had availed himself of the help rendered by his father Pyarelal for making up the sale consideration that would not make the sale deed a benami transaction so as to push it into the forbidden area envisaged in Section 3(1) of the Benami Act.

7. Bhim Singh v. Kan Singh

(Citation: Supreme Court, Civil Appeal 626 of 1971 dated 01.01.1970)

Facts

- Plaintiff no. 1 and plaintiff no. 2 were father and son while defendant was the brother of plaintiff no. 1.
- The plaintiffs in their suit against the defendant claimed that the suit house in which the defendant was living, belonged to them by virtue of a patta issued in their names.
- They alleged that the deceased brother of plaintiff no. 1, who remained a bachelor till his death, loved plaintiff no. 2 as his son and had thought of adopting plaintiff no. 2 but since he died all of a sudden it could not be done.
- The defendant on the other hand claimed that he and his deceased brother lived as members of a joint family after the partition of their family that as a result of the joint efforts of himself and his deceased brother the Maharaja, of Bikaner sanctioned sale of the house to them, that the purchase money was paid out of their joint income but that the patta was granted in the names of the plaintiffs due to political reasons and therefore the plaintiffs were at the most benamidars.

Issue

The principle issue which arises for consideration relates to the ownership of the suit house.

Key Ratio Decidendi

- Two kinds of benami transactions are generally recognised in India. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami. In that case the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner.
- The second case which is loosely termed as benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner.
- The difference between the two kinds of benami transactions referred to above lies in the fact that whereas in the former case there is an operative transfer from the transferor to the transferee though the transferee holds the property for the benefit of the person who has contributed the purchase money, in the latter case there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance.
- One common feature, however, in both these cases is that the real title is divorced from the ostensible title and they are vested in different persons.
- The question whether a transaction is a benami transaction or not mainly depends upon the intention of the person who has contributed the purchase money in the former case and upon the intention of the person who has executed the conveyance in the latter case.
- The principle underlying the former case is also statutorily recognised in section 82 of the Indian Trusts Act, 1882, which provides that where property is transferred to one person for a consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

8. Valliammal (D) By Lrs vs Subramaniam & Ors
(Citation: Supreme Court, Civil Appeal 5142 of 1998 dated 31.08.2004)

Facts

- The land measuring 10.37 \0261/2 acres (suit land) belonged to Malaya Gounder, plaintiff and his younger brother, Marappa Gounder.
- Marappa Gounder stood guarantee for his Uncle Chinnamalai Gounder in a loan transaction advance by one Samasundaram Chettiar who was a money-lender for a sum of Rs. 200/-.
- Marappa Gounder died in the year 1923 and was succeeded to by his brother Malaya Gounder, as the legal representative of Marappa Gounder.
- Suit was decreed against the debtor as well as the guarantor. They were made jointly liable. Suit land was sold on 1.8.1927 in the auction to satisfy the decree passed in OS No. 338 of 1925.
- Land was purchased by one Chockalingam Chettiar. Chockalingam Chettiar could not get physical possession of the land, however, he was given the symbolical possession.
- The suit land was purchased by Ramayee Ammal wife of Malaya Gounder, original Plaintiff, for a consideration of Rs. 500/- on 5.12.1933. Ramayee Ammal executed a registered will in favour of her daughters the defendants/respondents herein. Ramayee Ammal died on 2.1.1979.

Issue

Whether the courts below have wrongly cast the onus of proving the benami nature of the sale on the defendants and further more whether they have failed to apply the various tests laid down by the Supreme Court for determination of the question whether the sale in favour of Ramayee was a benami transaction?

Key Ratio Decidendi

- There is a presumption in law that the person who purchases the property is the owner of the same. This presumption can be displaced by successfully pleading and proving that the document was taken benami in name of another person for some reason, and the person whose name appears in the document is not the real owner, but only a benami. Heavy burden lies on the person who pleads that recorded owner is a benamiholder.

- **It is well established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami.** The essence of a benami transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof.
- After saying so, this Court spelt out following six circumstances which can be taken as a guide to determine the nature of the transaction:
  1. the source from which the purchase money came;
  2. the nature and possession of the property, after the purchase;
  3. motive, if any, for giving the transaction a benami colour;
  4. the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
  5. the custody of the title deeds after the sale; and
  6. the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another.

It is well settled that intention of the parties is essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami. The evidence shows clearly that the original plaintiff did not have any justification for purchasing the property in the name of Ramayee Ammal. The reason given by him is not at all acceptable. The source of money is not at all traceable to the plaintiff. No person named in the plaint or anyone else was examined as a witness. The failure of the plaintiff to examine the relevant witnesses completely demolishes his case.

9. Niharika Jain W/o Shri Andesh Jain Vs Union of India

(Citation: Rajasthan High Court, Civil Writ Petition No. 2915/2019 (SB), dated 12.07.2019)

Facts

- There was a search action under Section 132 of the Income Tax Act, 1961 on the petitioner before the amendment in Benami Act i.e. before 01/11/2016. During the course of search action, various incriminating documents were seized indicating several benami transactions.
- Accordingly, show cause notice under Section 24(1) of the Amended Benami Act was issued on the petitioner calling to show cause as to why the transactions found during the search action should not be treated as "Benami Transaction" under Section 2(9) of the Amended Benami Act and should not be liable for punishment under Section 3 of the Amended Act. The Initiating officer ignoring the submission of the petitioner treated the transactions as benami liable for punishment under Section 3 of the Amended Benami Act. The said matter travelled to the High Court.
- Before the High Court, the petitioner took the view that sub-section (3) of section 3 of Amended Benami Act talks of punishment in respect of transaction entered into after amendment. Since the transactions were entered into before the amendment, the said transactions fall outside the ambit of said sub-section.

Issue

Whether amendments in section 3 of Prohibition of Benami Transaction are "retrospective" or "prospective" in nature?

Key Ratio Decidendi

The Rajasthan High Court agreeing with the contention of the petitioner held that sub-section (3) to section (3) of the Amended Benami Act talks about punishments in respect of benami transactions entered into after amendment in Benami Act and is thus, prospective. While holding the said sub-section (3) as prospective, the Rajasthan High Court observed that :

1. Unless a contrary intention is reflected, a legislation is presumed and intended to be prospective;
2. Where an amendment affects rights or imposes obligations or castes a new duties or attached a new disability is to be treated as prospective ; and
3. Benami Amendment Act, 2016 neither appears to be Clarificatory nor curative.

Accordingly, the Rajasthan High Court threw the entire transactions entered into by the petitioner before amendment out of the purview of Benami Act.

10. M/s Fair Communication and Consultants & Anr V/S Surendra Kerdile

(Citation: Supreme Court of India, CIVIL APPEAL NO. 106 OF 2010, dated 20th January, 2020)

Facts

- This appeal by Special Leave challenges a decision of the Madhya Pradesh, High Court, by which a suit for recovery of 80,000/- was decreed in appeal. The impugned judgment set aside the judgment and decree of the XIII Additional District Judge, Indore (Trial court).
- The plaintiff (respondent in the present case, "Surendra") is the maternal unc le of the defendant-second appellant ("Sanjay"). Sanjay is also the sole proprietor of first appellant/defendant (M/s Fair Communication & Consultants). Surendra filed a suit for claiming recovery of ₹ 1,08,000/- alleging that Sanjay and his proprietorship firm owed money lent. Surendra was an Engineer employed at Nashik and owned some land and a flat (MIG Scheme No. 54, Indore). As Surendra wished to settle eventually in Nashik, he appointed Sanjay who used to reside in Indore as Power of Attorney and executed a deed of General Power of Attorney (GPA) in favour of Sanjay on 30.09.1989 for that purpose. Sanjay entered into an agreement to sell the property to one Niranjan Singh Nagra ("buyer") on 30.11.1989 and received a sum of Rs 50000/- as earnest money. Surendra alleged that Sanjay called him to Indore on 29.01.1990 and requested that the agreement to sell ought to be executed in favour of the buyer directly and that at the time of executing the agreement, the buyer had paid 80,000/-. This amount was returned by Sanjay. Surendra also alleged that the buyer requested for cancellation of the Power of Attorney which was given to Sanjay. Sanjay requested Surendra for an advance in the sum of 80,000/- for the expansion of his business, which he was carrying on under the style of the first respondent proprietorship concern. Sanjay assured the plaintiff that he would return the amount shortly. Accordingly, 80,000/ - was given by the plaintiff (Surendra) to Sanjay.
- Sanjay issued three post-dated cheques for the sum of ₹16,500/-, ₹3,500/- and ₹60,000/- all dated 16.02.1990, drawn on the State Bank of India, Indore Branch. Before the due date, Sanjay requested the plaintiff (Surendra) not to present the cheques for collection for a few months; this request was complied with. The cheques, when presented, were returned by the banker to the plaintiff (Surendra). In these circumstances, the suit for recovery of a sum of 80,000/- (together with interest @ ₹ 12% till the date of the filing of the suit and for future interest, consequently, was instituted.
- Sanjay, in his written statement denied the suit allegations. However, the written statement did not dispute the execution of the GPA or that he had entered - on behalf of the plaintiff, into the agreement to sell with Niranjan Singh Nagra and obtained ₹ 50,000/- as earnest money. The written statement also did not deny that Sanjay requested Surendra for a loan of 80,000/- which was given to him. However, in the defense, Sanjay alleged that Surendra asked him to return the amount on the same day i.e. 30.01.1990, which he did. The written statement then alleged that Sanjay repeatedly asked for the return of the three cheques but being the maternal uncle, the plaintiff insisted on keeping the three instruments, and prevailed upon him as the elder relative. It was also alleged in the written statement that Sanjay was assured that the cheques would be returned on the next day; however they were never returned.
- After framing issues and recording evidence, the trial court dismissed this suit. The trial court was of the opinion that the evidence clearly showed that a sum of ₹ 80,000/- had been deposited by Surendra in his bank account and that this circumstance, supported Sanjay's plea that the amount was returned immediately. The trial court was also of the opinion that the discrepancy in the amount received towards the sale consideration, casts doubt regarding the veracity of the plaintiff's claim. Aggrieved by the dismissal of the suit, Surendra appealed to the High Court. During the course of appeal, two applications seeking to amend the pleading and relief clause in the plaint were sought.
- Matter with the High Court: The High Court after an overall reading of the evidence framed three points for consideration, while dealing first with the applications, and then the merits: they were firstly, the consideration of the sale of the suit property – if it was for ₹ 2,30,000/- and not ₹1,30,000/- ; secondly, whether such fact had to be pleaded by the plaintiff in the suit and lastly, whether in the absence of such pleading, it was necessary to allow the application for amendment. The High Court after analyzing the nature of evidence led, concluded that since Sanjay had admitted the signature on the agreement to sell, as well as the plaintiff's GPA, even though the document was a photocopy, it could not be ignored.

- The impugned judgment also reasoned that there was no dispute that another agreement to sell was executed on 30.01.1990 by the plaintiff (Surendra) in favour of Niranjan Singh Nagra, where the sale consideration was showed to be 1,30,000/ -. The sale was also undisputedly completed on 31.01.1990. It was held that in these circumstances, the plaintiff had 1,80,000/- as on 30.01.1990, which clearly showed that the real consideration for the transaction was 2,30,000/-, though the document subsequently executed showed a lesser value as 1,30,000/-. The court noted that Surendra had not relied upon these circumstances to seek relief on the basis of the contract (for sale). The High Court then reasoned that these documents were needed only to consider their impact vis-a-vis the defendants' claim for return of 80,000/-.
- The High Court in its impugned judgment upheld the plaintiff's contention that he possessed sufficient amount to advance ₹80,000/- to Sanjay. He also had sufficient funds to deposit amounts in the bank account, for which statement of account, was on the record. Given that the real consideration for the transaction was ₹ 2,30,000/-, the fact that some amount was deposited in the bank account, did not in any way detract from the suit claim. The court, therefore, held that the deposit by itself could not be relied on, that the amount was paid to Sanjay who issued three cheques. The High Court then concluded and held as follows:-

  "15. Since it is not disputed by the respondents that the loan amount of Rs 80,000/was given by the appellant on 30/01/90 and the dispute is only whether the amount was returned by the respondent no. 2 to the appellant on that very day on not, the important documents are, the cheques and the receipt of Rs 60,000/- which was issued by the respondent no. 2 in favour of appellant. When the amount was given back by the respondent no. 2 to the appellant on that very day then it is surprising why the receipt and the cheques were not taken back by the respondent no. 2 from the appel lant and why the receipt of refund of the amount was not taken. Apart from this there is nothing on record to show that why the cheque of ₹ 30,000/- was given by the respondent no. 2 to the appellant. These all documents goes to show beyond doubt that the appellant who is maternal-uncle of the respondent no. 1 lent a sum of Rs 80,000 to the Respondent no. 2, in lieu of which the cheques were not taken back by the respondent no. 2 as proprietor of respondent no. 1 and the amount was returned by the respondents to the appellant.

  16. In view of this appeal stands allowed. The judgment and decree dated 22/07/95 passed by learned XIIIth Additional District Judge, Indore in Civil Suit No. 98-B/93 is set aside. Respondents are directed to pay Rs 80,000/- alongwith interest @ 6% p.a w.e.f. 16/02/90 with a period of two months, failing which the respondents shall be liable to pay the interest on the aforesaid amount @ 12% per annum. Respondents shall also be liable for the costs through out.

Issue

What was the actual sale consideration, ₹ 2,30,000/- or ₹ 1,30,000/-, since the argument was based on a prohibited transaction, outlawed by the Benami Act?

Key Ratio Decidendi

- The Supreme Court observed that the plaintiff wished to dispose of his property at Indore, where the second defendant, nephew resided and carried on business. Since the parties were related, the plaintiff relied on the defendant and constituted him as his attorney. An agreement to sell was entered into for the sale of the said property (a flat) on 03.07.1989. The consideration for the flat in terms of this agreement was ₹2,30,000/-. The original agreement with the purchaser (who ultimately finalized the transaction), is dated i.e. 03.07.1989. A second agreement was entered into on 30.11.1989. However, this showed a lesser consideration of ₹ 1,30,000/-. Sanjay, the second appellant received ₹50,000/- from the buyer and handed over that amount to Surendra. Furthermore, on 29.01.1990, Surendra went to Indore at Sanjay's behest to conclude the transaction directly with the purchaser, Niranjan Singh Nagra. He also received the amount agreed. Also, there is no dispute that Sanjay wanted ₹ 80,000/and was given it, by his uncle, the plaintiff, Surendra, for the purpose of expansion of his business. This is where the version of the two parties diverges:
- Sanjay alleged that the amount was returned the next day and that Surendra did not return the post-dated cheques issued by him; Surendra alleges that Sanjay in fact never returned the amount. The trial court was persuaded by arguments on behalf of Sanjay and the circumstance that the sum of ₹ 80,000/- was deposited in Surendra's account on the same day. The High Court, however, took note of the plaintiff's stand, with respect to the real consideration, which was ₹ 2,30,000/- as against what was shown in the document, to say that the amount deposited in Surendra's account had nothing to do with the money lent to Sanjay.

- The defendant/appellants arguments are two-fold: one, that the document on which the High Court returned its findings was a photocopy and was therefore, inadmissible; and two, that the question whether the sale consideration was ₹ 2,30,000/- or ₹1,30,000/- could not have been gone into, since that argument was based on a prohibited transaction, outlawed by the Benami Act.
- As far as the first question goes, this court notices that the plaintiff had put the matter, during the course of cross examination, to the appellant/defendant. The latter, unsurprisingly, admitted the document, despite the fact that it was a photocopy. The plaintiff had argued that the original of that document was with the purchaser: this was not denied. Once these were admitted, the plaintiff could not be faulted for seeking a consequential amendment, that was purely formal, to back his argument that there was sufficient money, after lending ₹ 80,000/- to the defendant, which was deposited in his account. The appellant's argument, in the opinion of this court, is insubstantial: the impugned judgment cannot be faulted on this aspect.
- Now as to the second argument by the appellant, which is that the plaintiff's plea that the real consideration for the sale was ₹ 2,30,000/- entails returning findings that would uphold a plea based on a benami transaction, this court is of the opinion that the argument is unmerited. Benami is defined by the Act as a transaction where (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration. Benami transactions are forbidden by reason of Section 3; no action lies, nor can any defense in a suit be taken, based on any benami transaction, in terms of Section 4 of the Act.
- In the opinion of this court, the argument that the plaintiff's plea regarding the real consideration being barred, has no merit. The plaintiff did not claim return of any amount from the buyer; the suit is not based on any plea involving examination of a benami transaction. Besides, the plaintiff is not asserting any claim as benami owner, nor urging a defense that any property or the amount claimed by him is a benami transaction. Therefore, the defendant appellant's argument is clearly insubstantial.
- In the present case, the appellants did not prove that the transaction (to which they were not parties) was benami; on the contrary, the appellant's argument was merely that the transaction could not be said to be for a consideration in excess of 1,30,000/ -, in the context of a defense in a suit for money decree. The defendant/appellants never said that the plaintiff or someone other than the purchaser was the real owner; nor was the interest in the property, the subject matter of the recovery suit. Therefore, in the opinion of this court, the conclusions and the findings in the impugned judgment are justified.

Conclusion

For the foregoing reasons, this court is of opinion that there is no merit in the appeal; it is accordingly dismissed, without order on costs.

Significant Case Laws

CHAPTER-7
The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

Cases included under this Chapter

S. No.	Title of the Case	Court / Date
1.	C. Bright V/s the District Collector & Ors	Supreme Court of India / 5th November 2020
2.	M/s. L&T Housing Finance Limited V/s M/s. Trishul Developers and Anr	Supreme Court of India / 27th October 2020
3.	Union Bank of India V/s Rajat Infrastructure Pvt. Ltd. & Ors.	Supreme Court of India / 2nd March 2020
4.	Shakeena V/s Bank of and Others	Supreme Court of India / 20th August 2019
5.	M/s Kut Energy Pvt Ltd V/s The Authorized Officer, Punjab	Supreme Court of India / 20th August 2020

1. C. Bright V/S the District Collector & Ors.

(Citation: Supreme Court of India, CIVIL APPEAL NO. 3441 OF 2020 (ARISING OUT OF SLP (CIVIL) NO. 12381 OF 2020) (DIARY NO. 46087 OF 2019), dated 5th November, 2020.)

Facts

- The challenge in the present appeal is to an order passed by the Division Bench of the Kerala High Court of 19.7.2019, whereby it was held that Section 14 of the SARFAESI Act, 2002 mandating the District Magistrate to deliver possession of a secured asset within 30 days, extendable to an aggregate of 60 days upon reasons recorded in writ ing, is a directory provision.
- Section 14: "14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.

  (1) xx xx xx

  Provided, further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall, after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured asset within a period of thirty days from the date of application:

  Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such period **not exceeding in the aggregate sixty days**."

Decision of the High Court of Kerala

- The High Court of Kerala observed that the primary question in these Writ Petitions, is namely, whether the time limits in section 14 of the SARFAESI Act are mandatory or directory should be answered in light of the principles enumerated above.
- As stated above, the object and purpose of the said time limit is to ensure that such applications are decided expeditiously so as to enable secured creditors to take physical possession quickly and realise their dues.
- Moreover, as stated earlier, the consequences of non-compliance with the time limit are not specified and the sequitur thereof would be that the district collector/district magistrate concerned would not be divested of jurisdiction upon expiry of the time limit.

- In this connection, it is also pertinent to bear in mind if the "consequences of noncompliance" test is applied, the borrower, guarantor or lessee, as the case may be, is not adversely affected or prejudiced, in any manner, whether such applications are decided in 60, 70 or 80 days.
- On the other hand, the secured creditor is adversely affected if the provision is construed as mandatory and not directory in as much as it would delay the process of taking physical possession of assets instead of expediting such process by entailing the filing of another application for such purpose. For all these reasons, **the time limit stipulation in the amended Section 14 of the SARFAESI Act is directory and not mandatory**."

Issue

❖ Whether the time limits prescribed under section 14 of the SARFAESI Act for a public officer to perform a public duty is directory or mandatory?

Key Ratio Decidendi

- The Supreme Court observed that the objects and reasons for amending the Act in 2014 and held that the Magistrate takes possession of the asset and "forwards" such asset to the secured creditor under Section 14(1); the management of the business of a borrower can actually be taken over under Section 15 of the Act and that Section 13(4) must be read in the light of Sections 14 and 15. These are separate and distinct modes of exercise of powers by a secured creditor under the Act.
- Section 14 of the Act, as originally enacted, empowered the Chief Metropolitan Magistrate or the District Magistrate to take possession of such assets and documents relating to secured assets.
- Later, by the Central Act No. 1 of 2013, which came into force on 15.1.2013, a proviso to sub-section (1) of Section 14 of the Act was inserted contemplating that upon filing of an affidavit, in the format mentioned therein, by an Authorised Officer of the secured creditor, the District Magistrate or the Chief Metropolitan Magistrate shall pass suitable orders for the purpose of taking possession of the secured assets. It is, thereafter, the Act was amended vide Central Act 44 of 2016, which came into force on 1.9.2016.
- The Supreme Court based on the various cases already decided by it, opined that when the provisions of a statute relate to the performance of a public duty and the case is such that to hold acts done in neglect of this duty as null and void, would cause serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, the practice of the courts should be to hold such provisions as directory.

Conclusion

The Supreme Court opined that no error was found in the order passed by the High Court. Consequently, the appeal is dismissed.

2. M/s. L&T Housing Finance Limited V/s M/s. Trishul Developers and Anr.

(Citation: Supreme Court of India, CIVIL APPEAL NO(s). 3413 of 2020 Arising out of SLP(C) No(s). 18360 of 2019) dated 27th October, 2020.)

Facts

- The appellant is a Housing Finance Company and is notified as Financial Institution by the Department of Finance (Central Government) in exercise of the powers conferred by Section 2(1)(m)(iv) of the SARFAESI Act.
- The appellant indeed falls within the definition of secured creditor under the provisions of the SARFAESI Act and is entitled to initiate measures under the provision of the SARFAESI Act for enforcement of security interest created on the secured assets by the respondents (borrower/guarantor) in favour of the appellant (secured creditor).
- The first respondent is a partnership firm dealing in the real estate construction business and the second respondent is the partner of first respondent firm. The first respondent and its partners in carrying out its business obligations approached the appellant for seeking financial assistance and submitted a request to the appellant for term loan of ₹20 crores for completion of its project.
- The appellant taking note of the request made by the respondents sanctioned Term Loan Facility to the tune of ₹ 20 crores towards completion of the project and for availing the above credit facility, the respondents executed Facility Agreement dated 11 th August, 2015 along with security documents by mortgaging the various immovable properties as a security for creating security interest in favour of the appellant.
- The sanction letter dated 07th August, 2015 duly signed by the authorised signatory of L&T Housing Finance Ltd. for execution of the Facility Agreement and effecting all compliance as required to the satisfaction of the lender was accepted and signed by the authorised signatory on behalf of the first respondent and also by the guarantors clearly demonstrates that on the top of the letterhead towards right, the name of the company is mentioned L&T Finance (Home Loans) and in the bottom towards left, it was mentioned L&T Housing Finance Ltd. with registered office at Mumbai and this is the letterhead which has always been taken in use for correspondence at all later stages when the proceedings against the respondents herein were initiated under Sections 13(2), 13(4) and 14 of the SARFAESI Act.
- The respondents at a later stage failed to maintain financial discipline and subsequently became a defaulter and because of the alleged breach of the terms and conditions of the Facility Agreement executed between the appellant (L&T Housing Finance Ltd.) and the respondents (M/s. Trishul Developers through its Partners) towards completion of its project, the appellant served a demand notice dated 16th December, 2016 to the respondents to pay the outstanding dues within the stipulated period mentioned in the demand notice.
- Since the respondents failed to make their outstanding payment, under the given circumstances the appellant classified the account of the respondents as Non–performing Assets (NPA) on 15th April, 2017 and sent a notice of demand dated 14th June, 2017 under Section 13(2) of the SARFAESI Act calling upon the respondents to pay the outstanding dues of ₹16. 97 crores as on 31st May, 2017 in terms of the notice with future interest till actual payment within sixty days from the date of the receipt of the demand notice.
- Pursuant to the service of the notice of demand, the respondents did not discharge their liability and sent their reply dated 08th August, 2017 to the notice with full consciousness knowing it well that the demand notice dated 14th June, 2017 has been served by the appellant (secured creditor) in reference to the Facility Agreement dated 11 th August, 2015 which has been executed between the parties i.e. the appellant and the respondents herein.
- It may be relevant to note that the demand notice dated 14th June, 2017 under Section 13(2) of the SARFAESI Act was issued on the same letterhead of the appellant duly signed by it self same authorised signatory, who had initially signed at the time when the proposal of term loan was sanctioned vide sanction letter dated 07th August, 2015 and no objection was raised by the respondents in its reply dated 08th August, 2017 of misconception or confusion if any, in reference to the secured creditor (appellant) on whose behest the demand notice was served under Section 13(2) of the SARFAESI Act.

- Since the respondents failed to discharge their liability towards the appellant in terms of the demand notice, the appellant took further action in due compliance under Section 13(4) read with Section 14 of the SARFAESI Act and filed application before the competent authority for taking possession of the mortgaged properties and the collateral security of the respondents.

Matter before the DRT

- The Learned Debt Recovery Tribunal vide its order dated 23rd March, 2018 **set aside the demand notice on the premise that it has not been validly issued** in the name of the appellant (L&T Housing Finance Ltd.), instead the name of the company has been mentioned as L&T Finance Ltd. and this defect as alleged not being curable after issuance of demand notice by another group company instead of secured creditor, held the proceedings not sustainable.

Matter before the DRAT and High Court of Karnataka

- The order of DRT was challenged by the appellant in appeal before the Debt Recovery Appellate Tribunal (DRAT) and after the parties being heard, DRAT vide its order dated 16th April, 2019 set aside the order of DRT which came to be challenged by the respondents in a writ petition before the High Court of Karnataka.
- The High Court while setting aside the order of DRAT returned its finding in conformity with what was observed by the DRT in its order.

Issue

- Whether the demand notice issued by the secured creditor was validly issued.

Key Ratio Decidendi

- The Supreme Court observed that that the respondents borrowed a term loan from the appellant (L&T Housing Finance Ltd.) of ₹20 crores and later their account became NPA on 15th April, 2017 and prior thereto, the appellant (secured creditor) served a notice on 16th December, 2016 demanding its outstanding dues sanctioned under the seal of their authorised officer on behalf of the lender, which has been informed to this Court was a self– same authorised signatory of both the companies namely L&T Housing Finance Ltd. and L&T Finance Ltd.

- Undisputedly, the notice under Section 13(2) of the SARFAESI Act was served by the authorised signatory on behalf of the appellant on the letterhead commonly used by L&T Housing Finance Ltd. and L&T Finance Ltd. but inadvertently, the authorised signatory put his signature under the seal of the company L&T Finance Ltd.
- In this backdrop, from reply dated 08th August, 2017 of the respondents, it becomes clear that repayment was demanded by the appellant (secured creditor) only and the respondents tried to justify and assigned reasons for which the Facility Agreement dated 11th August, 2015 could not have been carried out and only thereafter, the appellant (secured creditor) has initiated further proceedings under Section 13(4) read with Section 14 of the Act.
- Notably from the very inception at the stage, when the proposal of taking a term loan from the appellant was furnished by the respondents vide their application dated 15 th May, 2015 and accepted by the appellant vide sanction letter dated 07th August, 2015, the letterhead which was used for the purpose clearly indicates that on the top of the letterhead towards right, it reflects L&T Finance (Home Loans) and on the bottom towards left, is of L&T Housing Finance Ltd. with their registered office in Mumbai and this has been duly signed by the authorised signatory of the borrower for M/s. Trishul Developers and by its guarantors.
- It manifests from the record that the respondents from the initial stage are aware of the procedure which is being followed by the appellant in its correspondence while dealing with its customers and that is the same practice being followed by the appellant when demand notice dated 16th December, 2016 was served at a later stage. The demand notice in explicit terms clearly indicates the execution of the Facility Agreement dated 11th August, 2015 between the appellant (L&T Housing Finance Ltd.) and the respondents (M/s. Trishul Developers through its partners) and of the default being committed by the respondents (borrower/guarantor) in furtherance thereof, a notice under Section 13(2) of the SARFAESI Act was served on the same pattern of the letterhead which is being ordinarily used by the appellant in its correspondence with its customers and the demand notice dated 14th June, 2017 without leaving any iota of doubt is in reference to the non– fulfillment of the terms and conditions of the Facility Agreement dated 11th August, 2015 executed between the parties and even the schedule of

security profile which has been annexed thereto is in reference to the execution of Facility Agreement dated 11th August, 2015 and its non–compliance of the provisions of the SARFAESI Act.

- Even in the reply to the demand notice which was served by the respondents through their counsel dated 08th August, 2017 in compliance to Section 13(3A) of the SARFAESI Act, there was no confusion left in reference to the correspondence taken place between the appellant (secured creditor) and the respondents (borrower) tendering their justification and assigning reasons for which compliance could not have been made and no objection was indeed raised by the respondents in regard to the defect if any, in the demand notice dated 14th June, 2017 which was served by the secured creditor i.e. L&T Housing Finance Ltd. in compliance to the provisions of the SARFAESI Act or in furtherance to the proceedings initiated at the behest of the appellant under Section 13(4) read with Section 14 of the Act, for the first time, a feeble attempt was made in raising the alleged technical objection in a Securitisation Application filed before the DRT and succeeded.
- It may be relevant to note that the respondents (borrower) did not deny advancement of loan, execution of Facility Agreement, their liability and compliance of the procedure being followed by the secured creditor (appellant) prescribed under the SARFAESI Act.
- In the facts and circumstances, when the action has been taken by the competent authority as per the procedure prescribed by law and the person affected has a knowledge leaving no ambiguity or confusion in initiating proceedings under the provisions of the SARFAESI Act by the secured creditor, in our considered view, such action taken thereof cannot be held to be bad in law merely on raising a trivial objection which has no legs to stand unless the person is able to show any substantial prejudice being caused on account of the procedural lapse as prescribed under the Act or the rules framed thereunder still with a caveat that it always depends upon the facts of each case to decipher the nature of the procedural lapse being complained of and the resultant prejudiced if any, being caused and there cannot be a straitjacket formula which can be uniformly followed in all the transactions.
- We are of the view that the objection raised by the respondents was trivial and technical in nature and the appellant (secured creditor) has complied with the procedure prescribed under the SARFAESI Act. At the same time, the objection raised by the respondents in the first instance, at the stage of filing of a Securitisation Application before DRT under the SARFAESI Act is a feeble attempt which has persuaded the Tribunal and the High Court to negate the proceedings initiated by the appellant under the SARFAESI Act, is unsustainable more so, when the respondents are unable to justify the error in the procedure being followed by the appellant (secured creditor) to be complied with in initiating proceedings under the SARFAESI Act.
- The submission made by the respondents counsel that the notice under Section 13(2) of the Act was served by the authorised signatory of L&T Finance Ltd. and that was not the secured creditor in the facts of the case, in our considered view, is wholly without substance for the reason that L&T Finance Ltd. and L&T Housing Finance Ltd. are the companies who in their correspondence with all its customers use a common letterhead having their self–same authorised signatory, as being manifest from the record and it is the seal being put at one stage by the authorised signatory due to some human error of L&T Finance Ltd. in place of L&T Housing Finance Ltd.
- More so, when it is not the case of the respondents that there was any iota of confusion in their knowledge regarding the action being initiated in the instant case other than the secured creditor under the SARFAESI Act for non–fulfillment of the terms and conditions of the Facility Agreement dated 11th August, 2015 or any substantial prejudice being caused apart from the technical objection being raised while the demand notice under Section 13(2) was served under the SARFAESI Act or in the proceedings in furtherance thereof no interference by the High Court in its limited scope of judicial review was called for. Consequently, in our view, the judgment of the High Court is unsustainable and deserves to be set aside.

Conclusion

- In the result, the appeal succeeds and is accordingly, allowed. The impugned judgment dated 27th June, 2019 passed by the High Court of Karnataka is hereby quashed and set aside. No costs.

3. Union Bank of India v/s Rajat Infrastructure Pvt. Ltd. & Ors.
(Citation: Supreme Court of India, CIVIL APPEAL NO. 1902 of 2020 (@ SPECIAL LEAVE PETITION (CIVIL) No.28608 oF 2019) dated 2nd March 2020.)

Facts

- These appeals were initially directed against the order dated 25.11.2019 of the Bombay High Court. By the said impugned order, the High Court had relegated the appellant before it i.e. respondent no. 1 herein to avail the statutory remedy of appeal before the Debt Recovery Appellate Tribunal (DRAT).
- The basic facts are that the respondent no. 1 stood guarantee and mortgaged its property for repayment of loan availed by respondent nos. 4 and 5. The property was put to auction and respondent nos. 2 and 3 who are the alleged leaseholders in possession of the property are the highest bidders for a sum of ₹65.52 crores.
- The main objection of the respondent no.1 to the sale is that it is for a low amount and there is collusion between the officers of the Bank and the auction purchaser.
- The petitioner challenged the order of the DRAT dated 11.11.2019 before the High Court and the High Court passed the following order dated 25.11.2019:
  - Relegating the Petitioner to the appellate remedy on account of aforenoted facts and holding that the Petitioner has an efficacious alternate remedy of appeal before the learned DRAT where no pre–deposit is required, the Petition is rejected without making any observation on the merits of the disputes between the parties.
- It appears that the successful bidders filed review petitions before the High Court praying that the High Court could not have issued directions that no pre–deposit was required. Vide order dated 16.12.2019 the High Court dismissed the review petition and the relevant observations of the High Court are as under:
  - Suffice it to state that where a proposed sale notice is questioned with reference to the reserve price fixed and the argument takes the form of considering valuation report, such order, if challenged before DRAT, would not require any pre–deposit being made for the reason under the impugned order, no decree has been passed or liability fixed. It would depend on the nature of the order whether before the appeal there against is entertained, should a pre–deposit be made.

Issue

Whether the High Court was right in directing that pre–deposit was not required for entertaining an appeal before the DRAT as mandated by Section 18 of the SARFAESI Act.

Key Ratio Decidendi

- The issue is whether the High Court was right in holding that no pre–deposit was required. There is an absolute bar to the entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre–deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity. In view of the law laid down by this Court, we are clearly of the view that the observation made by the High Court was totally incorrect. [para 7
- This Court do not agree with the submission that the High Court has exercised its discretionary powers under Article 226 of the Constitution. The order of the High Court does not show any exercise of such discretionary powers but according to the High Court on an interpretation of the Section, pre–deposit was not required.
- A guarantor or a mortgagor, who has mortgaged its property to secure the repayment of the loan, stands on the same footing as a borrower and if he wants to file an appeal, he must comply with the terms of Section 18 of the SARFAESI Act.
- There is an absolute bar to the entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity. [para 7

- In view of the law laid down by this Court, the observation made by the High Court was totally incorrect.
- Furthermore, the High Court has no powers akin to powers vested in this Court under Article 142 of the Constitution. The High Court cannot give directions which are contrary to law.
- In view of the above discussion, the orders dated 25.11.2019 and 16.12.2019 of the High Court are set aside, in so far as they hold that pre–deposit is not required and allow the appeals.
- It is reiterated that this Court have not gone into the merits of the contentions raised by the parties which shall be decided by the DRAT when it entertains the appeal and is called upon to do so. This Court extend the time given to the auction purchasers, respondent nos. 2 and 3 to deposit the balance of the sale amount till 20.03.2020 and also direct that in case respondent no.1 files an appeal within 30 days of the pronouncement of this order it shall not be rejected on the ground of limitation.

4. Shakeena V/s Bank of India and Others
(Citation: Supreme Court of India, CIVIL APPEAL NO(S).8097–8098 of 2009 dated 20th August, 2019.)

Facts

- In 2003, Shri P. Shahul Hameed and Smt. Shakeena (appellants/borrowers) were sanctioned a term loan of ₹10 Lac each under Star Mortgage Loan by the Respondent Bank. The accounts became NPA (Non–Performing Assets) from 30th June, 2004, as there was default in re– payment, the respondent bank issued legal notice dated 19th October, 2004 to repay the dues within seven days.
- On 1st December, 2004, notice was issued under Section 13(2) of the 2002 Act to the appellants, calling upon them to discharge the loan within sixty days. In reply, the appellants by representations dated 10th December, 2004, requested the respondent bank to grant time for bringing the account in order. In view of the default in discharging the loans by the appellants, the respondent bank, exercised its power under Section 13(4) of the 2002 Act. Accordingly, constructive possession of the mortgaged property was taken over by the respondent bank on 8th February, 2005.
- The appellants then filed S.A. Nos.21 and 22 of 2005, by invoking Section 17 of the SARFAESI Act, before the DRT, challenging the notices, issued by the respondent bank. On 18th March, 2005, DRT passed an order in S.A. Nos.21 and 22 of 2005 staying all further proceedings on condition that the appellants would pay ₹1.50 Lac in each appeal. However, the appellants failed to comply with the said order and, therefore, the order being a self–operating order, stood automatically vacated. Later on, S.A. Nos.21 & 22 of 2005 were eventually dismissed for non–prosecution/default on 28th September, 2005, for non–payment of court fee.
- The respondent bank then brought the secured property for sale by inviting sealed tenders vide sale notice dated 15th November, 2005. Notice was also given to the appellants on 14th November, 2005. The appellants herein neither objected to the said sale notice nor challenged the same. Thus, the sale was held on 19th December, 2005, in which one Mr. Chidhamaramanickam, respondent No.3 herein was declared as the highest bidder who had quoted a sum of ₹42,51,000/–. He also deposited 25% of the sale consideration immediately, as per the rules.
- On 2nd January, 2006, the appellants approached the respondent bank and deposit ed three cheques for total sum of ₹25,21,446/–. These cheques were duly returned by the respondent bank on 4th February, 2006 as it could not be treated as a valid tender.
- The highest bidder (respondent No.3) in the meantime had complied with all the terms and conditions of sale as a result of which the sale was confirmed in his favour. In that, he paid the entire sale consideration of ₹42,51,000/– by 4th January, 2006. On payment of sale consideration, the respondent bank credited a sum of ₹12,40,000/– in the loan account of appellant No.2 herein and a sum of ₹12,52,350/– in the loan account of appellant No.1 herein and closed both the loan accounts.
- On 6th January, 2006, the respondent bank issued a sale certificate in favour of respondent No.3. According to the respondent bank upon issue of sale certificate, the sale had become final.
- The appellants filed applications for restoration of the main proceedings before DRT. However, the said applications came to be dismissed on 10th January, 2006. Even that order has been allowed to become final by the appellants.
- As aforementioned, consequent to sale of the secured asset, a sum of ₹24,92,750/– was adjusted towards the loan accounts of the appellants and a sum of ₹10,000/– towards legal expenses. Out of the balance sum of ₹17,48,250/–, the bank returned a sum of ₹17,25,000/– to the appellant (Petitioner in Writ Petition No.634 of 2006) by way of a bankers cheque along with letter dated 18th January, 2006. However, the said appellant did not encash the bankers cheque and instead returned the same. The bank had retained a sum of ₹23,250/– towards future legal expenses with the undertaking that the balance amount will be returned after adjusting the lawyer charges/legal expenses.
- The Appellants then forwarded demand drafts for ₹25,06,250/–, which was received by the respondent bank on 17th January, 2006. According to the respondent bank, the appellants had ante dated the covering letter as if it was written on 12th January, 2006, undertaking to pay the balance amount. The respondent bank, however, did not accept or encash the said demand drafts as a valid tender – as it were drawn in the name of the Authorised Officer of the bank i.e. respondent No.2 herein; and also because the sale certificate had already been issued on 6th January, 2006.

Matter before the High Court of Madras

- On 19th January, 2006 the appellants, feeling aggrieved by the action of respondent bank for having taken constructive possession of the secured assets and the notice of sale dated 14th November, 2005, filed subject Writ Petition (MD) Nos.634 and 635 of 2006 before the High Court of Madras for quashing of the auction of the subject property and further to direct the respondents to receive the amount offered by them towards settlement of loan accounts. Respondent no.3 herein (auction purchaser) got himself impleaded as a party–respondent in the said writ petitions, filed by the appellants herein, and opposed the same.
- The High Court allowed the writ petitions filed by the appellants herein, holding that the appellants had a subsisting right of redemption until the sale certificate was duly registered entailing in transfer of the subject property. It has been noted that such registration was not done in the present case until the filing of writ petitions and until disposal thereof.
- Against the judgment of the Learned Single Judge, respondent No.3 herein (auction purchaser) filed Writ Appeal Nos.145 and 146 of 2007 before the Madurai Bench of Madras High Court. By the impugned judgment dated 10th August, 2007, the Division Bench allowed the appeals filed by respondent No.3 herein and set aside the Order dated 9th March, 2007 passed by the Learned Single Judge.
- On 18th September, 2007, the stated sale certificate in respect of the **suit property had been registered and soon thereafter on 5th October, 2007, respondent No.3 sold the property to a third party.**
- Feeling aggrieved by the decision of the Division Bench of the High Court, the appellants have approached this Court by way of present appeals. This Court, on 23rd November, 2007, ordered that status quo as on that date be maintained with regard to the suit property. Later on, this Court granted leave to appeal on 27th November, 2009 and the interim order continued during the pendency of the appeals.

Issue

- Whether the sale of the secured asset in public auction as per section 13(4) of SARFAESI Act, which ended in issuance of a sale certificate as per rule 9(7) of the Security Interest (Enforcement) Rules, 2003 (in short the rules) is a complete and absolute sale for the purpose of SARFAESI Act or whether the sale would become final only on the registration of the sale certificate?
- Whether the action of the second respondent in not accepting the amounts paid by the borrowers and not cancelling the sale certificate before the registration of the sale is in derogation of section 60 of the Transfer of Property Act, in view of the Section 37 of SARFAESI Act?
- Whether section 35 of the SARFAESI Act has the effect of overriding section 37 of the SARFAESI Act?

Key Ratio Decidendi

- The ground of challenge considered by the High Court at the behest of the appellants in the impugned judgment, has become unavailable. In that, the matter proceeded before the High Court for setting aside the entire auction process on the premise that the sale certificate was yet to be registered in favour of the highest bidder (respondent No.3); and the appellants had made (unsuccessful) attempts to exercise their right of redemption by offering the outstanding dues to the respondent bank. It was argued by the appellant s that only upon registration of the sale certificate, the right of the borrower to redeem the mortgage would get extinguished and obliterated.
- Indisputably, after the disposal of the writ appeals by the Division Bench of the High Court vide impugned judgment on 10th August, 2007, the auction purchaser (respondent No.3) got the sale certificate registered on 18th September, 2007 and then transferred the property by a registered sale deed on 5th October, 2007 to third party. It is not the case of the appellants that some interim injunction prohibiting respondent No.3 from registering the sale certificate or transferring the suit property, was operating against him after the decision of the Division Bench of High Court. In fact, the impugned judgment was not even carried in appeal before this Court by the appellants until then. The special leave petitions came to be filed only on 13th October, 2007 and order of status quo was passed by this Court on 23rd November, 2007. In other words, there has been a paradigm shift in the rights of the parties upon registration of the sale certificate on 18th September, 2007 and also because of the registered sale deed in favour of third party on 5th October, 2007. The contention pursued before the

High Court by the appellants , therefore, has now become unavailable.

- The appellants had allowed the action taken by the respondent bank under Section 13(4) of the SARFAESI Act, to become final consequent to the order of the DRT rejecting challenge thereto due to non–compliance of the conditional order. Even the subsequent application for restoration of the DRT proceedings came to be rejected. The appellants then filed the subject Writ Petition (C) Nos.634–635 of 2006 on 19th January, 2006, by which date the auction had already concluded including the sale certificate was issued in favour of the highest bidder on 6th January, 2006. Moreover, the principal assertion of the appellants before the High Court was that they were wanting to exercise their right of redemption of mortgage, but due to fortuitous situation and the inappropriate stand taken by the respondent bank were prevented from doing so. No other plea was pursued by the appellants in support of the reliefs claimed by them before the High Court, as can be discerned from the three points formulated in paragraph No.8 of the impugned judgment (reproduced in paragraph No.16 hereinabove). The appellants cannot be permitted to assail the auction process on any other count.

- Reverting to the stand taken by the appellants that they had attempted to exercise their right of redemption by depositing an aggregate sum of Rupees Twenty Five Lacs on 30th December, 2005 and 4th January, 2006, in the account of the father of appellant No.2 followed by issuing cheque(s) in the aggregate sum of ₹ 25,21,446/–, on 2nd January, 2006; and once again offering the amount by demand drafts in the sum of ₹25,06,250/–, on 18th January, 2006. This stand though attractive at the first blush, will have to be stated to be rejected. On the other hand, we find substance in the stand taken by the respondent bank that none of the above was a valid tender so as to extricate or discharge the appellants from their obligation – to deposit the outstanding dues payable by them before the specified date. In that, the amount was allegedly deposited by them in the account of the father of appellant No.2 and not in their loan accounts as such. Unless the amount was transferred/deposited in the loan accounts of the appellants in relation to which the mortgage operated, it would not be a valid tender for paying the outstanding dues. Similarly, on the second occasion the appellants attempted to pay in the form of cheque(s) issued on 2nd January, 2006. However, as per the terms and conditions for grant of loan payment by cheque(s) was not permissible. Thus, the respondent bank was not obliged to accept the amount in the form of cheque(s). The respondent bank, therefore, justly declined to accept the cheque(s), not being a valid tender. Even the third attempt made by the appellants was to offer demand drafts drawn in favour of or in the name of the Authorised Officer of the respondent bank and not in the name of the bank or authorising the bank to appropriate it towards the subject loan accounts. Hence, these demand drafts were rightly not accepted as a valid tender.

- The appellants took no steps, whatsoever, to pay the outstanding dues to the respondent bank by way of a valid tender nor moved any formal application before the High Court after filing of the writ petitions on 19 January, 2006, to permit them to deposit the requisite amount either in the concerned loan accounts or in the court. That was not done even until the disposal of the writ petitions by the Single Judge or during the pendency of the writ appeals before the Division Bench and until the disposal thereof vide the impugned judgment. We must also notice the stand taken by the respondent bank that even the legal notice sent by the appellants to the respondent bank, in no way expresses unambiguous commitment of the appellants to exercise their right of redemption. Suffice it to observe that the appellants, for reasons best known to them, have not chosen to deposit the amount in the loan accounts or attempted to seek permission of the Court to deposit the same in Court from 19th January, 2006 immediately after filing of writ petitions or for that matter until the registration of the sale certificate on 18th September, 2007. In this backdrop, it is not possible to countenance the stand of the appellants that they had made a valid tender to the respondent bank or that the respondent bank had mischievously or malafide rejected their offer to defeat their rights, to redeem the mortgage before registration of the sale certificate on 18th September, 2007.

- The appellants have failed to exercise their right of redemption in the manner known to law, muchless until the registration of the sale certificate on 18th September, 2007. In that view of the matter no relief can be granted to the appellants, assuming that the appellants are right in contending that as per the applicable provision at the relevant time (unamended Section 13(8) of the 2002 Act), they could have exercised their right of redemption until the registration of the sale certificate which, indisputably, has already happened on 18th September, 2007. Therefore, it is not possible to countenance the plea of the appellants to reopen the entire auction process. This is moreso because, the narrative of the appellants that they had made a valid tender towards the subject loan accounts before registration of the sale certificate, has been found to be tenuous. Thus understood, their right of redemption in any case stood obliterated on 18th September, 2007. Further, the amended Section 13(8) of the 2002 Act which has

come into force w.e.f. 1st September, 2016, will now stare at the face of the appellants. As per the amended provision, stringent condition has been stipulated that the tender of dues to the secured creditor together with all costs, charges and expenses incurred by him shall be at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private deed for transfer by way of lease assessment or sale of the secured assets. That event happened before the institution of the subject writ petitions by the appellants.

- It is not necessary to examine other grounds urged by the appellants, in light of our conclusion that the appellants have failed to make a valid and legal tender to the respondent bank before the issue of sale certificate on 6th January, 2006, muchless registration thereof on 18th September, 2007.
- it is not possible for us to countenance the argument of the appellants that we should exercise plenary powers under Article 142 of the Constitution of India. The repo rted decisions pressed into service by both sides also need not detain us as the appellants have, in law, lost their option to exercise right of redemption, consequent to registration of the sale certificate on 18th September, 2007 and their failure to pay the dues to the secured creditors before that date.

Conclusion

The Supreme Court ordered that, these appeals must fail and same are dismissed with no order as to costs.

5. M/s Kut Energy Pvt Ltd V/s The Authorized Officer, Punjab

(Citation: Supreme Court of India, Civil Appeal Nos.6016-6017 of 2019, dated 20th August, 2019.)

Facts

- An agreement was entered into between the appellants and the Government of Himachal Pradesh on 26.05.2008 for setting up 24 MW "Kut Hydro Electric Project" in District Shimla. For commissioning said Project, the appellants availed loan from the consortium of Punjab National Bank, Corporation Bank and Central Bank of India. (the Bank)
- On 29.09.2015 the account of the appellant was declared NPA by the Bank. A demand notice was thereafter issued by the Bank under Section 13(2) of the SARFAESI Act, on 15.03.2017. The amount due to the Bank as on 14.03.2017 was ₹106. 07 crores.
- Soon thereafter, three proposals were made by the appellants in quick succession on 27.06.2017, 01.08.2017 & 19.08.2017 offering ₹84, ₹87 and ₹90 crores respectively for One Time Settlement (OTS).
- On 22.08.2017 a possession notice under Section 13(4) of the SARFAESI Act was issued by the Bank in respect of the Project in question.
- On 29.08.2017 a sale notice was issued in terms of which the concerned properties were to be sold by e-auction on 06.10.2017 with a reserve price of ₹120 crores.
- **Matter with DRT:** Immediately an application seeking **interim relief being SA No.481 of 2017 was moved by the appellants** before the Tribunal, which prayer was rejected by the Tribunal by its order dated 06.10.2017.
- On 06.10.2017 itself, the e-auction was conducted by the Bank in which a bid was received from 2nd respondent for ₹120 crores. This prompted the appellants to revise the OTS proposal to ₹140 crores. Such offer was made on 07.10.2017 and was followed by filing of CWP No.2274 of 2017 before the High Court on 10.10.2017 challenging:
  i. The notices dated 15.03.2017 and 22.08.2017
  ii. Sale Notice dated 29.03.2017 and
  iii. Order dated 06.10.2017 passed by the Tribunal refusing to grant interim relief.

- **Matter with the High Court**
  The matter came up for preliminary hearing before the High Court on 11.10.2017 and the Counsel for the appellants submitted that in order to establish their bona fides, **the appellants were willing and ready to deposit a sum of ₹140 crores** with the Bank. In order to establish their bona fides, petitioners are ready and will ing to deposit a sum of ₹140 crores with the lead Consortium Bank (Punjab National Bank) in the following manner:
  (i) ₹3 crores already deposited along with communication, dated 7th October, 2017;
  (ii) ₹15 crores on or before 16th October, 2017;
  (iii) ₹22 crores on or before 1st November, 2017 and
  (iv) ₹100 crores on or before 11th December, 2017.
- The High Court directed that subject to the **petitioners depositing a sum of ₹140 crores with the Punjab National Bank**, in terms of their statement, no coercive action shall be taken against them, more so when they are still in the actual physical possession of the assets. **Also, such deposit shall be subject to further orders, which may be passed by the Court. Deposit with the bank shall be treated to be a deposit in the Registry of this Court.**
- **Rejection of OTS:** On 31.10.2017 the Bank rejected the revised OTS proposal for ₹140 crores i.e. even before the sum of ₹140 crores was deposited by the appellants. The **appellants, therefore, filed CMP No.9618 of 2017 seeking modification of the aforementioned order dated 11.10.2017** stating inter alia that deposit of ₹100 crores be made subjection to the sanction of the settlement proposal. As on the date the appellants had deposited a sum of ₹40 crores in keeping with the commitment of first three stages as set out in the order dated 11.10.2017.

Matter with the Supreme Court

- **The Bank challenged the order dated 11.10.2017 by filing Special Leave Petition(C) Nos.4898-4904 of 2018 in Supreme Court, submitting inter alia that the High Court ought not to have interfered in the matter while exercising writ jurisdiction, as alternate**

remedy was available to the appellants. The submission was accepted by this Court and the appeals arising from SLP(C) Nos.4898-4904 of 2018 were disposed of by this Court.

- **On 22.05.2018 the Bank filed CMP No.4761 of 2018 in aforesaid CWP No.2274 of 2017 seeking appropriation of amount of ₹40 crores deposited by the appellants in terms of the order dated 11.10.2017, against the dues of the appellants.**
- **On the other hand, CMP No. 5386 of 2018 was filed by the appellants on 29.05.2018 in said Writ Petition for refund of said amount of ₹40 crores.** These applications were disposed of by the High Court by its judgment and order dated 19.03.2019.

Issue

- Whether the deposit of ₹40 crores made by the borrower/ appellants with the Registry of the High Court in terms of the order dated 11.10.2017 which was only to establish the bona fides of the appellants in support of the offer of OTS made by them can be demanded by the Bank.
- When, once the Writ Petition itself was held not to be maintainable and the offer made by the appellants was rejected by the Bank, whether the amount so deposited must be returned to the appellants.

Key Ratio Decidendi

- This Court is not agreeable with the contention that the Bank has a lien on the pre-deposit made under Section 18 of the SARFAESI Act in terms of Section 171 of the Contract Act, 1872.

  Section 171 of the Contract Act, 1872 on general lien, is in a different context:

  "171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.— Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

  Section 171 of the Contract Act, 1872 provides for retention of the goods bailed to the bank by way of security for the general balance of account. **The pre-deposit made by a borrower for the purpose of entertaining the appeal under Section 18 of the Act is not with the bank but with the Tribunal. It is not a bailment with the bank as provided under Section 148 of the Contract Act, 1872.** Conceptually, it should be an argument available to the depositor, since the goods bailed are to be returned or otherwise disposed of, after the purpose is accomplished as per the directions of the bailor."

- In the present case the **deposit of ₹40 crores in terms of the order of the High Court on 11.10.2017 was only to show the bona fides of the appellants when a revised offer was made by them.** The deposit was not towards satisfaction of the debt in question and that is precisely why the High Court had directed that the deposit would be treated to be a deposit in the Registry of the High Court.
- Going by the law laid down by this Court in Axis Bank vs. SBS Organics (P) Ltd. [(2016) 12 SCC 18], the 'secured creditor' would be entitled to proceed only against the 'secured assets' mentioned in the notice under Section 13(2) of the SARFAESI Act. In that case, the deposit was made to maintain an appeal before the DRAT and it was specifically held that the amount representing such deposit was neither a 'secured asset' nor a 'secured debt' which could be proceeded against and that the appellant before DRAT was entitled to refund of the amount so deposited. The submission that the bank had general lien over such deposit in terms of Section 171 of the Contract Act, 1872 was rejected as the money was not with the bank but with the DRAT. In the instant case also, the money was expressly to be treated to be with the Registry of the High Court.
- On the strength of the law laid down by this Court in Axis Bank case, in our view, the appellants are entitled to withdraw the sum deposited by them in terms of said order dated 11.10.2017. Their entitlement having been established, the claim of the appellants cannot be negated by any direction that the money may continue to be in deposit with the Bank.

Conclusion

- The Supreme Court, therefore set aside the judgment and order dated 19.03.2019 passed by the High Court, allowed CMP No.5386 of 2018 preferred by the appellants and directed that the amount deposited by the appellants in terms of the order dated 11.10.2017 be returned to them within two weeks along with interest, if any, accrued thereon.

Past Exam/May 2018/Case Study-1
(Competition Act,2002)
Country Peoples Plan Insurance Scheme

(A) A complaint was made by a complainant (Informant) to the Competition Commission of India (CCI) against the practices adopted by certain Insurance Companies in implementation of the Insurance scheme, Country Peoples Plan (CPP) by an imaginary State Government 'Z' in India.

The CCI after going through the complaint, on merit, ordered a detailed investigation by the Director General of Investigation under the Competition Act, 2002 (as amended in 2007, briefly referred to hereinafter as the "Act"). The facts of the case are mentioned as under:

(i) CPP is the health insurance scheme introduced by the CG for below poverty line (BPL) families. The task of implementation of this scheme was entrusted to the respective State Governments of the country with the CG bearing 75% of the expenses incurred in relation to the annual premiums.

(ii) A tender was floated by a State Government 'Z' through its agency ULTRA (on 1.11.2009) for selecting and insurance service provider for the implementation of the CPP for the year beginning 2010-11 for a period of three years. The State Government 'Z' issued a tender for the implementation of CPP scheme for the selection of the insurance provider. In this regard, bids were invited from: (a) insurance companies licensed and registered with the Insurance Regulatory and Development Authority; and (b) agencies enabled by any central legislation to undertake health insurance related activities. The last date for submission of the tender was 31.1.2010.

(iii) Four Public Sector Insurance Companies A, B, C & D Insurance Company, each submitted their offer in response to the above tender before its last date of submission. All these companies formed an Insurance Facilitation Group (IFG) with the objective of a common cause of furtherance and Development of insurance business in India and all these companies were members of the IFG. Before submitting their bids against the above tender, officials of these companies attended a meeting of IPG as per their practice, held on 27.12.2009 at XYZ place in the State 'Z' with the sole agenda to discuss the Tender Notice on CPP dated 1.11.2009 of the State Government 'Z'.

They agreed on a business sharing model of sharing the business in the ratio of 55% by the winning company and 15% each by the remaining companies of the total business generated. They also agreed on the premiums to be quoted by each of them in response to the tender. The minutes of the meeting signed by officials of aforementioned companies stated to share the business among the four Insurance Companies with insurance Company with 55% and other Companies with 15% each. D Insurance Company will be L1 and other three insurance companies will be L-2 to L-4 in the quotation being submitted on 28th December, 2009 as per the decision taken in the above meeting.

(iv) Seven insurance companies including the A, B, C, & D Insurance Company submitted the tender documents. The Technical Evaluation Committee (TEC) formed by the State Government 'Z' evaluated the bids on the basis of a scoring system.

The TEC decided that the companies which scored 50 marks and above (a benchmark set by the TEC through ratings) would be declared successful in the technical rounds. As such, only C and D insurance Company were declared successful and their financial bids were opened in the presence of the representatives of the respective insurance companies. TEC recommended acceptance of D Insurance Company's bid for implementation of CPP scheme being the lowest in the State 'Z' for a period of three years subject to yearly basis renewals. D Insurance Company was awarded the tender on the basis of comparative bids mentioned as under:

Details of Price Bids relating to the Tender dated 1.11.2009 for 2010-11.

S. No	Participating Insurance company	Whether Technically Qualified	Marks Awarded in Technical Evaluation	Premium Amt stated in Bid (₹)	
				Without S.T	With ST @ 10.3%
1	D	Yes	76	521	575
2	C	Yes	63	597	658
3	E	No	49	509	561
4	F	No	45	599	652
5	B	No	49	590	651
6	A	No	47	580	640
7	G	No	48	775	854

(v) Accordingly, D Insurance Company won the tender for 2010-11 and later on shared its business with A, B & C Insurance Company in their agreed mutual model sharing ratio. The tender was issued for a period of three years. However, towards the end of the first year of the contract, D Insurance Company sought for an upward revision of premium to ₹ 1,000/- per family. When this request of D Insurance Company was turned down by the State Government 'Z'; D Insurance Company invoked the exit clause of the contract. As a result of this action, the State Government retendered.

(vi) **Post Retendering Scenario:** It was found that the price rise effected by the Insurance companies - A, B, C & D Insurance Company could not have been based on any rational business justification as the retender for the year 2011- 12 and 2012-13 was won by E Insurance Company at a much lower premium of ₹ 840/- per family. The awarded contract was even extended with the same premium for the year 2012-13, 2013-14 and 2014-15 i.e. for a period of three years and this contract was renewed for the year 2014-15 at the same price. E Insurance Company confirmed that the company was not incurring any losses for providing health insurance services under CPP scheme.

The details of rates of these Insurance companies in relation to the tenders of 2010-11 to 2012-13 are mentioned as under:

Details of Insurance companies rates bids in relation to tenders of 2010-11 to 2013-14 Price Bids (₹)

S. No	Name Of the Insurance Company	Price Bids (₹)							
		2010-11		2011-12		2012-13		2013-14	
		Without S.T	With S.T	Without S.T	With S.T	Without S.T	With S.T	Without S.T	With S.T
1	2	3	4	5	6	7	8	9	10
1	A	580	640	850	938	1700	1875	900	994
2	B	590	651	850	938	1250	1392	1100	1214
3	C	597	658	910	1004	1400	1546	920	1016
4	D	521	575	1000	1104	1000	1104	1000	1104
5	E	**509	561	840	927	840	927	840	927

** Not technically qualified

(vii) It was observed that the State Government entrusted its agency named ULTRA to implement CPP scheme in letter and spirit in the State and this agency had actually facilitated continuance of D Insurance Company as the insurer under these schemes by employing an arbitrary practices. A, B, C & D Insurance Companies have claimed that until 2002, all of them were owned by General Insurance Company.

It was also submitted that pursuant to the enactment of the General Insurance Business (Nationalization) Amendment Act, 2002, Government of India holds 100% shares of each of them and controls the management and affairs of the companies through Department of Financial Services (Insurance Division), Ministry of Finance. In this regard, a reference may be had to the policy reforms introduced by the Government of India in 1991 which led to the de-regulation of the Indian economy.

With the commencement of private participation, a need was felt to modify the existing market structure of certain select sectors, including, the insurance sector so as to promote orderly growth of these sectors. In this regard, the Government of India established a committee in the year 1993 under the chairmanship of Shri R. N. Malhotra (former Governor of the Reserve Bank of India) to propose reforms for the insurance sector. Pursuant to the recommendations of the Malhotra Committee, two major regulatory changes were introduced, including, ending the monopoly of General Insurance Company in the general insurance business and ending the control exercised by General Insurance Company over its wholly owned subsidiaries.

These regulatory changes were ushered in to allow the public sector insurance companies to act independently and to compete with the private players to offer better services to consumers.

(viii) Further, A, B, C & D Insurance Companies submitted that all decisions relating to submission of bids, determination of bid amounts, business sharing arrangements, etc. were taken internally at company level without any ex ante approval/ directions from Ministry of Finance. Even the decisions taken by the companies were not notified ex post to the Ministry. These companies participated in the above said tenders, independent of Ministry of Finance.

(ix) Details of Business Sharing Arrangement among A, B, C & D Insurance Companies relating to the Tender dated 1.11.2009 are tabulated as under:

Details of Business Sharing Arrangement relating to the Tender dated 1.11.2009

Total Business Generated for D Insurance Company: ₹ 92,94,65,400/-

S. No	Name of Insurance Company	Business Sharing (in terms of %)	Business Sharing (in terms of Revenue ₹)
1	A	15	13,94,19,810.00
2	B	15	13,94,19,810.00
3	C	15	13,94,19,810.00
4	D	55	51,12,05,970.00

(x) Turnover of the A,.B,C & D Insurance Companies in the last three financial years based on the financial statements were as under :

S. No	Name of Insurance Company	Annual Turnover (₹ in Crores)		
		2010-11	2011-12	2012-13
1	A	6000	7660	9575
2	B	5400	6745	7853
3	C	7600	7500	8765
4	D	6745	7352	7872

You are required to analyse, with reference to the Competition Act Provisions.

1. Whether the public sector insurance companies i.e., A, B, C & D Insurance Company constitute a single economic entity? Explain.
2. Examine whether the A, B, C & D Insurance Companies by their conduct have entered into an agreement and have contravened any of the provisions of the Competition Act. Explain.
3. The State Government 'Z' has now desired to include a specific clause in the bid document to prevent abuse of the Competition Act. What key clauses would you recommend? Please draft your reply within a total of 100-200 words.
4. Assume a situation where the agreement and the meeting of IFG took place outside India. Explain whether the provisions of the Act still be applicable.
5. Chairman of the Competition Commission of India, based upon the facts of the above case, has requested you as an officer of the Commission to draft a brief show cause notice that should be issued to the insurance companies alleged to be in default. Your notice should cover the following aspects namely Authority issuing the notice, Defendant details, Alleged contraventions, Facts as available and Time line for the response by the defendant. Also include the relevant provisions which empower such notices to be issued.

(B) You are the Chairman of Competition Commission of India (CCI) under the Competition Act, 2002 (hereafter, the Act) as amended in 2007 and subsequently you are chairing the Bench to deal with information filed under section 19(1) (a) of the Act relating to the radio taxi market, alleging abuse of dominance and predatory pricing. You do not own a car.

For official journeys, you are provided with an office vehicle. For private use, you generally avail of the facility available in the market of radio taxis, fitted with GPS instruments. Therefore, you are fully aware of the radio taxis available in the market and exposed to the methodology of requisitioning a taxi for personal use and of paying for the service.

Informants A and B are engaged in the business of providing radio taxi services in a certain city XXX in South India under the brand names “Press and Hail a Taxi” and “Taxi before you blink”, A large Radio Taxi provider C is also in the market competing with Radio Taxi providers A and B and some others too. Informants A and B filed before the CCI separate information under Section 19 (1) (a) of the Act alleging that Radio Taxi provider C had abused its dominant position by engaging in predatory pricing in the relevant market by offering heavy discounts to passengers and incentives to cab drivers, in contravention of Section 4 (2) (a)(ii) of the Act. Radio Taxi provider C was in the habit of having oral agreements with customers thus practising an opaque behaviour prejudicing the interests of A and B.

Informants alleged that C controlled over 50% of a highly concentrated market, demonstrating C's dominance. The Informants also alleged that there were considerable entry barriers present which had made it difficult for a new player to effectively compete. Consistent payment of high incentives and discounts along with exclusivity clauses in agreements with drivers allowed C to thwart effective competition, lock-in drivers and create a wide base of customers.

Additionally, the Informants alleged that the presence of an extensive network of C across the city XXX had acted as a sufficient detriment to any countervailing buying power available with consumers. They alleged that the presence of a large network of C had restricted the power of consumers to negotiate and had substantially restricted competition in the market for other Radio Taxis in the city XXX.

Based on the high market share of C, the Commission arrived at the prima facie view that C held a dominant position in the relevant market of "Radio Taxi services" in city XXX and directed the Director General ("DG") to conduct a detailed investigation into the matter.

Findings of the DG

The DG recognized the different business models prevailing in the radio taxi service industry i.e. asset-owned model, aggregator model and hybrid model. He noted that while C functioned under the aggregator model, its services were functionally substitutable with those provided by other taxis operating under the different business models.

Accordingly, the DG concluded that the relevant product market would be the "market for radio taxi services" and the relevant geographic market would be the city of XXX.

The DG compared the number of trips/rides undertaken by different players in the relevant market between 2012 and 2016 to observe that while C did grow at a meagre rate of 63% between January and September of 2015, Informant A's trip size registered a phenomenal growth of 1200% in the same period. He noted that A was an aggressive player in the market and that the rise of A as a healthy competitor defeated the argument of the presence of entry barriers. The DG concluded that C was not in a dominant position, given these facts.

Informants had alleged that C had access to funds and had availed of the same in big measure, thwarting the other operators to avail of funds. This, according to them, was an entry barrier. DG found that no evidence had been supplied by the Informants to substantiate this entry barrier allegation. DG dismissed the allegation as not proved.

Answer the following 10 Multiple Choice Questions (10 x 2= 20 Marks)

1. The oral agreements between Radio Taxi provider C and some customers, falling within Section 2(b) of the Act_____.
   (a) are not legally enforceable
   (b) are legally enforceable
   (c) are not anti-competitive
   (d) are not actions in concert

2. Dominance under the Act should be determined on the basis of_____.
   (a) market share
   (b) price leadership.
   (c) profitability
   (d) ability to operate independently of competitive forces in the relevant market

3. Relevant market is made up of_____.
   (a) relevant geographic market
   (b) relevant product market
   (c) relevant geographic market and relevant product market
   (d) market structure and size alone

4. Abuse of dominance by a dominant enterprise arises_____.
   (a) if the enterprise imposes unfair or discriminatory condition in purchase or sale of goods or service
   (b) if the enterprise imposes discriminatory condition or price to meet competition
   (c) if the enterprise makes a sizeable profit in its activities
   (d) if the enterprise is a price leader

5. Predatory pricing arises when an enterprises_____.
   (a) prices its product very high
   (b) prices its product just below the prevalent market price
   (c) prices its product to clear inventory
   (d) prices its product below its cost of production with a view to reducing or eliminating competitors

6. Two Enterprises_____.
   (a) can be in dominant position at same time
   (b) cannot be in dominant position at same time
   (c) can be dominant only if they merge
   (d) can be dominant only if one acquires the other

7. Abuse of dominance does not arise if_____.
   (a) the enterprise limits or restricts production of goods or provision of services.
   (b) the enterprise limits or restricts technical and scientific development relating to goods or services to the prejudice of consumers.

(c) the enterprise does not indulge in practices resulting in denial of market access.
(d) the enterprise uses its dominance in one relevant market to enter into other relevant market.

8. CCI cannot make enquiry into alleged contravention of the provisions in Section 3 and 4
(a) on unfounded rumours
(b) on its own motion
(c) on receipt of information from consumers or trade associations
(d) on receipt of a reference from the Central Government or State Government

9. The parties requesting for confidentiality of information or documents submitted during the investigation shall have to satisfy the conditions laid down in regulation_____of the Competition Commission of India (General) Regulations, 2009.
(a) 42
(b) 39
(c) 35
(d) None of the above

10. Relevant product market will have to reckon
(a) regulatory trade barriers
(b) physical characteristics or end-use of goods
(c) national procurement policies
(d) Transport costs

Answers to Part (A) of Case study 1

Answer 1

Yes, the Public insurance companies, A, B, C & D Insurance company constitute a single economic entity, i.e., Companies associated with each other through the virtue of transport costs common control operate. These Companies formed an Insurance Facilitation Group (IFG) with the objective of a common cause of furtherance & development of insurance business in India and all these companies were members of IFG.

This common control operate can be considered as cartel defined in Sec 2(c) of the competition Act, 2002.

"Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

ALTERNATIVE ANSWER

It is observed that although the public sector insurance companies namely A, B, C and D Insurance company are presently under the supervision of the Central Government, each of them placed a separate bid in response to the tenders issued by the State Government for implementation of the CPP scheme.

Further, the Insurance companies themselves have submitted that all decisions relating to submission of bids, determination of bid amounts, business sharing arrangements, etc. were taken internally at company level without any ex ante approval/ directions from the Ministry of Finance. Thus, it is apparent that these companies participated in the impugned tenders independent of Ministry of Finance.

In view of the above, it is concluded that bid offers submitted by the A, B, C and D Insurance companies in response to the Tender issued by the State Government 'Z' in relation to the CPP were based on their own volition and the Ministry of Finance had no role to play. The Ministry of Finance did not exercise any de facto or de jure control over business decisions of these companies in submitting bids for impugned tenders. As such, these insurance companies do not constitute a single economic unit.

Answer 2

Yes, A, B, C, & D insurance companies have entered into an agreement for sharing the business on a basis of business sharing model in the ratio of 55% by the winning company and 15% each by the remaining companies of the total business generated.

Insurance companies through an agreement between them quoted the bids rate, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. These are anti-competitive agreements defined under section 3 of the Competition Act, 2002.

According to the section, it shall not be lawful for any enterprise or association of enterprises or person or association of persons to 'enter' into an agreement in respect of production, supply, storage, distribution, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. All such agreements entered into in contravention of the aforesaid prohibition shall be void.

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or

provision of services, shall be presumed to have an appreciable adverse effect on competition, in the following manner, where it—

(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market /type of goods or services /number of customers in the market /any other similar way;
(d) Directly or indirectly results in bid rigging or collusive bidding.

Accordingly, in the given case, the agreement between them A, B, C & D insurance companies results in the anti-competitive agreements, and thus contravened the provisions of the Competition Act.

ALTERNATIVE ANSWER

"In the given case, these insurance companies had held a meeting under the auspices of IFG on 27.12.2009 at XYZ place in the State 'Z' with the sole agenda to discuss the 'Tender Notice on CPP dated 1.11.2009 of the State Government 'Z', The meeting was held to discuss about sharing of business and submission of quotation for the above business", The minutes of the meeting of IFG signed by officials of aforementioned companies indicated that a decision was taken 'to share the business among the four PSUs with D Insurance Ltd. with 55% and other Companies with 15% each ...D Insurance Company will be LI and other three insurance companies will be L-2 to L-4 in the quotation being submitted on 28th December, 2009'.

It is a fact that the decision taken by these companies in the above mentioned IFG meeting was implemented by them. It is clear that the price quoted by these companies in their price bids was in accordance with the decision taken in the IFG meeting held on 27.12.2009. In line with the decision taken in the IFG meeting, D Insurance Company was the L-l bidder.

In terms of the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control or goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

By virtue of the presumption contained in subsection (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-(a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

It may also be pointed out that explanation appended to section 3(3) of the Act defines 'bid rigging' as any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services; which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

In view of the above, it is concluded that conduct of A, B, C & D Insurance Companies have resulted in manipulation of the bidding process initiated by the State Government in contravention of the provisions of section 3(1) read with section 3(3)(d) of the Act. In case of agreements as listed in section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the opposite parties".

Further, the insurance companies A, B, C & D have entered into an agreement (in writing as per the minutes of IFG meeting) to manipulate the tendering process initiated by Z State Government/ULTRA for implementation of the scheme for the years 2010-11, 2011-12, 2012-13 in accordance with the provisions of section 2(b) of the Act. It is clearly and unequivocally established. Section 2(b) of the Act defines the term 'Agreement'.

Accordingly, the term Agreement includes arrangement or understanding or action in concert
(i) whether or not, such arrangement, understanding or action is formal or in writing
(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings ."

Answer 3

To prevent abuse of Competition Act. It is advised that the following clauses be included by the State Government "Z" to prohibit abuse of dominant position by any enterprise or group.

An enterprise or a group, does not-

(a) directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or services; or price in purchase or sale (including predatory price) of goods or service, or
(b) limits or restricts the production of goods or provision of services or market therefor; or technical or scientific development relating to goods or services to the prejudice of consumers; or
(c) indulges in practice or practices resulting in denial of market access in any manner; or
(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Answer 4

As per section 32 of the Competition Act, 2002, where-

(a) an agreement referred to in section 3 has been entered into outside India; or
(b) any party to such agreement is outside India; or
(c) any enterprise abusing the dominant position is outside India; or
(d) a combination has taken place outside India; or
(e) any party to combination is outside India; or
(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India;

The Commission shall, have power to inquire under the various provisions of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.

Though the agreement and the meeting of IFG took place outside India, but have an appreciable adverse effect on competition in the relevant market in India, so the provisions of the Competition Act are applicable.

Answer 5

DRAFTING OF SHOW CAUSE NOTICE

To,

A, B, C, & D Insurance Companies

New Delhi-110014

12th May, 2018

Subject: Show cause notice for entering into anti-competitive agreement or combination of an enterprise for abusing of dominant position

The Chairman, CCI, has noticed that an agreement / combination of the A, B, C, & D Insurance Companies in response to the tender issued by the State government (Z), for selection of the insurance service provider for implementation of the CPP, insurance, is likely to cause, or has caused an appreciable adverse effect on competition and abuse of dominant provision under section 3 and 4, within the relevant market in India.

All the service providers as aforesaid, are required to respond within thirty days of the receipt of the notice, as to why investigation in respect of such an agreement/combination should not be conducted under section 29 of the Competition Act, 2002.

Chairman

CCI

Answers to Part B of Case study 1

(i) **Answer (a):** Are not legally enforceable
Reasoning: The oral agreements between radio taxi provider C and customers are presumed to have

an AAEC. These agreements are void, so they are not legally enforceable.

(ii) **Answer (d):** Ability to operate independently of competitive forces in the relevant market
Reasoning: Dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(a) operate independently of competitive forces prevailing in the relevant market; or
(b) affect its competitors or consumers or the relevant market in its favour.
[Explanation to section 4]

(iii) **Answer (c):** Relevant geographic market and relevant product market
Reasoning: "Relevant Market" means the market, which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets; [Section 2(r)]

(iv) **Answer (a):** If the enterprise imposes unfair or discriminatory condition in purchase or sale of G/S.
Reasoning: According to section 4 of the Competition Act, 2002, there shall be abuse of dominant position if an enterprise or a group, directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or services; or price in purchase or sale (including predatory price) of G/S.

(v) **Answer (d):** prices its product below its cost of production with a view to reducing competition or eliminating competitors
Reasoning: "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(vi) **Answer (b):** cannot be in a dominant position at the same time
Reasoning: Dominant position can be enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market. Therefore two enterprises cannot be in a dominant position at the same time.

(vii) **Answer (c):** the enterprise does not indulge in practices resulting in denial of market access
Reasoning: According to Section 4(2)(c) of the Competition Act, 2002, there shall be abuse of dominant position if an enterprise or a group indulges in practice or practices resulting in denial of market access in any manner. Therefore non indulgences in practices resulting in denial of market access by the enterprise is not a abuse of dominance.

(viii) **Answer (a):** on unfounded rumours
Reasoning: Section 19 of the Competition Act, 2002, lays down the procedure for any inquiry which can be initiated suo motu by the Commission, on receipt of a reference from the Central Government or a State Government and on the on receipt of an information from consumers or trade associations.

(ix) **Answer (c):** 35
Reasoning: According to section 30(3), the parties requesting for confidentiality shall file an affidavit as specified in regulation 42 of the Competition Commission of India (General) Regulations, 2009 stating that the conditions prescribed in regulation 35 of the Competition Commission of India (General) Regulations, 2009 are satisfied.

(x) **Answer (b):** Physical characteristics or end use of goods
Reasoning: "Relevant Product Market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;**[Section 2(t)]**

Past Exam/May 2018/Case Study-2
(IBC, FEMA)
M/s A limited under CIRP

(A) A Corporate Insolvency Resolution process, under the Insolvency and Bankruptcy Code 2016 was initiated by M/s A Limited as a Corporate Debtor. The company was in default to its creditors and the assets were insufficient to meet the liabilities of the company.

Attempts to resolve the insolvency of the corporate debtors failed and in the last, it was decided to go for liquidation of the company. The balance sheet and additional information of A Ltd. are given below:

KEY FINANCIAL INFORMATION:

Data	Amt (₹In cr)	Data	Amt (₹ In cr)
Equity Share Capital	11,000	Land & Building	16,500
Preference Share Capital	3,800	Fixtures & Fittings	1,000
Term Loan	1,500	Stocks	640
Working Capital Loan	1,200	Debtors	550
Unsecured Financial Creditors	1,000	Other current Assets	625
Government dues	400	Cash	175
Workman dues	240	Accumulated Losses	2,350
Employee Liability	300		
Operational Creditors	2,400		
	21,840		**21,840**

Additional Information:

CREDITORS

(1) Term loan is secured against fixed charge on land & building and fixtures & fittings. Bank A with an ₹ 800 crore term loan outstanding has first charge on the assets and Bank B with ₹ 700 crore outstanding has second charge on the assets.

(2) Working capital loan is provided by Bank C & secured against a floating charge on debtors stock of the company.

(3) Unsecured financial creditors include a Director X who owns 3% of the share capital of M/s A Limited with an outstanding loan due to him of ₹ 50 crores.

OTHER LIABILITIES:

(1) Workman dues represents amount payable for the period of 24 months preceding the liquidation commencement date.

(2) Employee liability includes ₹ 25 crore is outstanding for employees for a period of 12 months.

(3) Last 3 years of tax assessment pending total demand raised by the department is ₹ 1200 crore. This has not been included in the BS, but reflected as a contingent liability only. However the liquidator has managed to get an assessment completion certificate and agreed to a final liability of ₹ 300 crore.

FIXED ASSETS & OTHER ASSETS:

(1) L&B realized 70% of book value and there would be a cost of ₹ 175 crore in realizing the assets.

(2) Fixtures & fittings would realize 30% of book value, net of any realization cost. Stock, debtors & other current assets would realize 65% of book value.

OTHER INFORMATION:

(1) There was a pending insurance claim filled by the company for a quality breach by a supplier, which was not recorded in the books. The liquidator has managed to recover ₹ 150 cr from the insurance company.

(2) Lease for the office premises had a lock in period of 10 years, out of which three years have expired. The landlord has submitted a claim of ₹ 120 crore for the remaining seven years of the lease period.

(3) Based on the amount realized & distributed, the cost of liquidation is computed to be ₹ 140 crores.

(4) The pending insolvency period cost was ₹ 80 crore, mainly including interim funding, remuneration of the IP and other such costs as permitted under the Code.

(5) The secured creditors have decided to relinquish their security interest to the liquidation estate and receive proceeds from the sale of the liquidation assets by the liquidator as per provisions laid under the Insolvency and Bankruptcy Code, 2016 (IBC).

QUESTIONS:

You are required to find out following with reference to the relevant provisions laid under the IBC, 2016:

1. What would have been the constitution of the Committee of Creditors and what would have been the voting share of each of the members of the committee?
2. Total value realized by liquidator
3. Order of Priority with Notes indicating the relevant section of the Code.
4. You have been appointed as the Interim Resolution professional of A Ltd. Draft a public notice as required under the Act and Regulations.
5. The application before NCLT was filed on 5th January, 2018. The case was admitted on 20th January, 2018. The IRP who was appointed on 20th January, 2018, received the order on the same day and issued public notice on 23rd January, 2018 seeks your guidance on the various time lines to be compiled with. Prepare a checklist for his ready reference.
6. In the said case, assume that A Ltd. has transferred an amount of ₹ 500 crore to its subsidiary abroad. The subsidiary has acquired assets for its business purposes.
   How will you, as the liquidator treat the assets of the subsidiary and the shares held in the subsidiary?

(B) You are a Chartered Accountant specialising in FEMA related matters. You are back in office after a short trip and your assistant has compiled all clients' queries on which your opinion is requested. Choose the most appropriate reply and write a few lines justifying your stance.

(i) Mr. Patel's mother requires to travel to USA for a complicated brain surgery. The estimate given by the hospital in USA is USD 3,00,000 over and above Mr. Patel would need USD 50,000 towards lodging boarding and other incidental expenses. Mr. Patel had already spent USD 2,00,000 during the concerned Financial Year. Mr. Patel can remit from India_____.

(a) USD 2,50,000
(b) USD 3,00,000
(c) USD 3,50,000
(d) USD 1,00,000

(ii) Mr. Smith is deputed to India by his company to develop a strategic software for a period of five years from 1st Jan, 2015. He is paid salary to his Indian bank account. On 1st May, 2017 he wants to remit his entire salaries ended till 30th April, 2017 to his home country USA. Mr. Smith can .

(a) remit the salary after payment of appl. taxes and contribution to appl. social security schemes
(b) cannot remit any amount as salary is credited to his bank account in India
(c) remit gross salary before taxes and can make payment of taxes at the year end
(d) remit salary only upon completion of assignment after payment of taxes and filing of IT return

(iii) Mr. John, an Australian citizen of non-Indian origin is engaged in construction of farm houses in Australia. He intends to take 50% stake in an Indian company which is engaged in construction of residential premises in Jammu. Mr. John_____.

(a) cannot make any investment in the Real Estate Sector
(b) can invest through his company in Australia
(c) can make direct investment for construction of residential premises
(d) Both (a) and (b) above

(iv) Mr. Mehra intends to return to India for good after 30 years of stay in USA. Mr. Mehra needs to___.

(a) close all his bank accounts in USA and remit funds to India
(b) liquidate all his investments before returning to India
(c) bring minimum of USD 2,50,000 to India for his survival
(d) can retain his money, bank accounts, investments etc. abroad without any restrictions

(v) Mr. Kale migrated to UK 20 year ago. He later on acquired UK citizenship. He inherited 50 acres of agricultural land in Maharashtra which has an inbuilt Farm House. Mr. Kale intends to gift or sell this property to his only son who has UK citizenship, but settled in India. Mr. Kale_____.

(a) can gift this property to his son but cannot sale it
(b) can neither gift nor sale this property to his son
(c) can sale this property to his son but cannot gift it
(d) can do both, gift as well as sale this property to his son

(vi) Mr. Iyer an Indian resident acquired a residential flat in Malaysia in contravention of FEMA regulations. Fearing actions, he intends to gift the same to his nephew Mr. Kartik, who is a resident of India at present but will soon be migrating to Malaysia for higher studies. Mr. Kartik_____.

(a) can acquire the flat from his uncle by way of gift
(b) cannot acquire the flat from his uncle by way of gift
(c) can acquire the flat by way of inheritance but not as a gift
(d) can acquire the flat by way of sale, gift or inheritance

(vii) M/s Charming Garments has a warehouse in Amsterdam to which goods worth ₹ 10 crore are exported. The firm needs to realise the proceeds of exports _____
(a) as soon as exports are made
(b) within 9 months from the date of export
(c) as soon as goods are sold/within 15 months from the date of shipment of goods W.E is earlier.
(d) within 12 months from the date of shipment of goods

(viii) Mr. Gotad travelled to Germany for attending a conference. He acquired USD 5,000 from his travel agent in India, out of which he saved currency notes worth USD 2,500. Upon his return to India, Mr. Gotad_____.
(a) needs to surrender USD 2,500 to his Authorised Dealer (AD) within six months of date of return
(b) needs to surrender USD 2,500 to his AD within ninety days of date of return
(c) can retain USD 2,000 and surrender USD 500 within 90 days of his return to India
(d) can retain USD 2,500 for his next trip

(ix) For any contravention of FEMA Regulations under section 13 of the Act, where the sum involved is quantifiable, the quantum of penalty would be_____.
(a) three times of sum involved
(b) rupees two lacs only
(c) upto Rupees five thousand per day of the offence in continue
(d) Both (a) and (c) above

(x) The time limit for compounding of offences u/s 13 of FEMA by the Directorate of Enforcement is
(a) Nine months from the date of application
(b) Six months from the date of committing such contravention
(c) 180 days from the date of receipt of application by the Directorate of Enforcement
(d) 180 days from the date of application to the Directorate of Enforcement

Answers to Part (A) of Case study 2

Answer 1

In the given case, the committee of creditors will be constituted as per section 21 of the IBC, 2016.

The members of the committee will comprise all financial creditors excluding related party who will not have right of representation, participation or voting in the meeting of the committee of creditors.

Accordingly, the committee of creditors and their voting share will be as under:

S. No	Members	Loan Amount (Rs. Crores)	Voting Share %
1	Bank A	800	21.92
2	Bank B	700	19.18
3	Bank C	1200	32.88
4	Unsecured Unrelated financial Creditors	950	26.02
		3650	100

The director X who is an unsecured financial creditor with ₹ 50 crores, since related party of the corporate debtor, shall not have any right of representation, participation or voting in the committee of creditors.

Answer 2

Total Assets that can be realized by the Liquidator of M/S A Limited will be as follows:

Land & Building realized 70% of book value	= ₹ 11,550 Crore	
Less: Cost of realization	= ₹ 175 Crore	
Net value	= ₹ 11375 Crore	
Fixtures & Fittings realize 30 % of book value	= ₹ 300 Crore	
Stock, debtor & other current assets would realize 65% of book value		= ₹ 1179.75 Crore
Insurance claim recovered by the liquidator from insurance company		= ₹ 150 Crore
Total value realized by liquidator		= ₹ 13,004.75 Crore.

[Note: Answer may also be given on the assumption of inclusion of amount of cash available in the amount of total value released by liquidator. In such case total value released will be 13,179.75 Crore].

Answer 3

Section 53 of the Code lays the provisions related to distribution of assets or the proceeds from the sale of the liquidation assets.

Distribution of proceeds from the sale of the liquidation assets: The proceeds from the sale of the liquidation assets shall be distributed in the following order of priority —

(i) the insolvency resolution process costs and the liquidation costs paid in full;
(ii) the following debts which shall rank equally between and among the following :—
  (a) workmen's dues for the period of 24 months preceding the liquidation commencement date; and
  (b) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
(iii) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
(iv) financial debts owed to unsecured creditors;
(v) the following dues shall rank equally between and among the following:—
  (a) any amount due to the CG and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of 2 years preceding the liquidation commencement date;
  (b) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
(vi) any remaining debts and dues;
(vii) preference shareholders, if any; and
(viii) equity shareholders or partners, as the case may be.

Fees to liquidator: The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients, and the proceeds to the relevant recipient shall be distributed after such deduction.

Particulars	Amount in Crores (₹)	
Value realised by the liquidator		13,004.75
Add: Cash		175.00
Total Amounts of Funds Available		**13,179.75**
Less: Section 53(1)(A)		
Insolvency resolution process costs and liquidation costs		
(i) Costs of Liquidation	140.00	
(ii) Insolvency professional related costs	80.00	220.00
Balance Available		**12,959.75**
Less: Section 53(1)(b)		
(i) Workmen's dues for the period of 24 months preceding the	240.00	
(ii) Debt Owed to a secured creditors		
(a) Term Loans	1500.00	
(b) Working Capital Loan	1200.00	2940.00
Balance Available		**10,019.75**
Less: Section 53(1)(C)		
Wages and any unpaid dues owed to employees other than workmen		25.00
Balance Available		**9,994.75**
Less: Section 53(1)(D)		
Financial debts owed to unsecured financial creditors		1,000.00
Balance Available		**8,994.75**
Less: Section 53(1)(E)		
Amount due to the Central Government and the State Government		
(i) Government dues	400.00	
(ii) Income tax liability	300.00	700.00
Balance Available		**8,294.75**
Less: Section 53(1)(F)		
(i) Employee liability (300-25)	275.00	
(ii) Operational Creditors	2,400.00	2,675.00
Balance Available		**5619.75**
Less: Section 53(1)(G)		
Amount to be given to Preference Shareholders		3,800.00
Balance Available		**1,819.75**
Less: Section 53(1)(H)		
Amount to be given to Equity Shareholders		1,819.75
Balance Available		**Nil**

[Note 1: Rent claim for unexpired lease period has been considered at nil value as based on the relevant provisions, payment of periodic nature can only be claimed till the time order for liquidation is passed

***Note 2: It is assumed that 'pending insolvency cost of ₹ 80 crores has not been paid in full before and now being paid in full].**

Answer 4

Draft Public notice to the Creditors of A Ltd., the corporate debtor is as under:

Form A

PUBLIC ANNOUNCEMENT

(Under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.)

FOR THE ATTENTION OF THE CREDITORS OF A LIMITED

RELEVANT PARTICULARS		
1	NAME OF CORPORATE DEBTOR	A LIMITED
2	DATE OF INCORPORATION OF CORPORATE DEBTOR	
3	AUTHORITY UNDER WHICH CORPORATE DEBTOR IS INCORPORATED / REGISTERED	
4	CORPORATE IDENTITY NUMBER / LIMITED LIABILITY IDENTIFICATION NUMBER OF CORPORATE DEBTOR	
5	ADDRESS OF THE REGISTERED OFFICE AND PRINCIPAL OFFICE (IF ANY) OF CORPORATE DEBTOR	
6	INSOLVENCY COMMENCEMENT DATE IN RESPECT OF CORPORATE DEBTOR	
7	ESTIMATED DATE OF CLOSURE OF INSOLVENCY RESOLUTION PROCESS	
8	NAME AND REGISTRATION NUMBER OF THE INSOLVENCY PROFESSIONAL ACTING AS INTERIM RESOLUTION PROFESSIONAL	
9	ADDRESS AND E-MAIL OF THE INTERIM RESOLUTION PROFESSIONAL, AS REGISTERED WITH THE BOARD	
10	ADDRESS AND E-MAIL TO BE USED FOR CORRESPONDENCE WITH THE INTERIM RESOLUTION PROFESSIONAL, IF DIFFERENT FROM THOSE GIVEN AT SL. NO.9.	
11	LAST DATE FOR SUBMISSION OF CLAIMS	

Notice is hereby given that the National Company Law Tribunal has ordered the commencement of a CIRP against the M/S A Ltd. on ---------- [insolvency commencement date].

The creditors of M/S A Ltd., are hereby called upon to submit a proof of their claims on or before---------- [within fourteen days from the appointment of the interim resolution professional] to the interim resolution professional at the address mentioned against item 8.

The financial creditors shall submit their proof of claims by electronic means only. The operational creditors including workmen and employees may submit the proof of claims by in person, by post or by electronic means.

Submission of false or misleading proofs of claim shall attract penalties.

Name and Signature of Interim Resolution Professional:

Date and Place:

Answer 5

Checklist for ready reference of various time lines to be complied by IRP within the Insolvency and Bankruptcy Code are:

S. N	Process of Insolvency process	Timelines
1	Filing of application before NCLT	5th January 2018
2	Admission of application	20th January, 2018
3	Appointment of Interim Resolution Professional(IRP)- Actual date	20th January 2018 (within 14 days from the commencement date)
4	Public announcement -Actual date	Uptil 23rd January, 2018 (within 3 days from the date of appointment of the Interim Resolution Professional)
5	Collation of claims	Within 14 days of the date of appointment of Interim Resolution Professional
6	Verification of claims	Within 7 date from last date of submission of claims
7	Constitution of Committee of Creditors	Immediate after verification of claims
8	Holding first meeting of Committee of Creditors	Within 7 days of constitution of Committee of Creditors
9	Filing of report to Adjudicating Authority	Before 30th day of appointment of IRP
10	Moratorium	180 days from the date of admission of application i.e. 18th July, 2018.

Answer 6

According to section 36 of the code, for the purposes of liquidation, the liquidator shall form an estate of the assets, which will be called the liquidation estate in relation to the corporate debtor. The liquidation estate shall comprise all liquidation estate assets which shall include any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor.

However, as per the IBC, 2016, assets of any Indian or foreign subsidiary of the corporate debtor shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation.

So, according to the above provision, the assets of the foreign subsidiary of A Ltd., is excluded for recovery in the liquidation.

ANSWERS TO PART (B) OF CASE STUDY 2

(i) Answer (c): USD 3,50,000

Reasoning: As per Schedule III of the FEM (Current Account Transactions) Rules, 2000, Individuals can avail of foreign exchange facility within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit shall require prior approval of the Reserve Bank of India. However, for the purposes of expenses in connection with medical treatment abroad, the individual may avail of exchange facility for an amount in excess of the limit prescribed if it is so required by a medical institute offering treatment. Mr. Patel can remit from India 3,00,000+ 50,000= USD 3,50,000.

(ii)Answer (a): remit the salary after payment of applicable taxes and contribution to applicable social security schemes

Reasoning: As per Schedule III of the FEM (Current Account Transactions) Rules, 2000, a person who is resident but not permanently resident in India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company, may make remittance up to his net salary, after deduction of taxes, contribution to provident fund and other deductions. Accordingly, Mr. Smith can remit the salary after payment of taxes and contributions related to social security schemes.

(iii) Answer (c): can make direct investment for construction of residential premises

Reasoning: As per the FEM (Permissible Capital Account Transactions) Regulations, 2000, the person resident outside India is prohibited from making investments in India in any form, in any company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage in real estate business, or construction of farm houses. In “real estate business” the term shall not include shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.

(iv) Answer (d): can retain his money, bank accounts, investments etc. abroad without any restrictions

Reasoning: As per the Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2015, a citizen of a foreign state resident in India may open, hold and maintain a foreign currency account with a bank outside India.

[Note: This regulation does not form part of the study material. Correct answer given in common parlance, may be taken into consideration]

(v) Answer (a): can gift this property to his son but cannot sale it

Reasoning: As per the FEM (Acquisition and transfer of immovable property in India) Regulation, a person of Indian origin resident outside India may transfer any immovable property in India other than agricultural land/farm house/plantation property, by way of sale to a person resident in India. Since in the question it an agricultural land, so it will fall in exception for transfer of property by the way of sale to a person resident in India.

(vi) Answer (b): cannot acquire the flat from his uncle by way of gift

Reasoning: A person resident in India may acquire immovable property outside India, a person resident in India may acquire immovable property outside India, by way of inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition. Since in the given case there was contravention of FEMA regulations, so Mr. Kartik cannot acquire the flat.

(vii) Answer (c): as soon as goods are sold or within fifteen months from the date of shipment of goods whichever is earlier.

Reasoning: As per FEM (Export of goods and services) Regulation, the amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months from the date of export, provided that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods.

(viii) Answer (c): can retain USD 2,000 and surrender USD 500 within 90 days of his return to India

Reasoning: According to Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015, a person resident in India can retain foreign currency notes, bank notes and foreign currency traveller's cheques not exceeding USD 2,000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

(ix) Answer (d): Both (a) and (c) above i.e., three times of sum involved and up to rupees five thousand per day of the offence in continue

Reasoning: According to section 13 of the Foreign Exchange Management Act, 1999, if any person contravenes any provisions of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day which the contravention continues.

(x) Answer (c): 180 days from the date of receipt of application by the Directorate of Enforcement

Reasoning: According to section 15 of the Foreign Exchange Management Act, 1999, any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

Past Exam/May 2018/Case Study-3
(FEMA, Competition Act)
Ever Bullish Inc

Everbullish Inc. USA has a subsidiary in Singapore, namely Everbullish Steel Asia Pvt. Ltd. (ESA) looking after the entire south east Asia, including India.

ESA has following entities operating under it

(i) A branch in China for manufacturing of steel
(ii) A liaison office in India for marketing of steel exported by ESA directly to Indian customers.
(iii) A project office in Afghanistan
(iv) A commission agent in Bangladesh
(v) A warehouse in Sri lanka

ESA upgraded its Liaison Office (LO) in India to a full fledged subsidiary as 1st April, 2016 and transferred all its balances to the newly formed subsidiary, name Everbullish Indian Steel Pvt. Ltd. (EISPL)

Note In each of the above situations, you are required to give relevant 'FEMA' and 'Prohibition of Benami Property Transaction Act, 1988 and references options or steps to regularize the contraventions, if any.

(A) ESA was advised that since it has a permission to operate as a LO till 31.3.2018, there is no need to obtain separate approval from RBI for converting or upgrading the same into a subsidiary. Hence No permission was taken by ESA or EISPL. Incorporation expenses were spent by the Indian LO out of funds remitted by ESA. EISPL started local trading in India. The LO was not closed by the ESA and no intimation was filed with RBI till 31-10-2018.

QUESTION

Are there any FEMA violations in the above transactions, and if so, then what is the way out?

(B) Sensing something wrong, EISPL decided to undergo voluntary FEMA compliance audit. EISPL has appointed you as a FEMA auditor. In the process of audit, you discover several transactions where FEMA regulations were not adhered to, or compliances pending. You are required to give your expert opinion on following matters as to what are the contraventions under FEMA and how they can be regularized?

QUESTION 1

Receipt of Share application money from ESA amounting to ₹ One crore on 1st April 2017. No compliances are made in this respect as the company was advised that activities of the EISPL falls under the automatic route of RBI.

QUESTION 2

ESA had bought a large commercial property on 1st January, 2016 which was then leased to EISPL w.e.f, 1st April 2016 and part of the premises was leased to an unrelated Indian company w.e.f. 1st April, 2017.

QUESTION 3

ESA had sent an adhoc amount of ₹ two crore to EISPL for its day to day requirements. The funds have been received by the EISPL on 1st January, 2018. Again no FEMA compliances are made in this respect.

QUESTION 4

EISPL has exported steel worth ₹ 10 crore to solid steel Gmbh an unrelated German Company on 1st January 2017. Solid steel has run into financial trouble and therefore refused to pay. Despite best efforts, EISPL is unable to recover the sum. The directors of EISPL used to follow up for recovery over phone only and therefore no documentary evidence is available.

(i) Assuming that the total exports of EISPL for the year ended 31st March 2017 is likely to cross ₹ 50 crore, can it write off this sum?
(ii) Assuming that EISPL has imported steel ingots from solid steel amounting to ₹ 11 crore, in Dec. 2016, which is still outstanding. Can it net off and make the payment for the balance of ₹1 crore only?
(iii) Will your answer change if the import and export transactions would have happened in December, 2017 and January, 2018 respectively?

QUESTION 5
EISPL remitted ₹ one crore to the project office of the ESA in Afganistan in February, 2018. Is it permissible? Will your answer be different if instead of money, steel worth of ₹ one crore is exported to the Afganistan P.O.?

QUESTION 6
EISPL exported goods to Srilanka. For that purpose it hired the warehouse of ESA and paid warehousing charges. Is it permissible? What is the time limit for realising goods exported by EISPL to its Srilankan Warehouse?

QUESTION 7
EISPL wants to remit commission to the agent of ESA for exports made by Bangalore. However the Agent has requested to pay ₹ one crore extra, as advance to be adjusted against future commission. Looking at the present business scenario, it may take 5 years to adjust the advance commission paid to the Bangladesh Agent. Is it okay from FEMA perspective?

QUESTION 8
One of the directors, of the EISPL is a person of India origin with US citizenship. He wants to acquire a commercial premises in India and then lease it to the company. Is this permissible under FEMA? Will your answer be different if that director is a US citizen of non-Indian origin?

QUESTION 9
In the process of audit it is observed that one of the directors Mr. Valia of EISPL who, recently joined company has acquired a large bunglow in Bangalore in the name of his son who has settled in USA. He purchased the same by paying ₹ 10 crore. However, his son is still studying and has not disclosed this property in his US tax returns. Upon enquiry Mr. Valia's son denies of holding any such property. What are the consequences in this case under the provisions of the "Prohibition of Benami Property Transaction Act, 1988".

ANSWER (A)

According to the Foreign Exchange Management (Establishment of a Branch Office or a Liaison office or a project office or any other place of business) Regulations, 2016:

1. Liaison Office (LO) means a place of business to act as a channel of communication between the principal place of business or Head office or by whatever name called and entities in India but which does not undertake any commercial/ trading / industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel.
2. The validity period of an LO is generally for three years, except in the case of Non - Banking Finance Companies (NBFCs) and those entities engaged in construction and development sectors, for whom the validity period is two years only. No further extension would be considered for liaison offices of entities which are Non-Banking Finance Companies and those engaged in construction and development sectors (excluding infrastructure development companies). Upon expiry of the validity period, the offices shall have to either close down or be converted into a Joint Venture / Wholly Owned Subsidiary in conformity with the extant Foreign Direct Investment policy.

   The question states that ESA has the permission to operate as a LO till 31.3.2018. Hence, we can deduce that ESA must have got the permission to operate as a LO on 1.4.2016. The facts of the case study also states that ESA upgraded its LO in India to full fledged subsidiary on 1.4.2016.

   From the definition of LO, it can be inferred that trading is not included in the permissible operation of a LO. As per the question ESA has got the permission to operate as a LO and not as a subsidiary, hence, the decision to operate in nature of subsidiary without informing the concerned authority is incorrect.

   In every financial year, liaison office have to submit the annual activity certificate confirming the activities undertaken along with the Audited financial statements, including the receipt and payment of account on or before 30th September of the Year.

   Failure to comply the above, will attract penalty as provided in the Foreign Exchange Management Act, 1999.

   [Note: The question has provided that LO is liaisoning for steel business, hence it has been taken to be in the categories of those engaged in construction and development sectors.]

ALTERNATIVE ANSWER

ESA was wrongly advised that it can form a subsidiary without any compliances under FEMA. RBI grants permission for the Liaison office (LO) office for a Special duration and for specified activities only. A LO is supposed to adhere to all names under FEMA and comply wi th conditions mentioned in the permission from RBI.

So, ESA needs to set right things as follows:

(i) Intimate RBI about closure of LO and transfer of all its assets and liabilities in the new formed subsidiary EISPL.
(ii) File all pending returns of LO with the Income tax authority and audited accounts with ROC as well as activity certificate under FEMA with its authorized dealer for the onward submission to RBI.
(iii) Spending funds on incorporation of a company by a LO is in violation of conditions attached to the activities of the LO and utilization of funds.
(iv) It is given that EISPL started local trading in India. EISPL can do local trading only in respect of Cash & Carry wholesale Trading under automatic route of RBI. For any other category it requires prior approval of RBI.
(v) For various offences/contravention mentioned above ESA needs to approach RBI for compounding of offences. EISPL shall ensure that its activities remain within the purview of FEMA reputations. For allotment of share to ESA against the balances transferred from the LO as well as incorporation expenses. If EISPL intends to remit fund to ESA instead of allotments of shares, they still it needs to obtain RBI approval.

ANSWER B.

Answer 1

According to Schedule II to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, investment in India by a person resident outside India, through issue of securities by a body corporate or an entity in India and investment therein by a person resident outside India, is a permissible transaction.

Further, according to the Master Directions on Foreign Investment in India-

An Indian company issuing shares /convertible debentures under FDI Scheme to a person resident outside India shall receive the amt of consideration required to be paid for such shares /convertible debentures by:

(i) inward remittance through normal banking channels.
(ii) debit to NRE / FCNR account of a person concerned maintained with an AD category I bank.
(iii) conversion of royalty / lump sum / technical know how fee due for payment /import of capital goods by units in SEZ or conversion of ECB, shall be treated as consideration for issue of shares.
(iv) conversion of import payables / pre incorporation expenses / share swap can be treated as consideration for issue of shares with the approval of FIPB. (Now Line Ministry as FIPB is abolished on 17th April, 2017.)
(v) debit to non-interest bearing Escrow account in Indian Rupees in India which is opened with the approval from AD Category – I bank and is maintained with the AD Category I bank on behalf of residents and non-residents towards payment of share purchase consideration.

If the shares or convertible debentures are not issued within 180 days from the date of receipt of the inward remittance or date of debit to NRE / FCNR(B) / Escrow account, the amount of consideration shall be refunded.
It can be regularized on an application filed to RBI where amount outstanding towards issue of security is beyond the period of 180 days from the date of receipt.

ALTERNATIVE ANSWER

Compliances on Shares allotment

Two stages compliance is required in respect of receipt of funds and allotment of shares under FEMA:

(i) Form ARF needs to be submitted to the authorized dealer AD bank of the company within 30 days of receipt of remittance towards equity shares KYC and Foreign Inward remittance certificate (FIRC) need to be submitted alongwith form ARF.
(ii) Form ECGPR needs to be filed with AD bank within 30 days of allotment of shares. This form should be certified by a company Secretary certifying all compliances under the Companies Act, 2013 and a valuation certificate from a Chartered Accountant certifying the valuation of shares as per the pricing guidelines under FEMA.

(iii) The FEMA regulation provides that the allotment of shares needs to be completed within six months of the receipt of funds. Under the companies Act, the shares needs to be allotted in 3 months. Since share are not allotted within the time frame nor intimation filed, therefore EISPL need to obtain RBI permission for allotment of shares and apply for compounding of office.

(iv) It may be noted that automatic route of RBI is available only in respect of compliances made within the prescribed time frame.

Answer 2

According to the FEM (Acquisition & Transfer of Immovable Property in India) Regulations, 2000, provides that a person resident outside India cannot lease/ rent any part of the property acquired by him.

Hence, ESA cannot lease the said commercial property to EISPL & to an unrelated Indian Company.

ALTERNATIVE ANSWER

Foreign companies are allowed buy immovable property in India for the purpose of carrying on its own business. Form IP is to be filed with RBI for intimating the purchase of property. However, remittance of sale proceed needs prior approval of RBI. If ESA has ceased its activities as LO, it cannot continue to hold and lease property to others. Recently RBI has permitted to lease additional place to related enterprises.

Under the circumstances, ESA needs to regularize the leasing of premises to EISPL. As LO cannot earn any income in India, a question would arise for the leasing income.

Step to be taken by ESA

(i) Approach RBI with facts of the case
(ii) Obtain specific approval for lease of premises or sale its subsidiary EISPL.
(iii) Apply for compounding of offence as per advice from RBI.

Answer 3

Schedule I to the FEM (Permissible Capital Account Transactions) Regulations, 2000, allows loans and overdrafts (borrowing) by a person resident in India from a person outside India subject to the compliance of guidelines issued by RBI in this regard. Hence, ESA is advised to comply with the Newspaper guidelines.

ALTERNATIVE ANSWER

EISPL has received on adhoc amount of ₹ 2 crore for its day to day requirements for ESA on 1st Jan, 2018.

EISPL can take external commercial borrowing (ECB) from its parent company subject to conditions prescribe in the ECB regulations.

However, any loan under ECB regulations can be drawn only after obtaining loan Registrations Number (i.e. LRN). In the instance case EISPL has already received the funds from ESA on 1st January, 2018. It would be better to treat these funds towards subscription of compulsory convertible debentures (CCDs). Authorized Dealer Bank may be approached for necessary changes in the FIRC. ESA & EISPL can pass necessary resolution in this behalf. CCDs are treated at par with equity shares. Hence, EISPL needs to comply with necessary formalities under the Foreign Direct Investment (FDI) regulations.

RBI may levy nominal compounding fees for delay in intimation of receipt of funds.

Answer 4

(i) Section 7 of FEMA deals with provisions of Export of Goods and Services.
It is the duty of the exporter to see that foreign exchange is realized within the prescribed time limit. The normal time limit for realization of exports is nine months from the date of export. If for any reason export proceeds are not realized in time, the AD/RBI bank may be informed and requested to external the time limit.

As per Master Direction – Export of Goods and Services;

An exporter who has not been able to realize the outstanding export dues despite best efforts, may either self-write off or approach the AD Category – I banks, who had handled the relevant shipping documents, with appropriate supporting documentary evidence. The limits prescribed for write-offs of unrealized export bills are as under:

Self "write off" by an exporter (Other than status holder exporter)	5%*
Self "write off" by status holder exporter	10%*
"Write off" by AD Bank	10%*
*of the total export proceeds realized during the previous calendar year	

The above limits will be related to total export proceeds realized during the previous calendar year and will be cumulatively available in a year.

Thus, EISPL can write off the amount to the extent as prescribed in the above provisions.

ALTERNATIVE ANSWER
Section 7 of FEMA deals with provisions of Export of Goods and Services.

It is the duty of the exporter to see that foreign exchange is realized within the prescribed time limit. The normal time limit for realization of exports is nine months from the date of export. If for any reason export proceeds are not realized in time, the AD/RBI bank may be informed and requested to extend the time limit.

Exporter needs to main robust documentations of steps taken to realize the outstanding dues. In the instant case the directions followed up for payment only over phone and therefore would land up in trouble as they will not be able to prove that all reasonable efforts were put in to realize the export proceeds. Under the circumstances, the company may face stringent actions from the ED.

Self-write off of exports is permitted upto 10% of the average annual realization of exports in past 3 years subject to fulfilment of certain other conditions. As EISPL does not fall into this category specific approval from RBI is advisable.

(ii) As per Master Direction – Export of Goods and Services; EISPL can set off the amount and make payment for 1 crore only by following the conditions:

AD category –I banks may deal with the cases of set-off of export receivables against import payables, subject to following terms and conditions:

(1) The import is as per the Foreign Trade Policy in force.
(2) Invoices/Bills of Lading/Airway Bills and Exchange Control copies of Bills of Entry for home consumption have been submitted by the importer to the Authorized Dealer bank.
(3) Payment for the import is still outstanding in the books of the importer.
(4) Both the transactions of sale and purchase may be reported separately in R- Returns and FETERS (Foreign Exchange Transactions- Electronic Reporting System).
(5) The relative EDF (Export Declaration Form) will be released by the AD bank only after the entire export proceeds are adjusted / received.
(6) The set-off of export receivables against import payments should be in respect of the same overseas buyer and supplier and that consent for set -off has been obtained from him.
(7) The export / import transactions with ACU countries should be kept outside the arrangement.
(8) All the relevant documents are submitted to the concerned AD bank who should comply with all the regulatory requirements relating to the transactions.

ALTERNATIVE ANSWER
Netting off export of goods receivable and import payable from same party is permitted under the automatic route, provided the outstanding amounts are within the time frame prescribed in FEMA. In this case both are overdue and hence specific approval from RBI would be required.

(iii)The position as stated above in part (ii) will not change even if the import and export transactions would have happened in December 2017 and January 2018 respectively.

Answer 5

According to Foreign Exchange Management (Export and import of currency) Regulations, 2015, any person resident in India may take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India up to an amount not exceeding ₹25,000.

Hence, EISPL cannot remit amount of ₹ 1Cr to the project office of ESA in Afghanistan. However, EISPL can export steel worth ₹ 1Cr to project office of ESA in Afghanistan (by following guidelines as issued by RBI).

Answer 6

Remittance of funds for the warehouse rent falls within the current account transactions and therefore EISPL can freely remit warehouse charges to Sri Lanka.

According to Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, where goods are exported to a warehouse established outside India with the permission of the Reserve Bank of India, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods;

The Reserve Bank of India, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of fifteen months.

Hence, EISPL can send goods to the warehouse in Sri Lanka. Also, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within 15 months from the date of shipment of goods. However, this period can be extended as mentioned above.

Answer 7

Payment of export commission to an overseas agent is a current account transaction and hence freely permitted. However, payment of advance commission, lasting for five years would be regarded as capital account transaction and therefore would require prior approval of RBI.

EISPL is well advised to approach RBI for remitting advance commission which is in the nature of loan.

ALTERNATIVE ANSWER

The Foreign Exchange Management Act, 1999 does not provide for a prohibition for payment of commission to an agent provided it does not exceed 12.50% of the invoice value. Hence, EISPL can remit commission to agent of ESA for exports made by Bangladesh within the above limit.

In view of above, the request to pay ₹ One crore extra, as advance to be adjusted against future commission cannot be accepted and is not okay from FEMA perspective as the relative shipment has not been made.

Answer 8

According to Acquisition and transfer of immovable property in India, Regulations,A person of Indian origin and resident outside India may acquire immovable property in India other than an agricultural property, plantation, or a farm house:

Provided that in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of (i) funds received in India through normal banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank of India:

Provided further that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by currency notes of any foreign country or any mode other than those specifically permitted by this clause.

Thus, in the given situation, the said director who is a person of Indian origin with US citizenship can acquire the commercial premises in India.

According to Sec 6(3) of the Foreign Exchange Management Act, 1999, a person resident outside India can acquire or transfer the immovable property in India, other than a lease not exceeding five years. Thus, the director can lease the said commercial premises but not for a period exceeding 5 years.

If the director would have been a US citizen of non Indian origin then he will not be allowed to acquire the property in India.

Answer 9

In the given instant, a director Mr. Valia of EISPL has acquired bungalow in Bangalore in the name of his son who has settled in USA. Upon enquiry Mr. Valia's son denies of holding any such property and has also not disclosed in his US tax returns.

The given situation falls within the purview of section 2(9) of the PBPT Act, 1988. According to the section benami transaction "means a transaction or an arrangement

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

As per the exception to the above clause, Mr. Valia can hold the property in the name of his son provided the consideration is paid out of the known sources of the Mr. Valia. This source is also not disclosed so it is assumed that it is an unauthorized source.

Further, on enquiry, denial of Mr. Valia's Son of holding of any such property, is known in respect of such property, as a benami transaction.

As of consequential holding of benami transactions, Sec 3 states that no person shall enter into any benami transaction. Whoever enters into any benami transaction shall be punishable with imprisonment which may extend to 3 years or with fine or with both. So, Mr. Valia shall be liable under the PBPT Act, 1988.

Past Exam/Nov 2018/Case Study-1
(IBC, Competition Act)
Mr. Sharp

Mr. Sharp was appointed as whole time member of the Competition Commission of India in 2015 and is presently a whole time member. Before joining Competition Commission of India, during 2000-2014, he was acting as a trustee of several charitable trusts. For his contribution towards the society, he was awarded several times by the State Government. Prior to that during 1995-1999, he was acting as a managing director of 'Poor' Ltd., a Public Limited Company engaged in the commercial real estate and was overall in-charge of finance and sales function.

During 2005, based on complaints filed by foreign investors, investigation into the affairs of the company was initiated by the SFIO and CBI. The Report of CBI and SFIO issued in October 2017 has revealed that affairs of the company were not managed in the interest of the company during 1998-2005 and has resulted into financial loss of ₹ 400 Cr to the shareholders and the Government. Considering the outcome of the report, Central Government has issued an order of expulsion of Mr. Sharp from the post of whole time member of the Competition Commission of India with immediate effect.

He is in double mind to challenge the order keeping in view the grounds for disqualification and the fact that enactment of the Competition Act, 2002 is to provide an establishment of a Commission with certain objectives or join back 'Poor' Ltd. 'Poor' Ltd. has been a party to a proceeding before the Commission on the following issues:

(a) Whether a person who is purchasing goods for resale can also be considered as a consumer?
(b) Whether all agreements which causes or is likely to cause an appreciable adverse effect on competition in India, entered into in contravention shall be void?
(c) Whether the Commission also has powers to enquire into the acts taking place outside India?

Poor', Ltd., now is in default in repayment of mainly on account of the General slowdown in construction activities resulting in low capacity utilization and inadequate cash generation for timely repayment of dues to all concerned. Repeated follow-up by the Financial Institutions with the corporate debtor, 'Poor' Ltd., for submitting its specific plan of action for repayment of dues did not evoke any meaningful response. Therefore, after a joint lenders' meeting, all the financial creditors unanimously decided to apply under the provisions of the Insolvency and Bankruptcy Code, 2016 to the National Company Law Tribunal (NCLT) for starting the process of insolvency resolution in respect of corporate debtor, 'Poor' Ltd'.

Financial Creditors filed an application before NCLT which was admitted by NCLT on 20th May, 2018 and orders issued for commencement of a moratorium period of 180 days, appointment of Mr. Ram, an Interim Resolution Professional and for his making a public announcement inviting claims from all concerned. With the advent of the public announcement the following creditors were identified:

(1) Financial debts owed to unsecured creditors (D1)-₹ 10 crores.
(2) Workmen's dues for the period of 24 months preceding the liquidation commencement date (D2)-₹ 30 crores.
(3) Debts owed to a secured creditor who has relinquished his security (D3)-₹ 60 crores.
(4) Debts owed to the Central Government (D4)-34 Crores.
(5) Debts owed to a secured creditor for an amount unpaid following the enforcement of security interest (D5)-₹ 52 Crores.

Mr. Ram who has been appointed as Interim Resolution Professional wants to know the functional responsibilities of Insolvency Professional Agency (IPA). Mr. Ram, in the last financial year, has given some legal opinions on financial matters to 'Poor' Ltd. and has charged fees.

Smart was the statutory auditor of the corporate debtor. Mr. Sharp is the whole time member of the Competition Commission of India and has been identified as a relative of Mr. Dull, present Managing Director of 'Poor' Ltd. Mr. Dull is not dear on the provisions of Insolvency and Bankruptcy Code, 2016 (IBC) and requested Company Secretary to advise him on the vital objectives which are intended to be achieved with the Code and also whether the initiation of insolvency resolution process can be done by creditors only or by debtor also.

Mr. Dull also wants to know the specified procedure and term of appointment of an IRP. In case, 'Poor' Ltd. approach NCLT before the financial creditors and decide to appoint Mr. Ram as Interim Resolution Professional, advise Mr. Ram on the consent to be provided by him as required by regulations.

ANSWER THE FOLLOWING QUESTIONS:

(1) Mr. Ram who has been appointed as the resolution professional can take the following actions without the approval of the Committee of Creditors:
(A) Undertake transactions with Mr. Sharp.
(B) Make changes in the appointment of Smart, the statutory auditor.
(C) File applications for avoidance of preferential or undervalued transactions.
(D) Record any change in the ownership interest of 'Poor' Ltd.

(2) The Adjudicating Authority has by an order declared moratorium period on the 'Poor' Ltd. Vide the moratorium order, the following shall not be prohibited:
(A) the action to foreclose security interest created by the corporate debtor in respect of its property.
(B) the institution of arbitration proceedings.
(C) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
(D) The supply of raw material essential for construction of commercial real estate from its suppliers.

(3) The NCLT rejected the resolution plan for want of compliance with the IBC, accordingly the proceeds from the sale of liquidation shall be distributed in the following order of priority:
(A) D2- D1-D3-D4 & D5 (ranked equally).
(B) D2 & D5 (ranked equally)-D3-D1-D4.
(C) D2 & D5 (ranked equally)-D1-D3-D4.
(D) D3 & D2 (ranked equally)-D1-D5 & D4 (ranked equally).

(4) The NCLT rejected the resolution plan for want of compliance with the Insolvency and Bankruptcy Code and proceeded to initiate liquidation proceedings. During the course of liquidation, it was found that 'Poor' Ltd. had gifted some valuable assets of the Company to another friendly company Soft Ltd. on 20th April, 2016 and D1 (unsecured financial creditors) reported the transaction to the National Company Law Tribunal by way of an application. The NCLT may pass an order:
(A) Rejecting the application of D1.
(B) Requiring the Insolvency and Bankruptcy Board to initiate disciplinary proceedings against the liquidator.
(C) Require any person to pay sums in respect of benefits received by such person to the liquidator.
(D) Require any person to submit relevant documents of transaction to IBBI.

(5) The management of the affairs of 'Poor' Ltd., the corporate debtor undergoing corporate insolvency resolution process vests in the_____.
(A) Mr. Ram, Interim Resolution Professional
(B) Board of Directors
(C) Committee of Creditors
(D) Insolvency and Bankruptcy Board of India

(6) Mr. Sharp cannot be removed from the CCI by the Central Government, if he:
(A) has engaged at any time, in any paid employment.
(B) has become physically or mentally incapable of acting as a member.
(C) has been convicted of an offence which, in the opinion of the CG, involves moral turpitude.
(D) is, or at any time has been, adjudged as an insolvent.

(7) Mr. Sharp shall not for a period_____of years from the date on which cease to hold office in the Competition Commission of India, accept any employment in, or be connected with the management of administration of, any enterprise which has been a party to a proceeding before the CCI.
(A) 1
(B) 2
(C) 1
(D) None of the above

(8) 'Agreement' under the Competition Act, 2002 includes any arrangement or understanding or action in concert:
(A) if it is in writing only.
(B) if it is enforceable by legal proceedings only.
(C) if it is in writing and enforceable by legal proceedings only.
(D) If it is whether or not, in formal or writing or whether or not enforceable by legal proceedings.

(9) Any agreement under the Competition Act, 2002 shall be presumed to have an appreciable adverse effect on competition, which:
(A) directly or indirectly determines purchase or sale prices.
(B) limits or controls production, supply, markets, technical development, investment or provision of services.
(C) directly or indirectly results in bid rigging or collusive bidding.
(D) All of the above

(10) If Central Government issues expulsion order to Mr. Sharp, the order:
(A) is valid from the date of his joining the Commission.
(B) is not valid but cannot be challenged.
(C) is not valid and can be challenged.
(D) is valid on the basis of outcome of the report from the date of receipt of the order.

(11) Answer the following based on the facts given in the question with reference to the provisions of the Insolvency and Bankruptcy Code, 2016 (Code):
(A) Advise Mr. Dull on vital objectives which are intended to be achieved with the Code.
(B) Advise Mr. Ram on the functional responsibilities of Insolvency Professional Agencies (IPA).
(C) Advise Mr. Ram on the independence with the Corporate Debtor.
(D) Advise 'Poor' Ltd. whether the initiation of insolvency resolution process can be done by creditor only or by corporate debtor also.
(E) IRP is to be appointed by following the specified procedure and for a specific term. Examine and advise Mr. Ram on the consent to be provided by him in Form 2 as required by the relevant rules.

(12) Answer the following under the provisions of the Competition Act, 2002:
(A) Enactment of the Competition Act, 2002 is to provide for an establishment of a Commission with objectives. Advise Mr. Sharp for taking decision whether to challenge the order of the SC?
(B) A person who is purchasing goods for resale can also be considered as a 'Consumer'. Examine and advise 'Poor' Ltd.
(C) All agreements which causes or is likely to cause an appreciable adverse effect on competition in India, entered into in contravention shall be void. Examine and advise 'Poor' Ltd.
(D) Advise 'Poor' Ltd. whether the Commission also has power to enquire into the acts taking place outside India.

ANSWER TO CASE STUDY 1

(1) **Option (C):** File applications for avoidance of preferential or undervalued transactions

(2) **Option (D):** The supply of raw material essential for construction of commercial real estate from its suppliers.

(3) **Option (D):** D3 & D2 (ranked equally)-D1-D5 & D4 (ranked equally)

(4) **Option (A):** Rejecting the application of D1.

(5) **Option (A):** Mr. Ram, Interim Resolution Professional

(6) **Option (A):** has engaged at any time, in any paid employment.

(7) **Option (B):** 2

(8) **Option (D):** if it is whether or not, in formal or writing or whether or not enforceable by legal proceedings

(9) **Option (D):** All of the above

(10) **Option (C):** Is not valid and can be challenged.

(11)
(A) **Vital objectives which are intended to be achieved with the IBC:** The Insolvency and Bankruptcy Code, 2016 is intended to strike the right balance of interests of all stakeholders of the business enterprise so that the corporates and other business entities enjoy availability of credit and at the same time the creditor do not have to bear the losses on account of default. The purpose of enactment of the Insolvency and Bankruptcy Code, 2016 is as follows:
(a) To consolidate and amend the laws relating to re-organization and insolvency resolution of corporate persons, partnership firms and individuals.
(b) To fix time periods for execution of the law in a time bound manner.
(c) To maximize the value of assets of interested persons.
(d) To promote entrepreneurship
(e) To increase availability of credit.
(f) To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues.
(g) To establish an Insolvency and Bankruptcy Board of India as a regulatory body for insolvency and bankruptcy law.

(B) Functional responsibilities of Insolvency Professional Agencies (IPA):

It will perform three key functions:

(i) Regulatory functions

- drafting detailed standards and codes of conduct through bye-laws, that are made public and are binding on all members

(ii) Executive functions

- monitoring, inspecting and investigating members on a regular basis
- gathering information on their performance, with the over-arching objective of preventing frivolous behaviour, and
- malfeasance in the conduct of IP duties

(iii) Quasi-judicial functions

- addressing grievances of aggrieved parties, hearing complaints against members and taking suitable actions

(C) Eligibility of an insolvency Professional to be appointed as a Resolution Professional:

As per Regulation 3 of the Insolvency and Bankruptcy (Insolvency Resolution process for Corporate Persons) Regulation, 2016, an insolvency professional shall be eligible for appointment as a resolution professional for a CIRP if he and all partners and directors of the insolvency professional entity of which he is partner or director are independent of the corporate debtor:-

(a) He 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) He is not a related party of the corporate debtor.
(c) He is not an employee or proprietor or a partner of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor in the last three financial years.
(d) He is not an employee or proprietor or a partner of a legal or consulting firm that has or had any transaction with the corporate debtor amounting to ten percent or more of the gross turnover of such firm in the last three financial years.

(D) As per Section 6 of the IBC, 2016, where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter (Chapter II of part II). Therefore, Insolvency resolution process can be initiated by creditor as well as by the corporate debtor.

(E) **Appointment of IRP:** As per the Code, Adjudicating authority shall appoint an Interim Resolution Professional within 14 days from the commencement date of the Insolvency process. Section16 of the Code lays down the procedure for appointment of an Interim Resolution Professional.

Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, the RP as proposed in the application shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

Where the application for corporate insolvency resolution process is made by an operational creditor and

(a) **No proposal for an interim resolution professional is made**. The Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional.
(b) **A proposal for an interim resolution professional is made** the proposed resolution professional shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

The Board shall recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending, within ten days of the receipt of a reference from the Adjudicating Authority.

Period of appointment of IRP: The term of Interim Resolution Professional shall not exceed 30 days from the date of appointment. **[Section 16]**

As per Form 2, written consent by proposed IRP is given to the Adjudicating authority under the relevant rule of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

(12)

(A) The preamble of the Competition Act, 2002 provides that it is an Act to establish a Commission to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade in markets in India.

However Section 53T of the Competition Act, 2002, provides that the Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court.

Since the Supreme Court(SC) as per the Indian constitution is the apex body, so the decision of SC is binding on the CG / any SG / the Commission / any statutory authority / any LA /any enterprise / any person. So Mr. Sharp's decision to challenge the order of the Supreme court is not possible.

(B) The term 'consumer' is defined in section 2(f) of Competition Act, 2002. Accordingly, 'consumer' means any person who buys any goods for a consideration, which has been paid or promised or partly paid and partly promised, whether such purchase of goods is for resale or for any commercial purpose or for personal use.

Hence, it is not necessary that a person must purchase the goods for personal use in order to be considered as a 'consumer' under Competition Act, 2002. Even a person purchasing goods for resale or for any commercial purpose will also be considered as a 'consumer' within the meaning of Section 2(f) of the Competition Act, 2002.

(C) All agreements which causes or is likely to cause an appreciable adverse effect on competition in India, entered into in contravention shall be void

It shall not be lawful for any enterprise or association of enterprises or person or association of persons to 'enter' into an agreement in respect of production, supply, storage, distribution, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. All such agreements entered into in contravention of the aforesaid prohibition shall be void.

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, shall be presumed to have an appreciable adverse effect on competition, which—

(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding.

However, any agreement entered into by way of joint ventures, if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services, shall not be considered to be an anti-competitive.

(D) Acts taking place O/s India but having an effect on competition in India (Sec 32)

The Commission shall, notwithstanding that,—

(a) an agreement referred to in section 3 has been entered into outside India; or
(b) any party to such agreement is outside India; or
(c) any enterprise abusing the dominant position is outside India; or
(d) a combination has taken place outside India; or
(e) any party to combination is outside India; or
(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India;

have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an AAEC in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.

Past Exam/Nov 2018/Case Study-2
(RERA, PBPTA)
Mr.Cute

Mr. Cute had given an application to the state authorities for purchase of land for farming and agricultural use. This application was made by him through his company M/s Hip Hop Farms Ltd. (HHFL). HHFL was initially incorporated in 2003 with two shareholders Mr. A and Mr. B.

Through an executed share transfer deed, shares of this company were transferred to Mr. Cute and his wife Mrs. Pretty. Consequent to transfer of shares, first directors were also replaced with new directors i.e. Mr. D, Mrs. E and Mr. Sharp. Mr. D and Mrs. E are parents of Mrs. Pretty.

To enable HHFL to purchase the said piece of land, Mr. Cute, had given unsecured loan amounting to ₹ 11 Crore to HHFL. Since the subject piece of land was an agricultural land, during the time of representation, Mr. Sharp declared himself an agriculturist. Accordingly, the additional collector allowed the purchase of the land on condition that it would be used for farming within two years.

During the year 2010, Ms. F (sister of Mrs. Pretty) was appointed as director of HHFL in place of Mr. Sharp.

HHFL was preparing financial statements on a regular basis and was compliant in filing various documents with the Registrar of Companies. Financial Statements for the year ended on 31st March, 2018 and previous years did not show any income from farm activities or agricultural activities. Instead, the said piece of land was developed by HHFL and constructed a palatial bungalow with swimming pool and a dedicated space to facilitate landing and parking fixed wing aircrafts.

Mr. Cute had separately obtained a loan for his personal use from a Non- Banking Finance Company amounting to ₹ 65.Crore. The said loan was secured by the mortgage created on the property owned by HHFL. Mr. Cute defaulted on payment of last few instalments and tried persuading bank to restructure the covenants of the loan agreement. Bank officials did not agree to his request and decided to take action against him and the said mortgaged property.

This particular case came under the scanner of the authorities when the Collector of the region claimed that this particular property along with other 110 properties have allegedly flouted other applicable regulations prevailing in the State. Due to this matter, the case was forwarded to the Income Tax department. Acting proactively on the matter, the Income Tax department had issued an attachment notice under the Prohibition of Benami Property Transaction Act, 1988 to HHFL for provisionally attaching the property and filed a report before an adjudication authority to confirm the attachment.

Mr. Cute had engaged a lawyer to prepare a reply in response to the notice received. His lawyer had advised that maximum penalty for contravention, if any would be 10% of the cost of the property. Further, he has stated that in the worst case situation, attachment in no case under the provisions of the Prevention of Benami Property Transactions Act, 1988 exceed 3 months.

Mr. Cute after knowing the provisions, had instructed the lawyer to furnish a fabricated reply in response to the notice and include a point as to why notice has been issued to him. The said notice should have been issued to HHFL only.

After the legal proceedings were completed, the order was passed by the adjudicating authorities. After, perusing the order, Mr. Cute identified certain errors and misplaced facts, and asked his lawyer to discuss the same with the authorities. However, his lawyer forgot the matter due to other cases in hand. When he was reminded again after almost 11 months, he responded that the matter is time barred.

Besides the said piece of land on which bungalow and swimming pool were constructed, there were other seven pieces of non-agricultural land just adjacent to the land. Survey numbers of the same were 112/1, 112/2, 112/3, 112/4, 112/5, 112/6 and 112/7.

Mr. D and his family were quite affluent and generally they were seen in lavish social gatherings apart from managing their real estate development business. During a family function in 2012, they made a fixed deposit amounting to ₹ 10 crore in the name of Mrs. Pretty which was a gift for her.

Mrs. Pretty on maturity of the said deposit, transferred the amount in the name of Mr. Cute for his personal use. During 2015, the said amount was used by Mr. Cute to buy a piece of land bearing survey number 112/1 in the name of Mrs. Pretty. Owner as per the land records was Mrs. Pretty and payment for the said land bearing survey number 112/1 was made by Mr. Cute.

Mr. D was the owner of land bearing survey numbers 112/2, 112/3, 112/4, 112/5, 112/6 and 112/7. During the third quarter of financial year 2017-18, he developed and launched a new residential-cum-commercial project on the said pieces of land after seeking registration under the Real Estate (Regulation and Development) Act, 2016 (RERA). For the said project Ms. F was acting as an authorized agent for marketing. When the commercial launch was organized, it was announced by Ms. F that the project is available at an attractive rate of ₹ 8,800 per square feet and the units are very spacious since they admeasure 1500 square feet built-up with total 100 units.

Also, marketing brochure contains following features included in the project:

(1) Italian marble in the kitchen
(2) 5 Star rated Air Conditioners
(3) 3 Star rated Geysers
(4) French Windows of reputed brand
(5) Elevators of top brands
(6) Open parking slot at a nominal price of ₹ 11,000
(7) Massive multi-level kids play area
(8) Ducts attached to each flat
(9) Comprehensive insurance for the project

Marketing brochure mentioned that builder provides warranty of 5 years of the products with additional free 1 year warranty.

It was informed in the marketing material that the project would be completed in a time frame of 5 years. One of the allottee complained about Ms. F for project's registration to which she replied that project is already registered and since she is daughter of the promoter, she is not required to take the separate registration, only outsiders are required to take registration under RERA. Ms. F receives facilitation fees from the company owning the project.

Mr. Bhakt was one of the allottee who bought flat number 205 in Tower 1 of the project after several rounds of meeting with Ms. F. It was told to him that a Ganesh Temple would be constructed as a part of the project in the eastern side of Podium 2.

During the course of the project, an intimation along with a certificate from engineer was sent to all the allotees that due to a technical objection received from fire department, temple will have to be shifted from Podium 2 to Podium 3.

When this fact came in the knowledge of Mr. Bhakt, he consulted his lawyer who advised to file a complaint against the builder with the authorities. Also, he mentioned in the complaint that he bought flat through Ms. F who was not registered under RERA and reported several defects in the features contained in the marketing brochure.

Just before the completion of the project, the promoter got an offer to sell the entire project to an American builder at an attractive price. The acquirer informed the promoter that since it is the deal between us and I have never defaulted on the delivery in projects in last 50 years there is practically no use of seeking approval of allottees. There were several rounds of discussions between the promoter and the acquirer; however, the deal did not go through due to difference in valuation.

The project was completed on time and the invitation was sent to all the allottees to take physical possession of their respective units. After staying for about 8 months in the flat number 406 in Tower 4, Mr. Sultan informed builder that he is facing serious issues with the quality of MCB provided and there is a potential risk of short circuit which could lead to massive losses to the building as a whole. On investigation by an independent electrician appointed by Mr. Sultan, it was found that lining of electricity wire was done along with water pipe lines and due to internal damage, problem is arising. However, the promoter was harping on the fact that the issue is in the MCB and not in the wirings. The investigation done by electrician was confirmed by other electricians who surveyed a few other flats.

Further, Mr. Sultan complained that the grass given by the builder in the flower bed area was of sub-standard quality and needs replacement.

ANSWER THE FOLLOWING QUESTIONS:

(1) Who is Benamidar in the above case as per Prevention of Benami Property Transactions Act, 1988?
(A) HHFL.
(B) Mr. D.
(C) Mr. E.
(D) All of the above

(2) Whether is it a requirement under PBPT Act, 1988 that Benamidar shall be aware that property is registered in his / her name to categorize a transaction as Benami?
(A) Yes, it is necessary.
(B) No, it is not necessary
(C) Can't say
(D) None of the above

(3) Under PBPT Act, 1988, property which has been declared as Benami be confiscated by which authority?
(A) The President of India.
(B) State Government.
(C) Central Government.
(D) None of the above

(4) In a scenario where authorities conclude that the subject property is hit by the provisions of the Prevention of Benami Property Transactions Act, 1988, what could be the quantum of penalty?
(A) 25% of the cost of the property.
(B) 10% of the FMV of the property.
(C) 10% of the cost of the property.
(D) 25% of the FMV of the property.

(5) Under PBPT Act, 1988, notice for initiating action shall be submitted by following means?
(A) By Post.
(B) By way of summons.
(C) By e-mail.
(D) Either (A) or (B)

(6) As per the provisions of RERA, which of following are treated as part of common area?
(A) Kids play area.
(B) Duct attached to the units.
(C) Balcony attached to the living room.
(D) All of the above

(7) Under RERA, 20% of the flat cost cannot be accepted unless:
(A) Property is registered.
(B) Marketing brochure mentioned terms of payment.
(C) 20% project is completed.
(D) All of the above

(8) Under RERA, provision related to 5 years warranty is applicable to following:
(A) Chipped beam in the kitchen.
(B) Loose tiles in the washrooms.
(C) Leakage in the internal pipe lines.
(D) All of the above

(9) Under RERA, when all documents in connection with insurance shall be handed over by the promoter to the allotees?
(A) On receipt of final payment / installment.
(B) On receipt of occupancy certificate.
(C) On receipt of NOC from fire department.
(D) On formation of society.

(10) On completion of the project and after receipt of occupancy certificate, when can an allottee take physical possession of the flat?
(A) Within two months.
(B) Within three months.
(C) Within six months.
(D) None of the above

(11) Explain the following in light of the provisions of the PBPT Act, 1988:
(A) Owner of the land as per land records shall make payment for the land standing in his/her name. Examine the correctness of the statement.
(B) Whether action proposed by the officials of the bank is defensible? Advise officials of the bank.
(C) Examine legal ramifications of the instructions made by Mr. Cute to his lawyer and advice by his lawyer in the matter
(D) Mr. Cute has approached you after hearing response from lawyer after 1 month. Please advise him.

(12) Explain the following in light of the Provisions of the Real Estate (Regulation and Development) Act, 2016 (RERA):

(A) Mr. Bhakt has approached you to confirm advice given by his lawyer. Kindly assist Mr. Bhakt on the points mentioned by the lawyer.
(B) Promoter of the project has appointed you to advise on the issue raised by Mr. Sultan.
(C) Examine legal validity of the proposal given by the American builder.

Answer to Case Study 2

(1) **Option (A):** HHFL
(2) **Option (B):** No, it is not necessary.
(3) **Option (C):** Central Government
(4) **Option (D):** 25% of the fair market value of the property
(5) **Option (D):** Either (A) or (B)
(6) **Option (D):** All of the above
(7) **Option (A):** Property is registered
(8) **Option (D):** All of the above
(9) **Option (D):** On formation of society
(10) **Option (A):** Within two months

(11)(11)

(A) As per section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, all such type of transaction or an arrangement made in respect to a property, where -

- such a property is transferred to or held by one person and consideration is paid by some other person,
- such a property carried out or made in a fictitious name,
- owner of a property is not aware of, or, denies knowledge of, such ownership;
- where the person providing the consideration is not traceable or is fictitious.

Such a transaction is said to be a benami transaction.

Accordingly, in the light of the above provisions, the owner of the land as per land records shall make payment for the land standing in his/her name in order to be valid transaction and not to be considered as benami transaction in the terms of section 2(9) of the said Act.

(B) As per the facts given in the case study, Mr. Cute defaulted in the payment of few installments on the loan secured on the property owned by the HHFL. He tried persuading bank to restructure the covenants of loan agreement. Bank Officials did not agree to his request and decided to take action against him and the said mortgaged property.

As per Section 18 of the Prohibition of Benami Property Transactions Act, 1988, the following Authorities shall be there for the purposes of this Act, namely:—
(a) the Initiating Officer;
(b) the Approving Authority;
(c) the Administrator; and
(d) the Adjudicating Authority.

The authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, as the case may be, to it under this Act or in accordance with such rules as may be prescribed.

The authorities under this Act shall have the same powers as are vested in a civil court (U/s 19).

Accordingly, denial to agree to the request of Mr. Cute to restructure the covenants of loan agreement by bank officials, is right. However, the decision to take action against him and the said mortgaged property is not available with the Bank officials under the Prohibition of Benami Property Transactions Act, 1988. Any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government U/s 5 of the PBPT Act, 1988.

(C) Following will be the legal ramifications of the instructions made by Mr. Cute to his Lawyer and advice by his lawyer w.r.t furnishing of a fabricated reply in response to the notice and to include a point as to why notice has been issued to him. The said notice shall be issued to HHFL only-

As per section 24 of the Prohibition of Benami Property Transactions Act, 1988, where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.

Where the notice specifies any property as being held by a benamidar, a copy of the notice shall also be issued to the beneficial owner if his identity is known. Where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as prescribed in Rule 4 of the Benami Transactions Prohibition Rules, 2016, for a period not exceeding ninety days from the date of issue of notice.

The Initiating Officer, after making such inquires and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice —

(a) where the provisional attachment has been made —
i. pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority; or
ii. revoke the provisional attachment of the property with the prior approval of the Approving Authority;

(b) where provisional attachment has not been made—
i. pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority; or
ii. decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

Where the Initiating Officer passes an order continuing the provisional attachment of the property or passes an order provisionally attaching the property, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.

Parties to be issued notice: On receipt of a reference under Section 24, the Adjudicating Authority shall issue notice, to furnish such documents, particulars or evidence as is considered necessary on a date to be specified therein, on the following persons, namely:—
(a) the person specified as a benamidar therein;
(b) any person referred to as the beneficial owner therein or identified as such;
(c) any interested party, including a banking company;
(d) any person who has made a claim in respect of the property.

Therefore, as per the above given provisions, the Adjudicating Authority shall issue notice, to furnish such documents, particulars or evidence as is considered necessary on a date to be specified therein in the notice to the person specified as a benamidar therein; and to as the beneficial owner therein or identified as such.

(D) After pursuing the order passed by Adjudicating authorities, Mr. Cute identified certain errors and misplaced facts. He asked his lawyer to discuss the same with the authorities. However, his lawyer forgot the same. Reminding after 11 months, he responded that the said matter is time-barred.

According to section 47 of the Prohibition of Benami Property Transactions Act, 1988, the Appellate Tribunal or the Adjudicating Authority may, in order to rec tify any mistake apparent on the face of the record, amend any order made by it under section 26 and section 46 respectively, within a period of one year from the end of the month in which the order was passed.

No amendment shall be made, if the amendment is likely to affect any person prejudicially, unless he has been given notice of intention to do so and has been given an opportunity of being heard.

Accordingly, above stated course of action may be available to the Mr. Cute in compliance with the said provision.

(12)(12)

(A) Mr. Bhakt, an allottee was told that Ganesh Temple would be constructed as a part of the project in podium 2. Due to technical objection, an intimation along with the certificate from engineer was sent to allottees stating that as of consequences temple will have to be shifted from podium 2 to podium 3. Also filed a complained against Ms. F and towards builders for several defects in the features contained in the marketing brochure.

According to section 18 of the Real Estate (Regulation & Development) Act, 2016, if the promoter fails to complete or is unable to give possession of an apartment, plot or building, in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; He shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

However, where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the T&C of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

Further Sec 9 of the Act specifies that no real estate agent shall facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being the part of the real estate project registered U/s 3, being sold by the promoter in any planning area, without obtaining registration under this section. In case of contravention, Ms. F will be liable under section 62 of the said Act.

Accordingly, Mr. Bhakt will have above remedies under the RERA against the Ms. F and against builder with the authorities.

(B) According to section 14 of the RERA, the proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

As per section 14(3) of the Act, in case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

In the given case, Mr. Sultan after 8 months of his staying, informed the builder of the quality of MCB with a potential risk of short circuit.Considering it a structural defect Mr. Sultan intimated within time frame. So promoter of the project will be liable here. Whereas complain of grass given by builder in flower bed area for replacement is in the nature of "minor additions or alterations", so promoter will be discharged of his liabilities.

(C) As per section 15(1) of the Real Estate (Regulation & Development) Act, 2016, the promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two- third allottees, except the promoter, and without the prior written approval of the Authority. However, such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

In the case study, the American Builder's, proposal was not valid as no prior written consent from two-third allottees and the authority were obtained.

Past Exam/Nov 2018/Case Study-3
(PMLA,FEMA)
Mr. Inder and Mr. Sunder

Mr. Inder and Mr. Sunder are promoter directors of India Exports Limited having registered office in Jammu, is engaged in the export of software products to various countries in the world. One of the customer 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 the company under the provisions of the Foreign Exchange Management Act, 1999. The Company has sought advice on the followings:

(a) Relevant provisions for realization of export amount and its timeline.

(b) Timeline to surrender the realized foreign exchange under the Act.

(c) Cases where realization and repatriation enjoy exemption.

Later, the company settled the amount for 50% with the customer and the amount was transferred through Hawala to India. The money so received was partly used by the company to part finance its office building in Mumbai.

During search in the premises of Hawala businessman, some documentary evidence was captured by the search officer and based on which, the Adjudicating Authority appointed under the Prevention of Money Laundering Act, 2002 issued an order attaching the office of the company alleged to be involved in scheduled offence of money laundering Mr. Prabhat, one of the employee was sent to Japan to develop a software program on deputation for 2 years. He earned a sum of US$ 3000 as a honorarium.

Ms. Lilly, the daughter of Mr. Inder is an air hostess with the British Airways and flies for 12 days in a month and thereafter takes a break for 18 days. During the break, she accommodated of 'base', which is normally the city, outside India where the airways are headquartered. However, for security considerations, she was based on Mumbai, during the current financial year and was accommodated at Mumbai for more than 182 days.

Mr. Victor, son of Mr. Sunder, having Indian origin and resident of USA desires to acquire two immovable properties in India comprising a residential flat in Noida and a farm house on the outskirts of Delhi. Further, Mr. Sunder has won lottery and want to remit the amount to his son Mr. Victor in USA for buying-immovable property in USA under joint ownership of 50% with Mr. Sunder. Mr. Sunder also wants to remit money to meet his obligation of 50% in the above immovable property. 3.

The balance of the money received through Hawala was used by the company to part finance the residential flat in Noida purchased by Mr. Victor.

The Adjudicating Authority appointed under the Prevention of Money Laundering Act, 2002 issued an order attaching the flat alleged to be involved in scheduled offence of money laundering. The company decides to challenge the action of the Adjudicating Authority.

In the meantime, Mr. Sunder requested the Chief Financial Officer to examine the following issues under the Prevention of Money Laundering Act, 2002:

(a) Process of money laundering
(b) Multiple method of money laundering
(c) The connection between 'proceeds of crime' and 'criminal activity'
(d) The request from a contracting state for investigation.
(e) The powers of the authority under the Act to survey

ANSWER THE FOLLOWING QUESTIONS:

(1) Which of these is not a permissible capital account transactions?
(A) Investment by person resident in India in Foreign Securities.
(B) Foreign currency loans raised in India and abroad by a person resident in India.
(C) Export, Import and holding of currency/currency notes.
(D) Trading in transferable development rights.

(2) Mr. Prabhat can retain the honorarium earned on deputation to the extent of US $:
(A) 3000
(B) 2000
(C) 1000
(D) Nil

(3) The residential status of Ms. Lilly for the current financial year under FEMA would be:
(A) Non-Resident irrespective of her citizenship.
(B) Resident irrespective of her citizenship.
(C) Non-Resident since she is British citizen.
(D) Resident though she is British citizen.

(4) The time limit within which the appeal can be lodged against the decision of the Adjudicating Authority by India Export Limited:
(A) Within 30 days from receipt of order.
(B) Within 60 days from receipt of order.
(C) Within 45 days from receipt of order.
(D) Within 90 days from receipt of order.

(5) Mr. Victor can acquire the following properties by following the steps as mentioned in the provisions of the Foreign Exchange Management Act, 1999:
(A) a farm house in outskirt of Delhi, only.
(B) both farm house in the outskirt of Delhi and a flat in Noida.
(C) a flat in Noida, only.
(D) None of above

(6) Section 2 of the Prevention of Money Laundering Act, 2002 defines the term 'scheduled offence', which accordingly means:
(A) the offences specified under Part A of the Schedule.
(B) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more.
(C) the offences specified under Part C of the Schedule.
(D) All of the above

(7) Whoever commits offence of Money Laundering shall be punishable with:
(A) imprisonment only.
(B) fine only
(C) imprisonment or fine.
(D) Imprisonment and fine.

(8) Money Laundering is a single process however, its cycle can be broken down into following three distinct stages:

(A) Integration, Layering and Placement.
(B) Layering, Placement and Integration.
(C) Placement, Layering and Integration.
(D) Placement, Integration and Layering.

(9) Where an order of confiscation has been made under the provisions of section 58B of the Prevention of Money Laundering Act, 2002, in respect of any property of a person, all rights and title in such property shall vest absolutely in the_____free from all encumbrances.
(A) Central Government
(B) Supreme Court
(C) President of India
(D) None of the above

(10) The offences under the Prevention of Money Laundering Act, 2002 shall be:
(A) cognizable and bailable.
(B) non-cognizable and non-bailable.
(C) cognizable and non-bailable.
(D) non-cognizable and bailable.

(11) Answer the following with reference to the provisions of the Foreign Exchange Management Act, 1999:
(A) The FEMA extends to the whole of India. Examine and advise India Export Ltd. as they have registered office in Jammu.
(B) The drawal of foreign exchange is prohibited for certain current account transactions. Examine and advise Mr. Sunder whether he can remit the amount of lottery won by him to Mr. Victor in USA.
(C) The Act restricts acquisition or transfer of immovable property outside India by a PRI. Examine and advise Mr. Sunder whether he can remit amount to buy immovable property in USA.
(D) The amount representing full export value shall be realized within time limit permitted under the Act. Explain and advise India Export Ltd. the relevant provisions for realization of export value and its timeline.
(E) The realized foreign exchange is to be surrendered within the period specified under the Act. Examine and advise India Export Ltd.
(F) The realization and repatriation in certain cases enjoy exemption. Examine and advise India Export Ltd.

(12) Examine and advise Mr. Sunder on the following with reference to the provisions of the Prevention of Money Laundering Act, 2002 (PMLA):
(A) Money Laundering is a process.
(B) There are multiple methods of money laundering.
(C) The 'proceeds of crime' and 'criminal activity' have connection.
(D) The request from a contracting state can be accepted for investigation.
(E) The Authority under the Act can make survey only based on the material in his possession.

Answer to Case Study 3

(1) Option (D) :Trading in transferable development rights
(2) Option (B) : 2000
(3) Option (A) : Non-Resident irrespective of her citizenship
(4) Option (C) :within 45 days from receipt of order
(5) Option (C):a flat in Noida, only.
(6) Option (D) :All of the above
(7) Option (D) :imprisonment and fine
(8) Option (C) :Placement, Layering and Integration
(9) Option (A) :Central Government
(10) Option (C) :Cognizable and non-bailable
(11)

A. Extent and Application [Sections 1 of FEMA, 1999]

FEMA, 1999 extends to the whole of India. In addition, it shall also apply to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies.

Accordingly, FEMA does not apply to citizens of India who are outside India unless they are resident of India. The scope of the Act has been further extended to include branches, offices and agencies outside India. The scope is thus wide enough because the emphasis is on the words "Owned or Controlled". Even contravention of the FEMA committed outside India by a person to whom this Act applies will also be covered by FEMA.

B. According to Section 5 of the FEMA, 1999 and rules/regulations made thereunder, the drawal of foreign exchange for certain current account transactions is prohibited, a few need permission of appropriate Govt. of India authority and some other transactions would require RBI permission if they exceed a certain ceiling.According to Schedule I, Remittance out of lottery winnings is prohibited.

Hence, Mr. Sunder cannot remit the amount of lottery won by him to Mr. Victor in USA.

C. According to Regulations on Acquisition and Transfer of Immovable Property outside India, a person resident in India may acquire immovable property outside India, jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India.

In the instant case, Mr. Sunder wants to remit money to meet his obligation of 50% in the immovable property in USA under joint ownership with his son Mr. Victor.

Hence, as per the regulations, Mr. Sunder cannot remit amount to buy immovable property in USA.

D. Period within which export value of goods/software/ services to be realized
[Foreign Exchange Management (Export of Goods and Services) Regulations, 2015]

(1) The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months from the date of export, provided
(a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods;

(b) further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be.
(2)(2)
(a) Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then, the amount representing the full export value of

goods or software shall be realised and repatriated to India within nine months from the date of export.

Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months.

(b) The Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by sub-regulation (2);

Provided that no such direction shall be given unless the unit has been given a reasonable opportunity to make a representation in the matter.

(c) On such direction, the said exporter/s shall be governed by the provisions of sub-regulation (1), until directed otherwise by the Reserve Bank.'

Explanation—For the purpose of this regulation, the "date of export" in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.

E. Period for surrender of received/ realised/ unspent/ unused foreign exchange by Resident individuals [Regulation 5 of Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2000]:A Person being an individual resident in India shall surrender the received/realised/unspent/ unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be.

F. Exemption from realisation and repatriation in certain cases [Section 9 of FEMA, 1999]

The provisions of sections 4 and 8 shall not apply to the following, namely:

(a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify;
(b) foreign currency account held or operated by such person or class of persons and the limit up to which the Reserve Bank may specify;
(c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing there on which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank;
(d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising there from;
(e) foreign exchange acquired from employment, business, trade, vocation, service, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and
(f) such other receipts in foreign exchange as the Reserve Bank may specify.

(12)

(A) Money laundering is a process: It is the process by which illegal funds and assets are converted into legitimate funds and assets. In other words, it is basically the process of converting illegal or black money of a person in a legal or white money.
It is the process used by criminals to wash their "tainted" money to make it "clean." Money laundering is a single process however; its cycle can be broken down into three distinct stages

(1) Placement: It is the first and the initial stage when the crime money is injected into the formal financial System.
(2) Layering: Then under the second stage, money injected into the system is layered and moved or spread over various transactions in different accounts and different countries. Thus, it will become difficult to detect the origin of the money.
(3) Integration: Under the third and final stage, money enters the financial system in such a way that original association with the crime is sought to be obliterated so that the money can then be used by the offender or person receiving as clean money.

(B) Multiple methods of money laundering: There are multiple methods through which money can be laundered and huge profit is being made, some of them are:

- Cash Smuggling: Moving cash from one location to another / depositing the cash in Swiss Bank A/c:
- Structuring: Cash is broken down into formal receipts to buy money orders etc., smaller amounts are hard to detect;
- Laundering via Real Estate: Buying a land for money and then selling it making the profits legal.

- Stock Markets scams
- By creating bogus companies.
- Drug Trafficking;
- Bribery and Corruption;
- Kidnapping and Extortion.

(C) Section 2(1)(u) defines "proceeds of crime"as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken/held outside the country, then the property equivalent in value held within the country.

(D) Letter of Request to a Contracting State in Certain Cases [Section 57 of the PMLA, 2002]

(1) If, in the course of an investigation into an offence or other proceedings under this Act, an application is made to a Special Court by the Investigating Officer or any officer superior in rank to the Investigating Officer that any evidence is required in connection with investigation into an offence or proceedings under this Act and he is of the opinion that such evidence may be available in any place in a contracting State, and the Special Court, on being satisfied that such evidence is required in connection with the investigation into an offence or proceedings under this Act, may issue a letter of request to a court or an authority in the contracting State competent to deal with such request to-

i. examine facts and circumstances of the case,
ii. take such steps as the Special Court may specify in such letter of request, and
iii. forward all the evidence so taken or collected to the Special Court issuing such letter of request.

(2) The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

(3) Every statement recorded or document or thing received shall be deemed to be the evidence collected during the course of investigation.

(E) Power of authority to make survey [Section 16(1) of the PMLA]: Where an authority, on the basis of material in his possession, has reason to believe (the reasons for such belief to be recorded in writing) that an offence under section 3 has been committed, he may enter any place—

i. within the limits of the area assigned to him; or
ii. in respect of which he is authorised for the purposes of this section by such other authority, who is assigned the area within which such place is situated,

at which any act constituting the commission of such offence is carried on, and may require any proprietor, employee or any other person who may at that time and place be attending in any manner to, or helping in, such act so as to,

i. afford him the necessary facility to inspect such records as he may require and which may be available at such place;
ii. afford him the necessary facility to check or verify the proceeds of crime or any transaction related to proceeds of crime which may be found therein; and
iii. furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceedings under this Act.

Explanation. - For the purposes of this sub-section, a place, where an act which constitutes the commission of the offence is carried on, shall also include any other place, whether any activity is carried on therein or not, in which the person carrying on such activity states that any of his records or any part of his property relating to such act are or is kept.

Therefore, Authority under the Act can make survey as per the above stated section.

Past Exam/May 2019/Case Study-1 (Same as Case Study-5 Jan 2021 Paper)

Past Exam/May 2019/Case Study-2
(RERA, PMLA)
Winner Builders Private Limited

Winner Builders Private Limited ("Winner") is a premium real estate builder who specializes in constructing mid-sized apartment complexes (20 - 40 apartments) in South India. Winner was started in the year 2004 by Mr. Vijay Nair, Managing Director and has its head office in Kochi, Kerala with branches in Trivandrum, Bengaluru, Chennai and Tirupati. Mr. Vijay Nair has been in the real estate business for more than 30 years and comes from a family of civil engineers who are highly respected by their customers. Mr. Arun Nair, son of Mr. Vijay Nair, is a Chartered Accountant and is the Chief Financial Officer of Winner. Mr. Vijay and Mr. Arun together own 60 of the share capital of Winner and the balance is held by a large private equity investor.

Although the company is a private limited company, the affairs of the company are handled in the most professional manner akin to a listed company and Mr. Arun ensures that the financial statements are properly prepared and presented to the Board of Directors (Mr. Vijay, Mr. Arun and a representative of the PE investor) on a quarterly basis. The financial performance of Winner has been reasonable and being a conservative person, Mr. Vijay was never in the mind- set of taking aggressive positions with regard to business. Over the last few months, the PE investor has been pushing the company in making changes in the operational mechanism, sale prices etc. to increase the profits of the company and ensure decent return on their investment. Due to this, Mr. Vijay and Mr. Arun are under tremendous pressure to complete the ongoing projects fast and start new projects immediately and increase the revenues/profits of the Company.

In June 2018, Winner announced a new 80 apartment project in Kochi named as "Winner Shikaram", an ultra-modem luxury apartment complex with a variety of amenities including swimming pool, skating rink, basketball court, fully equipped club house with all amenities, etc. As per RERA regulations the Company applied for registration of the project on 15th June 2018. On 20th June 2018, the Company announced the launch of the project and commenced a big advertisement campaign in the TV media & also through release of promotion material through social media. It also collaborated with a regional TV Channel and announced a free home in "Winner Shikaram" for the 1st prize winner of a popular reality show. The property was registered by RERA on 10th July 2018 after scrutiny of the information provided by the promoter.

Based on the past performance of the Winner group and the general image of Mr. Vijay Nair, there was tremendous demand for the apartments in the project and all the apartments were booked within 1 month from the date of launch (20th June 2018). The following were some of the conditions mentioned in the agreement to sale entered into by Winner with its allottees:

1. Expected date of completion of construction -31st March, 2020.
2. Expected date of handover-31st May 2020, Subject to grace period of 4 months.
3. Booking Advance amount to be paid prior to entering into agreement to sale – 20% of total cost of apartment
4. Open car parking cost-INR 200,000
5. Any delay in payment of dues by the allottees will liable for interest on such delayed payments.
6. Return of booking amount shall not be entertained for any reason whatsoever.
7. Winner Group shall be liable for any deficiency in quality of construction for a period of 3 years from the date of handing over the apartments.

Winner Group collected a total amount of INR 80 crores from the allottees and deposited an amount of INR 60 crores in an escrow account for exclusive use for construction of the complex.

Separately, an amount of INR 5 lakhs each was collected from the 80 allottees in cash, aggregating to INR 400 lakhs towards interior work, modular kitchen, supplying fans and lights, etc. This money was accounted as receipt in a separate company, M/s. Wonderful Interiors, which was owned by Ms. Anusha Nair, daughter of Mr. Vijay Nair and Mr. Arun Nair.

Although the construction was proceeding apace, the Company encountered severe rock formations under the ground in one section of the land area which was previously not known and due to the same, the Company concluded that the swimming pool could not be constructed as designed and the size of the same had to be reduced. Winner got in' touch with the allottees and proposed that the reduction of the size of swimming pool will be compensated suitably by Winner by providing a Jacuzzi and Spa inside the club house. This was accepted by majority (45 of the 80) of the allottees and, accordingly, Winner proceeded with the construction based on the amended plan.

Few of the allottees reached out to Mr. Vijay Nair and stated that the carpet area for their apartments was lesser than the size stipulated in the sale agreement and therefore, wanted to be compensated. Mr. Vijay Nair mentioned to them that the reduction in the area was on account of the exterior walls appurtenant to their apartments and this is the case with all the apartments and not specific to their homes alone. Mr. Arun Nair attended one of the real estate conclaves held in Bangalore, in which he met one Mr. Henry Stewart, who runs an interior designing warehouse in Dubai UAE and showed quite a few exhibits to Arun. Arun was impressed by the designs and the prices quoted by Mr. Henry.

Mr. Henry was also amenable to receive funds in cash in India through an intermediary and then provide the material to Arun from UAE. Based on the same, Arun arranged for making cash payment to the extent of INR 200 lakhs (Out of the INR 400 lakhs received by M/s Wonderful Interiors) to an intermediary in Delhi, and the material was received from Henry in a month. During his visit to India, Henry noted that his UAE passport got expired and he did not realise the same. Since he did wanted to leave India immediately, he got in touch with a travel agent, Mr. Anil Kumar, who helped him get a forged passport, for which Mr. Henry paid INR 2 lakhs in cash.

Out of the balance INR 200 lakhs cash available with Wonderful Interiors, Arun used cash amounting to INR 25 lakhs to pay amounts to various intermediaries to facilitate timely and smooth registration process of thie apartments of Winner Shikharam, which was paid by the intermediaries to the officials of the Sub-Registrar. With Henry's help, Arun transferred the balance amount of INR 175 lakhs to an intermediary in Delhi and invested the amount to incorporate a shell company in the Cayman Islands. The funds were then transferred back by the Shell Company to the bank account of Winner.

For this purpose, Mr. Arun raised export invoices in the books of Winner on the Shell Company for providing professional services relating to real estate business. Based on these invoices, Winner claimed export incentives under the relevant laws in India and received INR 20 lakhs as export incentive.

On 30th March 2019, a meeting was organised by the Company and all the allottees during which May, 2020) Mr. Vijay Nair provided a status update on the project and stated that bulk of the construction activities will be completed by the timeline mentioned in the sale agreement (31st May 2020) and the apartments will be handed over by 31st July, 2020 (i.e. within the grace period). The common areas will be completed in parallel and handed over by 30th September, 2020. The slight delay in completion was on account of non-availability of quality labour and he wanted only the best labour to work on the project to ensure that the home owners have a happy life after hand over. He also mentioned that the labour rates increased by 15% after the sale agreements were entered and the Company did not ask for increase in prices from the allottees only for good will reasons. The allottees were unhappy with the delay but, accepted the same, since there was no other choice.

As one of the shareholders of Wonderful Interiors, Ms. Anusha Nair decided to visit Dubai to see the interior designs and then place an order for the upcoming projects. During her visit, she purchased 500 grams worth of gold (costing INR 15 lakhs) and since, she did not have enough money, she asked Mr. Arun Nair to make the payment through the intermediary in Delhi. Based on the discussion with the intermediary, Mr. Arun Nair provided an antique painting which he got from one of his social friends to the intermediary as consideration for the gold purchased by Ms. Anusha Nair in Dubai. Based on the same, Ms. Anusha brought the gold with her through the green channel.

One of the employees of Wonderful Interiors, noting the substantial amount of cash transactions, informs the Bank regarding the same, which in turn informs the enforcement directorate. The ED has issued a show cause notice to all the parties regarding the above transactions.

Answer the following questions:

1. RERA authorities sent a notice to Winner that their advertisement campaign was not in accordance with the RERA 2016. Evaluate.
   (A) Valid, Since Winner decided to use Social media platform for promotion, without obtaining specific approval from RERA.
   (B) Valid, Since Winner collaborated with a TV channel to give a free home in Winner Shikaram when the construction itself was not complete.
   (C) Valid, Since Winner launched the project and commenced marketing even before the project received registration from RERA.
   (D) Not Valid, Since Winner applied for the registration prior to the launch of campaign and the registration was ultimately received within the stipulated period.

2. As per RERA, Winner is required to enable the formation of the association of allottees of Winner Shikaram within_months.
   (A) 3 months of the majority of the allottees having booked their apartment.
   (B) 3 months of the receipt of occupancy certificate.
   (C) 3 months of the majority of the allottees registering their apartments with the sub-registrar.
   (D) 3 months of all the allottees making the full payment for the apartments.

3. After registering the apartments in the name of the allottees, Winner informed the allottees that they need to pay the water & electricity charges to the concerned departments for their apartments. Evaluate.
   (A) The registration of the apartments denote that the allottees are now the legal owners of the apartments and hence, need to bear the water and electricity charges.
   (B) The promoter is liable for making payment for the water and electricity charges until the physical possession is transferred to the allottees.
   (C) This is dependent on the terms of the agreement of sale between Winner and the allottees.
   (D) This amount need to be paid equally by Winner and the allottees, since the registration is completed and only transfer of physical possession is pending.

4. The time limit within which the allottees of winner Shikaram are required to take physical possession of the apartment after issuance of occupancy certificate is:
   (A) Three months
   (B) One month
   (C) Five months
   (D) Two months

5. As per provisions of RERA, collection of cash by Wonderful Interiors for interior work, modular kitchen, supplying fans and lights, etc. :
   (A) May be appropriate, since RERA does not specify the mode of collection.
   (B) May not be appropriate, since collection should be done as per the stipulations of RERA.
   (C) May be appropriate, since provisions of RERA are not applicable.
   (D) May not be appropriate, since Wonderful Interiors are not registered with RERA.

6. What are the three distinct stages of Money Laundering?
   (A) Information, Interrogation, Indictment
   (B) Placement, Layering, Integration
   (C) Planning, Comingling, Profiting
   (D) Monitoring, Adjudicating, Punishing

7. Which of the following are not circumstances which need to be considered by the ED for performing search of the offices of Winner and other parties mentioned in the case study?
   (A) Possession of any property related to crime
   (B) Possession of any records relating to money laundering
   (C) Possession of records relating to RERA compliance by Winner
   (D) Possession of any proceeds of crime involved in money laundering.

8. Ms. Anusha Nair brought gold jewellery worth INR 15 lakhs from D ubai through the green channel. Is this an offence under the PMLA 2002?
   (A) Yes, because she came through the green channel and evaded duty of customs.
   (B) No, whilst it is an offence, it is not actionable under the PMLA 2002.
   (C) No, she did not pay any cash for the purchase.
   (D) Yes, since purchase of gold from gulf countries requires specific consent as per the agreement entered with foreign countries as per Section 56 of PMLA 2002.

9. As per RERA 2016, what is the Min. amount that Winner was required to deposit in the escrow account?
   (A) INR 50 crores
   (B) INR 56 crores
   (C) INR 54 crores
   (D) INR 58.8 crores

10. Of the below, which of the practices are not common schemes of money laundering?
    (A) Bribery and Corruption
    (B) False declarations under Customs act
    (C) Usage of false trade Marks/copyrights
    (D) Possession of foreign currency over and above permitted limit

11. Answer the following questions in the context of the provisions relating to the Real Estate (Regulation & Development) Act, 2016 (RERA 2016).
    (i) Examine the appropriateness of the conditions mentioned in the agreement to sale, in the context of the provisions of RERA 2016.
    (ii) What are the provisions in RERA 2016 relating to the changes in design of the construction from the sanctioned plans? Analyse if the changes made by Winner are appropriate in this context.

(iii) What would be your advice if the customers of Winner reach out to you for your views with regard to the validity of the explanations provided by Mr. Vijay Nair on reduction of carpet area?

(iv) Evaluate the statements made by Mr. Vijay Nair in the meeting with the allottees on 30th March 2019 regarding the delay and the increase in labour costs in context of provisions of RERA 2016.

12. Examine / advice regarding the below questions relating to the PMLA 2002.

(i) As a leading consultant on PMLA matters, the enforcement directorate has sought your advice on identifying :
(a) the offences (b) the parties involved and (c) the punishment for the offence of money laundering.

(ii) The Bank, in which Winner holds its bank account, has reached out to you to understand their obligations for maintaining and reporting of transactions under the PMLA 2002. Advise.

(iii) When the Enforcement Directorate proposed to take action against Mr. Vijay Nair under the PMLA 2002, Mr. Vijay Nair contended that he was not a party to any of the alleged offences and he was managing the real estate business of Winner only.
Examine whether his statement is valid. What would be the position of the nominee director of the PE investor?

ANSWER CASE STUDY 2

1. (C)
2. (A)
3. (B)
4. (D)
5. (C)
6. (B)
7. (C)
8. (B)
9. (B)
10. (C)

11.

(i)

(1) Expected date of completion of construction- 31st March, 2020 -This condition is valid.

(2) Expected date of handover- 31st May 2020, subject to a grace period of 4 months. -This condition is valid.

(3) According to Section 13, a promoter shall not accept a sum more than ten percent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

Hence, the condition in the agreement for sale for booking advance amount to be paid prior to entering into agreement to sale @20% of total cost of apartment is not valid.

(4) Section 2(n) of RERA, 2016 defines 'common areas' to include 'open parking areas', thus open parking areas cannot be sold to the allottees.

Hence, the condition in the agreement for sale for open car parking cost ₹ 2,00,000 is not valid.

(5) As per section 19(7) of RERA, 2016, the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid.

Hence, the condition about any delay in payment of dues by the allottees will be liable for interest on such delayed payments, is valid.

(6) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

Hence, the condition for return of booking amount shall not be entertained for any reason whatsoever is not valid.

(7) The builder has to provide five-year warranty for any structural defects in the building. They are liable to pay equal rate of interest in case of default or delays as home buyers.

Hence, the condition that Winner Group shall be liable for any deficiency in quality of construction for a period of 3 years from the date handing over the apartments is not valid.

(ii) Adherence to sanctioned plans and project specifications by the promoter (Section 14)

(1) The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

(2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—

(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person.

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

(ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation.—For the purpose of this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

In the instant case, the proposal of Winner for reduction of the size of swimming pool and the same to be compensated by providing a Jacuzzi and spa inside the club house was accepted by majority (45 of the 80) of the allottees and accordingly, Winner proceeded with the construction based on the amended plan.

According to the above provisions, the promoter shall not make any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Hence, approval by majority (45 of 80) is not valid.

(iii) As per section 2(k) of the Real Estate (Regulation & Development)Act, 2016 "carpet area" means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.
Accordingly, Sale of property will be on carpet area, not super built area. Therefore, the homebuyer will have to pay only for the carpet area, that is the area within walls, and the builder cannot charge for the super built-up area.

Therefore, the explanations provided by Mr. Vijay Nair on the reduction of the carpet area was invalid. So, home buyers/ customers are liable to pay only for the carpet area, that is the area within walls.

(iv) As given in the question that on 30th March, 2019, meeting was organized by the company with all the allottees. During the meeting, Mr. Vijay Nair provided a status update on the project and of the construction activities to be completed and the other information mentioned in the sale agreement. As per the Section 11 of Real Estate (Regulation & Development) Act, 2016, it is the duty of the promoter, to alter a project plan, structural design and specifications of the plot, apartment or a building, the promoter has to get the consent of minimum two-third allottees (buyers) after the necessary disclosures.
Since in the given case no approval of 2/3rd of the allottees was taken w.r.t. to delay and the increase in labour costs i.e., as to the updation of the status of the said project. This act of Mr. Vijay Nair is not in compliance with the Law.

12. (i)

(a) Offences: The term "scheduled offence" has been defined in clause (y) of sub- section (1) of section 2. It means –

(a) the offences specified under Part A of the Schedule; or

(b) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or

(c) The offences specified under Part C of the Schedule.

The Schedule to the Act gives a list of all the above offences. The Schedule is divided into three parts- Part A, Part B and Part C, which are given in Annexure to the Chapter.

(b) The parties involved: Clause (p) of sub section (1) of section 2 provides that "money-laundering" has the meaning assigned to it in section 3. Moving to section 3, it is observed that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money laundering.

(c) The punishment for the offence of money laundering: Section 4 provides for the Punishment for Money-Laundering - 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.

But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule (i.e. Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985), the maximum punishment may extend to ten years instead of seven years.

(ii) Obligation of Banking Companies, Financial Institutions and Intermediaries Reporting entity to maintain records

Section 12 provides for the obligation of Banking Companies, Financial Institutions and Intermediaries.

1) Maintenance of records: According to sub-section (1), every reporting entity shall –
(a) maintain a record of all transactions, including information relating to transactions covered under clause (b), in such manner as to enable it to reconstruct individual transactions;

(b) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;

(c) verify the identity of its clients in such manner and subject to such conditions, as may be prescribed;

(d) identify the beneficial owner, if any, of such of its clients, as may be prescribed;

(e) maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

2) Confidentiality: Every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force shall be kept confidential.

3) Maintenance of records (for clause a): The records referred to in clause (a) of sub-section (1) shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

4) Maintenance of records (for clause e): The records referred to in clause (e) of sub-section (1) shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

5) Exemption by the Central Government: The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this chapter.

Access to information [Section 12A]

1. The Director may call for from any reporting entity any of the records referred to in sub-section (1) of section 12 and any additional information as he considers necessary for the purposes of this Act.
2. Every reporting entity shall furnish to the Director such information as may be required by him under sub-section (1) within such time and in such manner as he may specify.
3. Save as otherwise provided under any law for the time being in force, every information sought by the Director under sub-section (1), shall be kept confidential.

(iii) Offences by companies [Section 70]

(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of and was responsible to the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

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

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of any company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

In the instant case, Mr. Vijay Nair contended that he was not a party to any of the alleged offences and he was managing the real estate business of Winner only. His statement is not valid on the grounds of section 70 of the PMLA 2002.

The position of the nominee director of the PE investor would be same as of Mr. Vijay Nair and he shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Past Exam/May 2019/Case Study-3
(IBC,Competition Act)
M/s Transmission Corporation of Andhra Pradesh Limited

(PART-A)

The appellant "M/s Transmission Corporation of Andhra Pradesh Limited" is a successor of Andhra Pradesh State Electricity Board and is in the activities relating to transmission of electricity. It had awarded certain contracts to the respondent "M/s Equipment Conductors & Cables Limited" herein for supply of goods and services. Some disputes arose and the respondent initiated arbitration proceedings. As many as 82 claims were filed by the respondent before Haryana Micro and Small Enterprises Facilitation Council (hereinafter referred as 'Arbitral Council'). These proceedings culminated into Award dated June 21st, 2010.

The Arbitral Council came to the conclusion that the claims made on the basis of Invoice Nos. 1 - 57 were barred by law of limitation and, therefore, no amount could be awarded against the said claims. In respect of Invoice Nos. 58-82, the award was passed in favour of the respondent. Against the aforesaid award rejecting claims in respect of Invoice Nos. 1 - 57 as time barred, the respondent herein filed an application under Section 34 of the Arbitration and Conciliation Act before the Additional District Judge, Chandigarh.

The Additional District Judge passed the order dated August 28, 2014 in the said application thereby remanding the case back to the Arbitral Council for fresh decision. Against this order, the appellant filed the appeal before the High Court of Punjab and Haryana at Chandigarh. This appeal was allowed by the High Court by its order dated January 29, 2016 thereby setting aside the direction of the Additional District Judge remanding the matter to Arbitral Council for fresh consideration.

The respondent herein filed execution petition for execution of judgment dated January 29, 2016 passed by the High Court of Punjab and Haryana as well as the award dated June 21, 2010 passed by the Arbitral Council. In so far as award of Arbitral Council is concerned, as noted above the respondent's claim pertaining to Invoice Nos. 58 - 82 WAS allowed and the execution thereof was sought.

The respondent, however, filed another execution petition seeking execution of amount in respect of Invoice Nos. 1 - 57 also. This application was entertained and both the petitions were directed to be dealt with simultaneously vide orders dated August 17, 2016. The High Court vide its order dated November 08,2016 allowed the said Revision Petition holding that there was no award in respect of claim towards Invoice Nos. 1 - 57 and, therefore, it was not permissible for the respondent to seek the execution. When the things rested at that, the respondent approached the NCLT by means of a Company Petition under Section 9 of IBC, 2016 read with Rule 6 of Insolvency and Bankruptcy (AAA) Rules, 2016. In this petition, the respondent stated that it had served demand notice dated October 14, 2017 upon the appellant under the provisions of the IBC, thereby claiming the amount of ₹ 45,69,31,233/- which was not paid by the appellant.

As mentioned above, this petition was dismissed by the NCLT filed u/s 9 of IBC vide its order dated April 09, 2018 being non maintainable on account of existence of a dispute between the parties and this assertion of the NCLT is based on the fact that these very claims of the respondent were subject matter of arbitration and the award was passed rejecting these claims as time barred. Against this order, the respondent has filed appeal before the NCLAT in which impugned orders dated September 04, 2018 have been passed.

The Honourable NCLAT passed an order stating "Prima facie case has been made out by the Appellant in view of the part decree awarded by the competent court u/s 34 of the A&C Act, 1996. However, taking into consideration the fact that if appeal is allowed and Corporate Insolvency Resolution Process is initiated against the Respondent - "Transmission Corporation of Andhra Pradesh Ltd. ", the Govt undertaking may face trouble. Therefore, by way of last chance we grant one opportunity to respondents to settle the claim with the appellant, failing which this Appellate Tribunal may pass appropriate order on merit."

This very order of the 'NCLAT dated September 04, 2018 is the subject matter of challenge before the Hon.SC by the appellant M/s Transmission Corporation of Andhra Pradesh Limited and prays that the same be reversed as there exists a Dispute and the application under IBC cannot be accepted.

(PART-B)

One Shri Rajendra Singh (Informant') filed an information u/s 19(1)(a) of the Competition Act, 2002 (the 'Act') against Ghaziabad Development Authority (‘OP' /'GDA') alleging contravention of the provisions of Sec 4 of the Act. As per information, the Informant is an allottee of a flat under the Adarsh Vihar residential housing scheme for the Economically Weaker Sections ('Scheme') being developed by the OP in Ghaziabad, U. P. in 2008. It is informed that OP is constituted u/s 4 of the Urban Planning and Development Act, 1973 of UP and is, inter alia, engaged in the activity of development and sale of real estate in Ghaziabad, U. P.

It is further stated that the OP had conducted a lottery draw for allotment of EWS flats under the aforesaid scheme. On being successful in the said lottery draw, the Informant was allotted a flat bearing no. A-1/222 and accordingly, an allotment letter dated 04.05.2009 was issued in favour of the Informant mentioning the final price of the flat as ₹ 2,00,000 and other conditions relating to payment plan, date of giving possession, penal interest in case of delay in the payment of the balance amount etc. As per the condition of the scheme, the Informant paid ₹ 20,000 to the OP as registration amount constituting 10% of the total price of the said house.

It is averred by the Informant that on 27.11.2015, the OP issued a letter to all the allottees of the aforesaid scheme asking them to pay ₹ 7,00,000 as sale price of the flats allotted to them failing which their allotment would stand cancelled. It is alleged that the OP has arbitrarily increased the sale price of the said flat to₹ 7,00,000 from ₹ 2,00,000 which was mentioned in the allotment letter dated 04.05.2009. As per the Informant, the OP has indulged in unfair and arbitrary practices and has misused its dominant position in the market.

It is further averred that the OP has indulged in the said practice even after knowing that the allottees of the scheme belong to the weaker sections of the society and they are not in a position to challenge the OP for its unfair and arbitrary conduct. Further, it is stated that the allottees of the said scheme are dependent upon the OP for the residential flats under the said scheme. The Informant has averred that the alleged conduct of OP is in contravention of the provisions of Section 4(2)(a) of the Act.

Based on the above submissions, the Informant has prayed before the Commission to initiate an inquiry against the OP under the provisions of the Act, set aside the impugned letter dated 27.11.2015 of the OP demanding ₹ 7,00,000 for the aforementioned flat, and direct the OP to deliver possession of the flat to the informant under the said scheme at the price of ₹ 2,00,000 per flat. Besides hearing the parties on 27.12.2016, the Commission has perused the information available on record and the documents submitted by the OP. From the facts of the case, it appears that the grievance of the Informant relates to the letter dated 27.11.2015 of the OP demanding a higher price of ₹ 7,00,000 for a EWS flat allotted to the Informant under the aforesaid scheme as compared with the price of ₹ 2,00,000 as declared in the scheme's initial brochure and intimated to the Informant vide allotment letter dated 04.05.2009. It is the case of the Informant that the OP has abused its dominant position by arbitrarily increasing the price of the said flat in contravention of the provisions of Section 4 of the Act.

The Commission observes that GDA is established under Section 4 of the Urban Planning and Development Act, 1973 of the State of Uttar Pradesh. It has a common seal with power to acquire, hold or dispose of both movable and immovable properties. The Urban Planning and Development Act, 1973 of Uttar Pradesh empower GDA to pursue activities for promoting and securing development of Ghaziabad in a planned manner. GDA has the power to acquire, hold, manage and dispose of land and other properties in Ghaziabad and to carry out building, engineering, mining and other operations, etc.

Further, GDA is, inter alia, engaged in the activities of development and sale of buildings, flats, complexes etc. for residential, commercial, institutional and other purposes and with regard to the relevant geographic market. The Commission is of the view that the geographic area of Ghaziabad district of the State of Uttar Pradesh exhibits homogeneous and distinct market conditions for the development and sale of low cost residential flats under affordable housing schemes for EWS and can be distinguished from the conditions of competition prevailing in other adjacent areas of Ghaziabad such as Delhi, Noida, etc.

It may be noted that a consumer intending to buy a low cost residential flat under affordable housing scheme for EWS in Ghaziabad may not prefer to purchase the same in other adjacent areas of Ghaziabad because of factors such as difference in regulatory authorities (and hence, different rules, regulation and taxes), distance to locations frequently commuted, regional or personal preferences, transport connectivity etc.

Simultaneously, the Competition Commission of India (CCI) received a complaint from the Tamil Nadu State Government alleging that two companies, M/s Sun Limited, a company engaged in the business of manufacturing solar panels, and M/s Shine Limited, a company engaged in the sale, installation and maintenance of solar energy generation plants, have entered into an informal agreement to limit or control the production, supply and marketing of the products to ensure maximum price realisation. M/s Sun Limited sells its manufactured panels on an exclusive basis to M/s Shine Limited, which is India's largest solar power generation company supplying solar plants to more than 60% of the current market.

Therefore, it is the case of the Tamil Nadu State Government that the agreement between M/s Sun Limited and M/s Shine Limited is anti-competitive and has an adverse effect on competition since the entities have abused their dominance in the market.

ANSWER THE FOLLOWING QUESTIONS:

1) Which of the following are not duties of the Competition Commission of India?
(A) To promote and sustain competition in markets in India.
(B) To protect the interests of consumers.
(C) To ensure freedom of trade carried on by Indian suppliers in global market.
(D) To eliminate practices having adverse effect on competition.

2) Notwithstanding anything contained in sub-regulation (2), the Commission may, after recording reasons, invalidate a notice filed under regulation 5 or regulation 8 of The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 as amended when it comes to the knowledge of the Commission that such notice is not valid as per sub-regulation (1) and, in that case, the Secretary shall convey the decision of the Commission to the parties to the combination within_____.
(A) Seven days of such decision of the Commission.
(B) Fourteen days of such decision of the Commission.
(C) Seven working days of such decision of the Commission.
(D) Fourteen working days of such decision of the Commission.

3) Operate independently of competitive forces prevailing in the relevant market is___component.
(A) Abuse of Dominance
(B) Anti-Competition agreements
(C) Combinations Regulation
(D) Competition Advocacy

4) Which of the following are not functions of Insolvency Professional Agencies (IPAs)?
(A) Monitoring, Inspecting and Investigating members.
(B) Recommending Insolvency Professionals to Committee of Creditors.
(C) Drafting detailed standards and code of conduct for insolvency professionals.
(D) Addressing grievances, hearing complaints and taking suitable action.

5) Following are the liabilities of M/s A Limited, under insolvency process under IBC 2016
(i) Loan from Bank - INR 100 crores.
(ii) Secured Debentures issued to M/s B Limited - INR 20 crores.
(iii) Trade Payable (10 creditors, including B Ltd., whose outstanding is ₹ 2 crores) – INR 14 crores.
(iv) Amounts payable to workmen - INR 4 crores.

Calculate the voting share of M/s B Limited in the Committee of Creditors.
(A) 15.9420%
(B) 16.6667%
(C) 16.4179%
(D) 16.1290%

6) The liquidation process relating to corporate debtors under IBC 2016 will not be initiated under which of the following circumstances?
(A) The Committee of Creditors do not approve a resolution plan within 180 days.
(B) The NCLT rejects the resolution plan submitted to it on technical grounds.
(C) The Committee of Creditors resolve to liquidate the debtor with a majority (> 50%).
(D) The debtor contravenes the agreed resolution plan and an affected person makes an application to the NCLT to liquidate the debtor.

7) The liquidator of M/s Wrong way has sought your help in prioritizing the claims against M/s Wrong way, as per IBC 2016:
(1) Costs payable to liquidator and resolution professional.
(2) Property tax payable to Government of Goa.
(3) Salary payable to the Finance team for past 6 months.
(4) Amounts payable to M/s Dhara Bank towards secured loans, where security was relinquished.
(5) Amounts payable to Holding company of M/s Wrong way for Royalty fees.
(A) (1), (2), (4), (3), (5)
(B) (2), (1), (4), (5), (3)
(C) (1), (4), (2), (3), (5)
(D) None of the above

8) Whether an operational creditor can assign/legally transfer any operational debt to a financial creditor ?
(A) Yes. However, the transferee shall be considered as an operational creditor to such extent of transfer.
(B) Yes but the transferee shall be considered as a financial creditor in relation to such transfer.
(C) No. An operational creditor cannot assign or legally transfer any operational debt to a financial creditor.
(D) No. An operational creditor can assign or legally transfer an operational debt only to an operational creditor.

9) Which of the following agenda items should be taken up in the first meeting of committee of creditors (COC)_____.
   (A) Appointment of interim resolution professional as insolvency professional or replacement of the interim resolution professional by another resolution professional
   (B) Preparation of draft resolution plan.
   (C) Discussion of the status of corporate debtor as on the present date & the road map ahead.
   (D) Collection of information on corporate debtor from independent sources (2 Marks)

10) What is quorum in case of meeting of committee of creditors (CoC)?
   (A) Members of the Committee representing at least 33% of the voting rights present either in person or video conference or other audio visual means.
   (B) Members of the Committee representing at least 50% of the voting rights are present either in person or proxy.
   (C) Members of the Committee representing at least 50% of the voting rights are present either in person or video conference or other audio visual means or proxy.
   (D) Members of the Committee representing at least 66% of the committee present in person or proxy.

11) What is to be construed as a "Dispute" under the Insolvency & Bankruptcy Code, 2016? State its significance for the maintainability of an application filed under section 9 of the Code.
In the given case study whether the appellant M/s Transmission Corporation of Andhra Pradesh Limited will succeed in its appeal ? Decide.

12) (i) Examine the provisions of the Competition Act, 2002:
   (a) Decide whether the agreement between Sun Limited and Shine Limited is covered under the scope of the Act with reasons. Also, clarify the nature of the agreement based on facts provided.
   (b) What factors shall the CCI consider while evaluating the views of the Government of Tamil Nadu?
   (c) What orders can the CCI pass on completion of the inquiry?

   (ii) In the given case study, decide with reasons whether Rajendra Singh (Informant) will succeed against the Opposite Party (OP) for alleged violation of Section 4(2)(a) of the Competition Act, 2002 ?

ANSWER CASE STUDY 3

1) (C)
2) (C) Note: Prior to Amendment in the combination Regulation, it was Option A.
3) (A)
4) (B)
5) (B)
6) (C)
7) (D)
8) (A)
9) (A)
10) (A)

11) **Meaning of dispute**: As per section 5(6) of the Insolvency and Bankruptcy Code, 2016 the word "Dispute" includes a suit or arbitration proceedings relating to—

   (a) the existence of the amount of debt;
   (b) the quality of goods or service; or
   (c) the breach of a representation or warranty;

   Significance of "dispute" for filing of an application by operational creditor under section 9 of the IBC: If there is any dispute about debt, the corporate debtor is required to reply within ten days of receipt of copy of invoice, existence of a dispute, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute [section 8(2)(a) of Insolvency & Bankruptcy Code, 2016].

   After the expiry of the period of 10 days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute, the operational creditor may file application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

   The operational creditor shall, along with the application furnish the relevant documents, containing an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt. The Adjudicating Authority shall, within fourteen days of the receipt of the

application, by an order admit the application and communicate such decision to the operational creditor and the corporate debtor if no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility.

In the given case study, appellant M/s Transmission Corporation, filed an appeal against the order of NCLAT before the Supreme Court on the ground of existence of a dispute, so the application under IBC cannot be accepted and so order passed in the favour of respondent (M/s Equipment Conductors & Cables Ltd.) to be revered.

As per the facts given in the case study, respondent filed petition seeking execution of amount in respect of Invoice Nos. 1-57. Vide order dated Nov, 8, 2016 high court held that this revision petition holding that there was no award in respect of claim towards Invoice Nos. 1- 57 and therefore, it was not permissible for the respondent to seek the execution.

Against this order, respondent approached NCLT on the ground that it has served demand notice dated October 2014, 2017. This application was dismissed by the NCLT Vide Order April 9, 2018. Against this order of NCLT, respondent filed appeal before NCLAT. NCLAT challenged the orders and passed an order dated 4th September 2018. Cause of action arised when, high court rejected on the execution of the petition which was holding that there was no award in respect of claim towards Invoice Nos. 1- 57, was passed, which means that still the dispute is pending. Against this order, respondent, served demand notice dated October 14, 2017.

As per the Code, if there is dispute about claim of debt between parties prior to issue of demand notice by operational creditor, application cannot be admitted. On the basis of this ground, Appellant challenged the subject matter of the order passed by NCLAT dated 4th September 2018 before SC.

In the judicial pronouncement, it was held that, application by operational creditor to initiate insolvency process was accepted when it was found that there was no existing dispute prior to date of demand notice and dispute raised after receipt of demand notice was not genuine [Badjate Stock v. Snowblue Trexim (2018) 145 SCL 441 = 89 taxmann.com 64 (NCLT)].

Also, If appeal has been filed under section 34 of Arbitration Act, the proceedings are pending as appeal is continuation of the adjudication proceedings. Hence, application for insolvency resolution is not maintainable. [CG Power & Industrial Solutions Ltd. v. ACC Ltd. (2018) 91 taxmann.com 363 (NCLT)].

Therefore, in the light of the given facts and circumstances, Appellant M/s Transmission Corporation of Andhra Pradesh Limited will succeed in its appeal.

12) (i)

(a) Anti-Competitive Agreements [Section 3]:

It shall not be lawful for any enterprise or association of enterprises or person or association of persons to 'enter' into an agreement in respect of production, supply, storage, distribution, acquisition or control of goods or provision of services, which causes or is likely to cause an AAEC within India. All such agreements entered into in contravention of the aforesaid prohibition shall be void.

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, shall be presumed to have an AAEC, which—

(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding.

In the instant case, M/s Sun Limited and M/s Shine Limited have entered into an informal agreement to limit or control the production, supply and marketing of the products to ensure maximum price realization. M/s Sun Ltd. sells its manufactured panels on an exclusive basis to M/s Shine Ltd. which is India's largest solar power generation company supplying solar plants to more than 60% of the current market.

The above agreement is covered under the scope of the Competition Act, 2002 as it is an Anti-competitive agreement under section 3.

(b) **Dominant position of enterprise:** The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not, have due regard to all or any of the following factors, namely:—

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.

(c) Orders by Commission after inquiry into agreements or abuse of dominant position [Section 27]

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

In case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.

(c) Omitted

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any:

(f) Omitted

(g) pass such other order or issue such directions as it may deem fit.

While passing orders under this Sec, if the Commission comes to a finding that an enterprise in contravention to Section 3/4 of the Act is a member of a group as defined in clause (b) of the Explanation to Sec 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this Section, against such members of the group.

(ii) **Section 4(2)(a) of the Competition Act, 2002 says** there shall be an abuse of dominant position under sub-section (1), if an enterprise or a group,—

(a) directly or indirectly, imposes unfair or discriminatory—
  (i) condition in purchase or sale of goods or services; or
  (ii) price in purchase or sale (including predatory price) of goods or service; or

Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition.

As Opposite Party (OP) has increased the price of the flat allotted to Rajendra Singh from ₹ 2,00,000 to ₹ 7,00,000. OP has been indulged in unfair and arbitrary practices and has misused its dominant position in the market.

Hence, OP has violated section 4(2)(a) of the Competition Act, 2002.

Past Exam/Nov 2019/Case Study-1
(IBC,Competition Act)
Delta Corporation

Delta Corporation, a government corporation purchases Aluminium Phosphide Tablets (APT) on bulk basis through a formal tender process for the past several years. The main market of APT in India was that of the institutional sales and a majority of buyers were Government agencies. The number of private buyers was insignificant.

APT is manufactured only by 4 companies in the country, namely M/s. Easy, M/s. Samurai, M/s. Multicrop and, M/s. Agro Chemicals. Sometime during the year 2018, Mr. Rohit the Chairman and Managing Director of Delta Corporation, as part of his review of the operations, analysed the purchase of APT over the last several years, and noted a trend that the four manufacturers of APT had formed a cartel by entering into an anticompetitive agreement amongst themselves and on that basis they had been submitting their bids for last eight years by quoting identical rates in the tenders invited by the Delta Corporation for the purchase of APT. Based on the above, Mr. Rohit wrote a complaint to the Competition Commission of India (CCI) on February 4, 2018 and the CCI assigned the complaint to the Director General (DG) for investigation.

Based on the investigation carried out, the DG noted the following:

- Right from the year 2009, upto the year 2016, all the four parties used to quote identical rates, excepting for the year 2014. In 2009, ₹ 245 was the rate quoted by these four parties and in the year 2012 it was ₹ 310 (though the tender was scrapped in this year). In November, 2012, though the tenders were invited, all the parties had abstained from quoting. In 2014, M/s. Samurai had quoted the price which was much below the price of other competitors. In 2015, all the parties abstained from quoting, while in 2016 only the three appellants, barring Agro Chemicals, participated and quoted uniform rate of 388, which was ultimately brought down to ₹ 386 after negotiations.
- It was also found that the tender documents were usually submitted in-person and the rates were normally filled with hand;
- In respect of the tender floated in March, 2016, the three appellants had quoted identical rates of ₹ 388.
- The DG also analysed the bidding pattern for tenders issued by other corporations during the period from 2014 to 2018 and concluded that the pricing pattern was similar between the parties in such tenders as well, as indicated below

Corporations	Year	Price Quoted			
		Easy	Samurai	Multi-crop	Agro Chemical
A	2014	225	225	-	-
B	2015	260	260	-	-
C	2015	450	-	450	-
C	2016	414	414	-	-
Delta	2016	388	388	388	-
B	2016	399	-	-	399
D	2016	-	-	399	399
B	2017	419	-	-	410
C	2017	421	421	421	-
B	2018	-	415	-	415

Based on the investigation carried out above, the DG concluded that:

- The pricing pattern definitely showed the practice of quoting identical pricing by all the parties.
- The explanation given by the parties (rise in price was mostly attributed to increase in price by China) for the common pricing was unconvincing since it was noticed that even during the period when the Phosphorous prices had fallen, no reflection thereof was seen in the high prices quoted by the parties.
- Examination of the cost structure of each company reflected that there was nothing common between the parties as far as the said cost structure was concerned and, therefore, quoting of identical prices by all the parties was unnatural.
- Joint boycotting by the parties, at times, showed their concerted action, which happened again in March, 2018 when the Delta Corporation had issued e-tender, which was closed on July 25, 2018.

On the basis of the aforesaid findings, the DG framed an opinion that the appellants had contravened the provisions of Sections 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Competition Act, 2002.

The CCI called for the responses of the parties for the above observations of the DG and the responses are:

- In so far as tender of 2018 is concerned, it was contended that inquiry in respect of boycotting the said tender by the appellants was without jurisdiction in as much as the Delta Corporation in its complaint dated February 04, 2018 did not mention about the said tender.
- On the merits, increase in the price over a period of time, particularly between years 2016 and 2018, was sought to be justified on the ground that the "price of yellow phosphorous, which was to be procured from China, had increased". It was further submitted that merely because there was identical prices quoted by the parties, it would not mean that there was any bid rigging or formation of cartel by the parties. Submission in this behalf was that· the market forces brought the situation where the prices became so competitive and it had led to the aforesaid trend.
- It was further submitted that, notwithstanding the same price quoted by the parties, each time the tender was evaluated by a Committee of Officers of the Delta Corporation and no such suspicion was raised by the Committee. On the contrary, this aspect was specifically gone into and the Committee was satisfied that quoting of identical price was not due to any cartelisation.

The CCI rejected each of the responses provided by the parties and concluded 'that the parties had entered into an agreement or understanding, and indulged in anti-competitive activities while submitting their bids in response to the tenders issued by the Delta Corporation.

Prosper Extractors Limited (PEL) is one of the key operational creditors of Multicrop and was the sole supplier of Phosphorous to Multicrop for the manufacture of the APT. The arrangement between PEL and Multicrop was formally documented through a blanket Purchase Order on an annual basis with weekly supply schedule and a 30 days credit period.

Due to the financial issues including losses of Multicrop, there was a significant backlog in the payment by Multicrop and in line with the terms of the purchase order, the matter was referred to an Arbitral Tribunal with claims and counter claims by both parties. The Arbitral Tribunal delivered its award in favour PEL for the entire balance payable (including receivables assigned to the bank without recourse basis) by Multicrop and rejected the cross claims of Multicrop. Multicrop proceeded to file a petition under the Arbitration and Conciliation Act, 1996 challenging the award of the Arbitral Tribunal. Based on the opinion of CFO that the object of IBC, 2016 is also to hold promoters personally financially liable for default of the firms they control, an application was then filed by PEL under Section 9 of the IBC, 2016 as the sole operational creditor of Multicrop. The NCLT, based on the application; admitted the same since there is a clear evidence of a demand and the appropriate notice has been submitted by PEL as per the IBC, 2016.

ANSWER THE FOLLOWING QUESTIONS:

1. Which of the following is not part of the objectives for introduction of the IBC, 2016?
   (A) Avoiding destruction of value.
   (B) Hold Promoters personally financially liable for default of the firms that they control as opined by CFO in the case study.
   (C) Improve handling of conflicts between creditors and debtor through process of negotiation.
   (D) Clear allocation of losses during downturn.

2. Which of the following is not covered under the definition of a financial debt under IBC, 2016?
   (A) Interest on Unsecured debentures issued by a corporate debtor.
   (B) Market value of a derivative taken to hedge foreign currency fluctuations of an ECB loan.
   (C) Amount raised from an allottee of an apartment under a real estate project.
   (D) Receivables assigned to a Bank on without recourse basis.

3. The IRP appointed for Multicrop is seeking your views on the constitution of the Committee of Creditors of Multicrop. Multicrop does not have any financial debt other than a loan obtained from Mr. Ajay Jhawar, son of the Mr. Vijay Jhawar, the Managing Director of Multicrop. Considering the above, identify the appropriate constitution of the Committee of Creditors out of the following:
   (A) Mr. Ajay Jhawar, 18 largest operational creditors, and 1 representative of all workmen.
   (B) 18 largest operational creditors, 1 representative of workmen and 1 representative of employees.
   (C) Only Mr. Ajay Jhawar since he is the only financial creditor.
   (D) 18 largest operational creditors, 1 representative of workmen and 1 representative of employees and the resolution professional.

4. Which of the following are not factors to be considered for determining the relevant product market under the Competition Act, 2002?
   (A) Existence of specialised producers
   (B) Market structure and size of market
   (C) Consumer preferences
   (D) Actual end use of the products

5. When evaluating whether the arrangement between the parties involved shall be presumed to be anti-competitive and likely to have an appreciable adverse effect on competition, which of the following are not factors to be considered by the Director General ?
   (A) Limit and control the use of technology used by all parties in manufacturing APT.
   (B) Allocate the supply of APT in India between the parties and limit new entrants.
   (C) Collectively determine the purchase price of the key raw material (phosphorous) from the vendors.
   (D) Joint venture between the parties to share distribution channels & logistics services to reduce cost.

6. Answer the following questions in the context of the provisions relating to Competition Act, 2002.
(i) Analyse whether the CCI can consider the tender called for in March, 2009 and negotiations finalised in July, 2009 for examination u/s 3, which became operational only on 20th May, 2009.
(ii) Whether CCI was barred from investigating the matter pertaining to the tender floated by Delta Corporation in March, 2018 on the basis that this was not a subject matter contained in the complaint submitted by Delta Corporation on 4 February, 2018.
(iii) Analyse based on the facts of the case, regarding the conclusion of CCI that the appellants had entered into an agreement to indulge in collusive bidding by forming a cartel, resulting into contravention of Section 3 of the Act.

7. Examine/advise regarding the below questions relating to the Insolvency and Bankruptcy Code, 2016: What is your view with regard to the stand taken by NCLT in admitting the application of PEL for initiating insolvency proceedings against Multicorp?

ANSWER TO CASE STUDY 1

1. (B)
2. (D)
3. (B)
4. (B)
5. (D)

DESCRIPTIVE ANSWERS

6.

i. **According to Section 36 of the Competition Act, 2002**, the Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:
   (a) summoning and enforcing the attendance of any person and examining him on oath;
   (b) requiring the discovery and production of documents;
   (c) receiving evidence on affidavit;
   (d) issuing commissions for the examination of witnesses or documents;
   (e) requisitioning, subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, any public record or document or copy of such of record or document from any office.

   The Commission may also direct any person:

   (a) to produce before the Director General or the Secretary or an Officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;
   (b) to furnish to the Director General or the Secretary or any other Officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.

   Hence, CCI can also consider the tender called for in March, 2009.

   ALTERNATE SOLUTION

   The bid was called in March 2009 and negotiations finalized in July, 2009 by which date, Section 3 of the Competition Act, 2002 had already been activated. Therefore, the principle of retro-activity shall become applicable as the process of finalization of the tender was still on. Therefore, the inquiry into the tender of March, 2009 by the CCI is covered by Section 3 of the Act in as much as the tender process, though initiated prior to the date when Section 3 became operational, continued much beyond May 20, 2009, the date on which the provisions of Section 3 of the Act were enforced.

   In the light of the above, it can be concluded that CCI can consider the tender called for.

ii. According to Section 19 of the Competition Act, 2002, the Commission is empowered to inquire into any alleged contravention of the provisions contained in Sec 3(1) or Sec4(1) either on its own motion or on:
(a) receipt of any information in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
(b) a reference made to it by the Central Government or a State Government or a Statutory Authority.

As per the situation given and provisions of the Act, CCI is empowered to inquire into any alleged contravention of the provisions contained in Sec 3(1) or Sec 4(1) on its own motion also. Hence, CCI can also investigate the matter pertaining to the tender floated by Delta Corporation in March, 2018 (though it was not the subject matter contained in complaint submitted by Delta Corporation on 4th Feb, 2018).

iii. "Bid rigging" means any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

As per the facts, there seems to be collusive bid rigging by forming cartel due to following reasons:
1. All the parties (namely M/s Easy, M/s Samurai, M/s Multicrop and M/s Agro Chemicals) quoted identical rates from 2009 to 2014.
2. In tender floated in March 2016, the three applicants quoted identical prices.
3. If we see the bidding patterns for other corporations also (i.e. A, B, C and D) we see that participating applicants quoted identical prices always.

Further, the response given by the parties (namely M/s Easy, M/s Samurai, M/s Multicrop and M/s Agro Chemicals) did not support that there was no cartelization, on the following grounds:

1. CCI is empowered to inquire into any alleged contravention of the provisions contained in Section 3(1) or Section 4(1) on its own motion also. Hence, **CCI can also investigate the matter pertaining to the tender floated by Delta Corporation in March, 2018** (though it was not the subject matter contained in the complaint submitted by Delta Corporation on 4th Feb, 2018).
2. The said parties pleaded that the price rise of APT was due to increase of price of yellow phosphorous, which was to be procured from China, had increased. However, all the parties quoted identical prices which has resulted in adversely affecting/ manipulating the process of bidding.

7. Initiation of Insolvency resolution by PEL (operational creditor) against Multicrop.

According to Section 8 of the IBC, 2016, following requirements are to be met for initiation of CIRP by operational creditor, i.e. by PEL against the corporate debtor, Multicrop:

(1) On the occurrence of default, an operational creditor shall first **send a demand notice and a copy of invoice to the corporate debtor.**

(2) The corporate debtor shall, **within a period of ten days of the receipt of the demand notice or copy of the invoice** bring to the notice of the operational creditor about **existence of a dispute about debt**, if any, record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute; Where corporate debtor might have already paid the unpaid operational debt, there in such situation, corporate debtor will inform within 10 days send an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or sends an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor. **[Section 8]**

According to Section 9 of the IBC, an application for initiation of corporate insolvency resolution process by operational creditor may be filed, if no reply is received or payment or notice of the dispute under Section 8(2) from the corporate debtor within ten days from the date of delivery of the notice or invoice demanding payment, operational creditor can file application before Adjudicating Authority (NCLT) for initiating a corporate insolvency resolution process.

As per the facts stated, PEL had not served demand notice and a copy of invoice to the Multicrop. In fact it directly went to the Arbitral tribunal, for settlement of the claim as per the term of agreement. Award was passed in the favour of PEL. However, the award was challenged by the Multicrop. Whereas PEL also filed an application before the NCLT for initiation of CIRP against Multicrop.

According to the above provision, due to prima facie non-compliance of serving of demand notice and a copy of invoice to the Multicrop by the operational creditor (PEL) and of further no notice of dispute about debt regarding the pendency of the suit in appeal before Appellate Arbitration by the Corporate Debtor (Multicrop).

Therefore NCLT stand as regard the admission of application of PEL on initiation of CIRP against Multicrop, is not appropriate.

Past Exam/Nov 2019/Case Study-2
(PMLA, FEMA)
Teddy Bear Technology Private Limited

Teddy Bear Technology Private Limited (TBTPL), is one of India's fastest growing start-up companies. TBTPL was incorporated in the year 2015 by two promoters Mr. Sudhir Shankar and Mr. Ajay Vinod, who were college mates at IIT Bombay and completed their masters in the United States of America (USA). Both Mr. Sudhir Shankar and Mr. Ajay Vinod worked in the USA for more than 10 years.

Post that they came back to India in 2015 (and continue to stay in India) to serve the country and established TBTPL to develop technology and software relating to aviation technology and machine learning. TBTPL has around 300 employees in India and has several clientele in US and the company is also looking at rapid expansion over the next 3 years. The Company is registered with the Software Technology Parks but is not a status holder exporter.

The details of export sales and realization of export proceeds by TBTPL during the last 3 FYs is as under:

Particulars	2015-16	2016-17	2017-18	**AVERAGE**
Export Turnover (USO)	500,000	2,500,000	4,500,000	2,500,000
Realisation of Export Proceeds (USD)	300,000	2,000,000	3,000,000	1,600,000

One of the export invoices amounting to USD 200,000 raised by TBTPL in the financial year 2016-17 was outstanding for more than one year as of 31st March, 2018 and the Company's auditors insisted on the Company taking action for recovery. However, even after the best efforts, no amounts could be recovered and therefore, during the financial year 2018-19, the Company wrote off the entire amount of USD 200,000 without obtaining the approval from the Authorised Dealer (AD). Out of the export proceeds received by TBTPL, the Company lent an amount of USD 500,000 in foreign currency to one of its key Indian vendors to enable them to create/maintain core working capital. The Management convinced the Board of Directors to approve the loan since the vendor was providing, critical services for business continuity of TBTPL. Further, this loan has been guaranteed by the holding company of the vendor, which is located in Mauritius.

In order to expand its operations, TBTPL was intending to lease a commercial property in India in Mumbai for a period of 5 years at an upfront lease premium of ₹ 5 crores, TBTPL was in great urgency to complete the transaction soonest in view of the great demand for the property and therefore, M/s. DoCorrect Consultants, the agency assisting TBTPL used a counterfeit government stamp paper for the purpose of registering the lease deed and this was informed by the agency to Mr. Ajay Vinod at the time of transaction to minimise the cost of stamp duty. The funds for acquiring the stamp papers was paid by the agency and was in-turn billed by the agency on TBTPL as part of its invoice for agency fee / commission. The invoice was settled by TBTPL to the agency in cash without deduction of tax, even though the CFO of TBTPL was of the view that the same is not in accordance with the applicable statutory requirements.

For the purpose of enhancing its capabilities, TBTPL engaged the services of two reputed organizations to train the employees of TBTPL. For this purpose, TBTPL paid an amount of USD 500,000 to one company and USD 1,500,000 to the second company. For the purpose of investing money into the business, TBTPL sold a commercial plot owned by it in India to a friend of Mr. Ajay Vinod who was a Non-resident Indian in the USA, through an agent based in Chicago, USA for an amount of USD 500,000. In accordance with the terms of the agreement with the agent, TBTPL paid an amount of USD 30,000 as commission to the agent. TBTPL also published an advertisement costing USD 100,000 in the New York Times weekend edition calling for employees to join its proposed office in New York.

Mr. Siddarth Shankar, brother of Sudhir Shankar who works as a CFO in a listed entity in India, provided certain price sensitive information to Mr. Sudhir Shankar about his employer based on which Mr. Sudhir Shankar purchased equity shares of the entity and made a profit of ₹ 2 crores. With these proceeds, he sent ₹ 1 crore to his wife Ms. Anne Shankar (as part of the LRS) to purchase a small apartment in the USA. He also purchased a very old statue of an Indian king in an amount of ₹ 0.20 crores and sent it to his wife for display in his home in USA. He invested the bal. amount of ₹ 0.80 crores in TBTPL as an equity investment.

During one of the discussions with the customers in USA, Mr. Ajay Vinod indicated to the customer that TBTPL has capabilities to develop new robotic technology on aviation and accordingly, entered into a contract for an amount of USD 2,000,000. TBTPL developed the robotic platform in 2 months and delivered to the customer, although the patent and copyright was owned by another competitor of TBTPL. TBTPL is of the view that the company rightfully owns the patent for the same, although it has not applied / registered for the same.

The ED got wind of the transactions carried out by TBTPL and the Directors, through one of the employees of the Company and have issued a notice to the Company and the Directors.

ANSWER THE FOLLOWING QUESTIONS:

1. Which of the following are not actions that could be taken by the ED on TBTPL or its employees, for not complying with its orders under PMLA, 2002?
   (A) Issue a warning in writing.
   (B) Direct the entity or its employees to directly send reports.
   (C) Direct the relevant courts to take civil or criminal proceedings against TBTPL or its employees.
   (D) Impose a monetary penalty on TBTPL or its employees.

2. In order to obtain more information from Mr. Sudhir Shankar, the ED wanted to detain Mr. Sudhir Shankar for a period of 3 days to make enquiries and get the relevant information from him. Evaluate if this is appropriate under PMLA, 2002.
   (A) Yes, the Director is well within his powers to detain Sudhir until all informations are collected.
   (B) No, maximum period of detention under PMLA is 24 hours before which Sudhir should be presented before the superior ranking office or the magistrate.
   (C) Yes, however, the Director is required to take the prior approval of his superior ranking officer.
   (D) No, the Director is not within his rights to detain Sudhir.

3. The Appellate Tribunal has concluded that the Director who searched Mr. Sudhir Shankar and his property indulged in a vexatious search without recording proper reasons in writing and has sought your views on the next course of action:
   (A) Suspension / Dismissal from service, as may be decided by the central government.
   (B) Fine which may extend to ₹ 2 lakhs.
   (C) Imprisonment for a term which may extend to four years and fine which may extend to ₹ 2 lakhs.
   (D) Imprisonment for a term which may extend to 2 Yrs or fine which may extend to ₹ 50,000 or both.

4. What is the maximum amount of export receivables which can be written off by TBTPL during the financial year 2018-19?
   (A) With approval of AD - USD 450,000; Without approval of AD – USD 225,000
   (B) With approval of AD - USD 250,000; Without approval of AD – USD 125,000
   (C) With approval of AD - USD 300,000; Without approval of AD – USD 150,000
   (D) With approval of AD - USD 160,000; Without approval of AD – USD 80,000

5. Under FEMA, 1999, what is the amount that can be paid by TBTPL for publishing an advertisement in New York Times ?
   (A) USD 10,000
   (B) USD 100,000
   (C) USD 250,000, subject to the approval of the Reserve Bank of India.
   (D) None, all such transactions require approval of the government of India.

6. Advise the Board of Directors of TBTPL on the compliance with FEMA, 1999 with regard to the below transactions:
   a. Payments made by TBTPL for consultancy services
   b. Payment of commission
   c. Loan provided in foreign currency to vendor in India and the validity of the guarantee provided by the vendor's holding company.

7. Examine / advise regarding the below questions relating to the Prevention of Money Laundering Act, 2002 :
   (i) The Enforcement Directorate has sought your advice on identifying all the offences committed by the parties under the PMLA, 2002 described in the case study.
   Identify:
   (a) the offences along with explanations,
   (b) the parties involved, and
   (c) the proceeds of crime.

   (ii) The Enforcement Directorate is proposing to perform a search of M/s. DoCorrect Consultants premises in connection with the investigation of TBTPL's transactions. This has been challenged by M/s DoCorrect consultants. Evaluate the appropriateness of the position taken by M/s. DoCorrect Consultants.

ANSWER TO CASE STUDY 2

1. (C)
2. (B)
3. (D)
4. (C)
5. (D)

DESCRIPTIVE ANSWERS

6. As per Schedule III, the following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India:

i. Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.

ii. Remittances exceeding USD 1,00,00,000 per project for any consultancy services in respect of infrastructure projects and USD 10,00,000 per project, for other consultancy services procured from outside India.

a) TBTPL made a payment of USD 500,000 to one Company and USD 1,500,000 to another Company for training the employees of TBTPL. Thus, in total, made a payment of USD 2,000,000.

As per the provision of law and facts of case study, **TBTPL require prior approval** of the Reserve Bank of India to make a payment of USD 200,000 as it exceeds the limit of USD 1,000,000 given under law.

ALTERNATE SOLUTION

As per Schedule III, the following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India:

(i) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.

(ii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

TBTPL made a payment of USD 500,000 to one Company and USD 1,500,000 to another Company for training the employees of TBTPL. Therefore, the prior approval of the RBI is required for the payment of USD 1,500,000 to the second Company. No specific approval of the RBI is required for the payment of USD 500,000 to the first Company.

b) TBTPL made a payment of USD 30,000 as commission to agent abroad for selling a commercial plot owned by it in India to a Non- resident Indian in USA.

As per facts of case and provision of law, TBTPL can make a remittance of USD 25,000 or five percent of the inward remittance from sale of commercial plot, without RBI approval.

Thus, TBTPL have to take prior approval of RBI to make a payment of USD 30,000 as commission to agent abroad (as it exceeds the limit of USD 25,000 or 5% of USD 500,000, whichever is higher).

c) As per FEMA provisions, a resident cannot lend to another resident in foreign currency. However, Loan and guarantee can be extended to an overseas entity only if there is already an existing equity / CCPS (Compulsorily Convertible Preference Shares) participation by way of direct investment.

In the given case study, TBTPL lent an amount of USD 500,000 in foreign currency to one of its vendor. This loan was guaranteed by the holding Company of the vendor, which is located in Mauritius.

As per the facts of the case study and the provision enumerated above, TBTPL cannot give loan to its vendor.

7.

i. In the given case study, Enforcement Directorate identified following offences committed by the parties under the PMLA, 2002-

(a) <u>Offences with Explanation:</u>

(1) Use of counterfeit government stamp paper for the purpose of registering the lease deed to minimise the cost of stamp duty- offence under Part A of the Schedule,

(2) invoice for agency fees /commission for acquiring the stamp papers, settled in cash without deduction of tax by TBTPL- Offence under Part C of the Schedule
(3) Use of patent and copyright owned by another competitor of TBTPL -- offence under Part A of the Schedule
(4) Providing of price sensitive information to Mr. Sudhir Shankar of an employee on the basis of which he purchased equity shares of the entity- offence under Part A of the Schedule (5) sending to ₹ 1 Crore out of proceeds from purchase of an equity shares to Ms Anne Shankar- offence under Part A of the Schedule.

(b) **Parties Involved:** Offence pertaining to use of counterfeit government stamp paper- TBTPL, Mr. Ajay Vinod, Agency M/s DoCorrect Consultants, CFO of TBTPL.

Invoice for agency fees /commission for acquiring the stamp papers- Agency M/s DoCorrect Consultants, TBTPL, CFO of TBTPL.

Use of patent and copyright owned by another competitor by TBTPL: TBTPL, Mr. Ajay Vinod.

Purchase of equity shares of an entity on the price sensitive information: Mr. Siddarth Shanker & Mr. Sudhir Shankar

Out of proceeds obtained above, sent certain amount to Ms. Anne- Mr. Siddarth Shanker, Mr. Sudhir Shankar, Ms. Anne Shanker.

(c) **Proceeds of Crime:** ₹ 5 Crore (Lease premium), USD 2,000,000 (for development of Robotic Platform under the patent & copyright owned by another), & ₹ 2 Crore (obtained by the purchase of equity shares).

ii. According to Section 17 of the Prevention of Money Laundering Act, 2002, where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this Section, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person—
(i) has committed any act which constitutes money-laundering, or
(ii) is in possession of any proceeds of crime involved in money-laundering, or
(iii) is in possession of any records relating to money-laundering, or
(iv) is in possession of any property related to crime,

then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to—

enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;

Thus, the Enforcement Directorate can perform a search of M/s DoCorrect Consultants' premises in connection with the investigation of TBTPL's connection.

Hence, the position taken by M/s DoCorrect Consultants is not appropriate based on the above legal provisions.

Past Exam/Nov 2019/Case Study-3
(PMLA, Competition Act)
LPPL, SMCL and HLL

The Indian pharmaceutical manufacturing industry comprises of 3 large companies, LPPL, SMCL and HLL. The above 3 companies, in total supply more than 90% of the across the counter medicine market in India and their products were available across India through the sale of medicines to registered agencies / stockists, who in turn supplied to the local chemists and drugstores. In addition to the business of manufacturing across the counter medicines, all the 3 entities were also engaged in the manufacture of 'Active Product Ingredients' (API), which were supplied to global pharmaceutical companies for production of medicines. The entire API manufacturing in India is performed only by the 3 companies.

During one of the discussions between LPPL and its overseas customer based in Canada, the overseas customer requested LPPL to supply API for manufacturing diabetes medicines and also stated that as per the latest research carried out by them, coca leaves have a lot of medicinal properties and have tremendous potential to supress diabetes and other ailments.

LPPL stated that they could supply coca leaves from India and pursuant to a purchase order from the customer, LPPL sold coca leaves for an amount of Rs. 5 crores and the CFO of LPPL ensured that the proceeds was received from the customer into LPPL's EEFC account in compliance with FEMA, 1999. For the purpose of increasing their operations in Canada, LPPL wanted to set up its branch office in Canada and accordingly, used the consideration received for acquiring Land and Building in Toronto, Canada for an amount of ₹ 4 crores. The CFO of LPPL was informed by the internal auditor that the above acquisition of immovable property in Canada was in accordance with the provisions of FEMA, 1999.

During the year 2017, the Pharmaceutical Agents Association of Uttar Pradesh filed a complaint against the 3 companies with the Director General that the companies were engaging in anti-competitive market activities by forcing stockists to obtain a Non-Objection Certificate from the local chemists and druggists association and the companies were denying the supply of medicines to the stockists solely because they were not able to obtain the NOC.

LPPL, SMCL and HLL responded to the DG that sub-clause (a) of Clause 28 of the Drugs (Price Control) Order, 2013 creates an obligation on a pharmaceutical company/distributor to sell drugs/medicines unless there is a 'good and sufficient reason' to refuse sale. Based on their evaluation of the facts and circumstances, the non-availability of NOC from the local chemists association tantamount to 'good and sufficient reason'.

Based on the investigation carried out by the DG and analysis of all the documents and information provided by the Pharmaceutical manufacturing companies, the stockists etc. and notwithstanding the above views of the pharmaceutical manufacturers, the DG concluded that the 3 companies, LPPL. SMCL and HLL contravened the provisions of Section 3(3)(b) read with Section 3(1) of the Competition Act, 2002. For indulging in anti-competitive practices in violation of the provisions of Section 3 of the Act, the CCI imposed penalties upon all the three appellants at 9% of average 3 years' total turnover of these appellants under the Act.

LPPL, SMCL and HLL accepted the order of the DG in principle and accepted to remove, the condition of obtaining NOC for supply to the stockists. However, they contested the manner in which the DG had computed the penalty by considering the total turnover of the entities (as per the Statement of Profit and Loss) without considering that the turnover includes incomes from the API business, which is not forming part of the investigation of the DG. They filed an appeal before the Appellate Tribunal that the penalty could be calculated only based on the turnover relating to the "Across the Counter" operations of the pharmaceutical companies.

In the meantime during the year 2018, LPPL entered into an agreement with HLL to acquire the API business of HLL for a consideration of ₹ 200 Crores. The latest available financial information relating to the entities are as under:

Particulars	₹ in crores		₹ in crores	
	LPPL		HLL	
	Total entity	API business	Total Entity	API business
Assets	900	800	500	300
Turnover	2800	2400	1000	800

Note: The entities do not have any business / operations outside India.

SMCL is of the view that the above arrangement will cause an appreciable adverse effect on competition in the API manufacturing market in India and requires the approval of the Competition Commission.

The Authorised dealer, when reviewing the export invoices raised by LPPL noted the sale of coca leaves and informed the income tax authorities regarding the same. The authorities, after review of the documents and other information, concluded that the transactions was in ₹ in Crores violation of the Prevention of Money Laundering Act, 2002 and have sent a notice to LPPL, who is not a willful defaulter.

Answer the following questions:

1. Which of the following terms and conditions as per the agreement between LPPL and HLL is not likely to cause an appreciable adverse effect on competition under the Competition Act, 2002?
   (A) All purchase of raw materials by HLL should be made from SMCL or from LPPL only.
   (B) The API manufactured by HLL should be sold to the customers as mandated by LPPL.
   (C) Any purchase of API by HLL should be along with purchase of the packing material & preservatives.
   (D) A maximum price ceiling on the resale price that may be charged by HLL for ultimate sale of the goods purchased by it from LPPL.

2. Considering the nature of the operations of LPPL and HLL, what is the requirement of giving notice regarding the· proposed combination as per Form Il as specified in the Schedule II to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ?
   (A) Mandatory, if the combined market share after such combination is more than 15 % of the market.
   (B) Optional, 'if the combined market share after such combination is more than 25% of the market.
   (C) Optional, if the combined market share after such combination is more than 15% of the market.
   (D) Mandatory, if the combined market share after such combination is more than 25% of the market.

3. Which of the following are not included within arrangements entered into by central government with another country, in relation to reciprocal arrangements under PMLA, 2002?
   (A) Enforcement of the provisions of PMLA, 2002.
   (B) Prevention of offence in India under the corresponding PMLA law in force in the other country.
   (C) Exchange the history of LPPL if it is wilful offenders under the PMLA on annual basis.
   (D) Exchange information to prevent any offence under PMLA, 2002.

4. The composition of an Adjudicating Authority (AO) under the PMLA, 2002 referred in the case study is:
   (A) One Chairperson, appointed by central government and two other members.
   (B) Three members, one of whom will be a Chairperson, as per seniority.
   (C) Four members, each of whom will be a Chairperson on rotation.
   (D) Five members, appointed by central government and four other members.

5. On the basis that the transactions entered into by LPPL is considered to be in contravention of the PMLA, 2002, what is the punishment that the CFO of LPPL would be liable under the PMLA, 2002?
   (A) Minimum 3 years and maximum 10 years with fine.
   (B) No punishment since he is not a director of LPPL & therefore cannot held liable under PMLA, 2002.
   (C) Minimum 3 years and maximum 7 years with fine.
   (D) No punishment since he was not aware that the transaction was indeed a non-compliance under PMLA, 2002.

6. Answer the following questions in the context of the provision relating to Competition Act, 2002 WITh reasons and explanations:
   (i) SMCL has reached out to you to seek your advice on their views regarding the impact of the provisions of the Competition Act on the proposed combination between LPPL and HLL.
   (ii) Whether penalty under Section 27(b) of the Act has to be on total/entire turnover of the offending company or it can be only on "relevant turnover", i.e., relating to the product in question.

7. Answer the following questions in the context of the provisions relating to PMLA, 2002 WITh reasons and explanations:
   (i) LPPL has challenged the notice and without admitting to any of the offences, is of the view that only immovable property held within India is to be considered for identifying proceeds of crime under PMLA. Evaluate.
   (ii) In the above case study, what is the mechanism to be followed by the Enforcement Directorate for attachment of property situated in Canada?

ANSWER TO CASE STUDY 3

(1) (D)
(2) (C)
(3) (C)
(4) (A)
(5) (A)

Descriptive answers

(6)

i. The given proposed combination between LPPL & HLL in terms of Section 5 of the Competition Act, 2002, is a combination of the enterprises by acquisition where the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores.

Pursuant to Notification No. S.O. 675 (E) dated March 4, 2016 the value of assets and the value of turnover has been enhanced by the Central Government by 100% for the purposes of Section 5 of the Act.

So, the revised value of assets and turnover is presently more than ₹ 2000 crore and ₹ 6000 Crore.

Since, here the proposed combination between LPPL and HLL was to acquire the API business of HLL only, therefore, it will not be valid as they have not met with the requirement of assets of the value of more than ₹ 2000 crore [i.e., total value of asset of LPPL (900+800) + value of asset of API business of HLL (300)] and turnover of ₹ 6000 crore [i.e., total turnover of LPPL (2800+2400) + turnover of API business of HLL (800)]

ii. As per Section 27 of the Competition Act, 2002, where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, is in contravention of Section 3 or Section 4, as the case may be, it may impose such penalty, as it may deem fit, which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

In case any agreement referred to in Section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher.

Accordingly, the penalty under Section 27(b) of the Act has to be on total/ entire turnover of the offending Company.

(7)

i. In the light of Section 2(1)(u) of the Prevention of Money Laundering Act, 2002, "**proceeds of crime**" means as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken/held outside the country, then the property equivalent in value held within the country or abroad.

In the said case, LPPL challenged the notice and not admitting to any of the offences on the ground that only immovable property held within India is to consider for identifying proceeds of Crime under PMLA. According to the above stated provision, LPPL challenge to the notice and not admitting to any of the offences pertaining to the immovable property held outside India, is not valid and therefore the **notice served on LPPL cannot be challenged.**

ii. Following are the ways for attachment of property situated in Canada in the given case study in the light of Section 60 of the PMLA, 2002 –

1. **Issue of letter of request:** Where the Director has made an order for attachment of any property under Section 5 or for freezing under sub-Section (1A) of Section 17 or where an Adjudicating Authority has made an order relating to a property under Section 8 or where a Special Court has made an order of confiscation relating to a property under sub-Section (5) or sub-Section (6) of Section 8, and **such property is suspected to be in a contracting State**,
   - the **Special Court**, on an application by the Director or the Administrator appointed under sub- Section 10(1), as the case may be, may issue a letter of request to a court or an authority in the contracting State for execution of such order.

2. **Forwarding of letter of request for execution on its receipt by CG:** Where a letter of request is received by the Central Government from a Court or an Authority in a Contracting State requesting attachment, seizure, freezing or confiscation of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence under a corresponding law committed in that Contracting State, the Central Government may forward such letter of request to the Director, as it thinks fit, for execution in accordance with the provisions of this Act.
3. **Issue of Order of confiscation:** Where on closure of the criminal case or conclusion of trial in a criminal court outside India under the corresponding law of any other country, such court finds that the offence of money-laundering under the corresponding law of that country has been committed, the Special Court shall, on receipt of an application from the Director for execution of confiscation under sub-Section (2), order, after giving notice to the affected persons, that such property involved in money-laundering or which has been used for commission of the offence of money-laundering stand confiscated to the Central Government.
4. **The** provisions of this Act relating to attachment, adjudication, confiscation and vesting of property in the Central Government shall apply to the property in respect of which letter of request is received from a court or contracting State for attachment or confiscation of property.

Past Exam/Nov 2019/Case Study-4
(PBPTA, IBC)
Highcity Partners LLP

Highcity Partners LLP (Highcity), is a recently established limited liability partnership between Seaview Constructions Private Limited, a Real Estate Development Company owned by Mr. Vyas Chakraborty (Seaview constructions) and Mr. Ved Chakraborty. Highcity was established for the purpose of acquiring an existing apartment complex "Riverview Bliss" (comprising of 12 luxury apartments) in Kolkata and redevelopment of the same. Seaview Constructions is a very successful real estate company and has completed more than 20 apartment complexes and is known for quality constructions, adherence to timelines and profitable growth.

6 of the 12 apartments in Riverview Bliss is currently owned by SPZ Private Limited (SPZ) and the balance 6 are owned by the senior employees of SPZ. Due to the strategic location of the property and the quality of construction, Highcity and the current owners have agreed for a price of ₹ 3 crores for each of the 12 apartments and therefore the total consideration to be paid by Highcity is ₹ 36 crores.

SPZ is an associate Company of True & Fair Finance Company Limited (TFFC), a listed company in the business of providing loans for large corporate projects. Both SPZ Private Limited and TFFC have common promoters and senior employees and operate out of the same registered office.

In the past, Seaview Constructions has obtained loans from TFFC for many of their projects and has established a strong professional relationship with them on account of the mutual benefit realised by both the entities from the transactions between them. Therefore, considering the size of the transaction to be entered into by Highcity, Mr. Vyas Chakraborty had discussions with TFFC and based on the business case submitted by Highcity, TFFC approved a secured loan of ₹ 30 crores to Highcity to enable purchase of the apartments in Riverview Bliss from its owners. The loan was fully utilised by Highcity to acquire the apartments and a charge was created against the property for the secured loan obtained from TFFC. Highcity obtained further loans amounting to ₹ 10 crores from SPZ for the purpose of the redevelopment of the property.

During the scrutiny assessment of Highcity, the Income tax authorities noted the details of the transactions and concluded that the entire transaction is a benami transaction where Highcity is the Benamidar and SPZ / TFFC are the beneficial owners. The Initiating Officer sent a show cause notice under Section 24(1) of the Prohibition of Benami Property Transactions Act, 1988 (PBPT Act, 1988) and on the same day, an order was passed by the Dy. Commissioner of Income Tax for provisional attachment of the Riverview Bliss property based on the following averments:

- Highcity did not have any business or operations prior to the acquisition of the benami property.
- Mere approvals in the name of benamidar do not prove in any way that the benefits from the property are actually enjoyed by it and not by the beneficial owner.
- High city received huge amounts of money from SPZ which it used for the development of property, thereby establishing that SPZ is directly involved in the development of project in order to derive future benefits arising out of the same.
- The entire transaction is only for the benefit of TFFC and SPZ, who are owned by common promoters since the person providing the consideration i.e. TFFC and person reaping the benefits of such transaction i.e. SPZ are same as they are linked to each by means of common directors and promoters.
- The benefits to the beneficial owner arising out of property held in the name of the benamidar need not be direct and immediate and· that indirect and future benefits are also covered under the definition of a benami transaction under section 2(9)(A) of the PBPT Act, 1988.

The Initiating Officer further stated in his show cause notice seeking response and proof from Highcity and SPZ that the above transactions are not benami transactions. Highcity is of the strong view that the above averments are incorrect and that the entire transaction is a genuine business transaction and the loan from TFFC was obtained in the ordinary course of business (similar to the other loans taken by Seaview Constructions).

Seaview Constructions was operating as a profit making company until 2016 and whilst it was having debt, the entity was able to service the debt promptly from its business cash flows. However, due to the downturn of the real estate industry and commencement of additional businesses, Seaview Construction's profits and operations started to deteriorate and it had to obtain significant borrowings during 2017 from a consortium of banks for working capital purposes.

However, due to the difficulties in the business operations and the economic slowdown, Seaview Constructions could not repay its borrowings and the entire net worth got eroded due to significant operating losses. This led to Seaview Constructions filing a petition under the Insolvency and Bankruptcy Code, 2016. The petition was accepted by the National Company Law Tribunal (NCLT) and an Interim Resolution Professional (IRP) was appointed, who was later approved as the Resolution Professional (RP).

The Committee of Creditors, comprising of the financial creditors was formed with the following vote share:

Particulars	Voting Share (%)
A Bank	22.33%
B Bank	14.39%
C Bank	15.15%.
D Bank	26.36%
E Bank	10.94%
F Bank	10.83%

The resolution plan submitted by the RP was placed before the Committee of Creditors at its meeting held on 4th December, 2018 wherein, the resolution plan was approved by A Bank, B Bank and C Bank. D Bank rejected the resolution plan and provided its reasons in writing to the RP. E Bank and F Bank did not approve or reject the proposal and abstained from voting at the meeting. Seaview Constructions (the Corporate Debtor) is of the view that the resolution plan has been approved by the Committee of Creditors since the resolution plan has been approved by more than the prescribed percentage of creditors who actually voted in the meeting (i.e. after excluding the percentage relating to the creditors who abstained). The RP did not agree to this view since more than 25% of the creditors present in the meeting had out rightly rejected the resolution plan and therefore, proceeded for liquidation under the IBC since no resolution plan was approved within the prescribed time limit under the Code.

M/s. Sunflower Estates Private Limited (Sunflower Estates), a Company under the common control of the promoter of Seaview Constructions had also subscribed to the secured debentures of Seaview Constructions to the extent of ₹ 50 Crores (representing 15% of the total financial debts of Seaview Constructions). The IRP rejected the request received from Sunflower Estates for inclusion into the Committee of Creditors.

ANSWER THE FOLLOWING QUESTIONS:

1. The owner (one of the employees of SPZ) of one of the apartments in Riverview Bliss is not aware of his ownership of the apartment. He is seeking your advice on the impact on same under PBPT Act, 1988.
   (A) No impact, since the property has already been sold off to Highcity.
   (B) The property is not a benami property since the employee had continuous possession of the property through the period he was the owner.
   (C) The property is not a benami property since the sale agreement was registered appropriately and stamp duty was also paid.
   (D) The property is a benami property since the owner of the property is not aware of such ownership.

2. Mr. Vyas Chakraborty is of the view that the Initiating Authority does not have the right to send the notice for attachment of the property and those powers are vested with the adjudicating authority, as per PBPT, 1988 and seeks your advice :
   (A) Yes. Initiating Authority has only powers to summon and conduct inquiries.
   (B) No. The adjudicating authority's function is to confiscate and vest the property. The. Initiating Officer has powers to send the notice for attachment of property.
   (C) No. The approving authority has to send the notice for attachment of property and the adjudicating authority is required to confiscate and vest the property.
   (D) Yes. The initiating authority can provisionally attach properties only with the prior approval of the adjudicating authority.

3. Assuming that the Riverview Bliss property is considered as a benami property, the Initiating Officer seeks your views on whether the rental income earned by Highcity from the lease of the apartment (pending commencement of redevelopment) is also a benami transaction.
   (A) No, the rental income is an independent transaction between a landlord and a tenant for legitimate use of the property.
   (B) No, as long as Highcity remits Income tax on the rental income earned.
   (C) Yes, benami transaction includes any income/proceeds received or earned out of a benami property,
   (D) Yes, if the proceeds from the rental income are used by Highcity for making interest payment or loan repayment to TFFC or SPZ.

4. How should the voting share of each of the Banks who have lent to Seaview Constructions be determined under IBC, 2016?
   (A) Based on the financial debt owed by Seaview Constructions to each bank as a proportion to the total debt (financial + operational) owed by Seaview Constructions.
   (B) Based on the financial debt owed by Seaview Constructions to each bank as a proportion to the total financial debt owed by Seaview Constructions to third parties (i.e. other than related parties).
   (C) Based on· the financial debt owed by Seaview Constructions to each bank as a proportion to the total financial debt owed by Seaview Constructions.
   (D) Based on the financial debt owed by Seaview Constructions to each bank as a proportion to the total financial debt and statutory dues owed by Seaview Constructions.

5. Which of the following operational creditors of Seaview Constructions are eligible to initiate corporate insolvency process against Seaview Constructions?
   (A) G Limited, completed a corporate insolvency resolution process 15 months prior to the date of making the application.
   (B) H Limited, who is currently undergoing a insolvency resolution process.
   (C) I Limited, who could not meet its resolution plan under a insolvency resolution process.
   (D) J Limited, who supplied goods to ACL one month prior to the date of making the application and the invoice demanding payment is in transit.

6. Answer the following questions in the context of the provision relating to PBPT Act, 1988 with reasons and explanations :
   (i) Analyse based on the facts of the case provided above, whether the Initiating officer's actions were appropriate in concluding that the transaction was a benami transaction.
   (ii) What are the factors that will need to be considered for the purpose of determining whether a. transaction is a benami transaction?

7. Answer the following questions in the context of the provision relating to IBC, 2016 with reasons and explanations :
   (i) Examine the appropriateness of the approval or otherwise of the resolution plan of Seaview Constructions and whether the view taken by the RP is appropriate.
   (ii) Advise Sunflower Estates with regard to the rejection of the request for inclusion into the Committee of Creditors of Seaview Constructions.

ANSWER TO CASE STUDY 4

1. (D)
2. (B)
3. (C)
4. (B)
5. (A) [In order to drive the answer for initiation of CIRP against Seaview constructions, word "Operational Creditor" is to be assumed as corporate person].

DESCRIPTIVE ANSWERS

6.

i. **Course of action taken by Initiating Officer under Section 24 of the PBPT Act, 2016:** Where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.

Where the notice specifies any property as being held by a benamidar, a copy of the notice shall also be issued to the beneficial owner if his identity is known. Where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as prescribed in **Rule 4 of the Benami Transactions Prohibition Rules, 2016, for a period not exceeding ninety days from the date of issue of notice.**

The Initiating Officer, after making such inquires and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice —

(a) where the provisional attachment has been made —
i. pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority; or
ii. revoke the provisional attachment of the property with the prior approval of the Approving Authority;

(b) where provisional attachment has not been made—
i. pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority; or
ii. decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

Where the Initiating Officer passes an order continuing the provisional attachment of the property or passes an order provisionally attaching the property, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority under Section 26 of the PBPT Act, 2016.

Yes, the actions taken by the initiating officer, were appropriate in the compliance of the above stated provisions.

ALTERNATE SOLUTION

For a transaction to be covered under Section 2 (9)(A) of PBPT Act, 1988 the following two conditions are to be met.

(i) The consideration for person and the property has been provided or paid by another
(ii) The property is held for immediate or future benefit direct or indirect of the person who provided the consideration

In order to ascertain whether a particular sale is Benami and the apparent purchaser is not the real owner, the burden lies on the person who sets up the case and such burden has to strictly discharged based on legal evidence of definite nature. Therefore, the Initiating Officer (IO) cannot show cause High City and seek proof as to why the transaction cannot be treated as a Benami transaction.

Therefore, the onus is on the IO to prove, if at all the transaction is a Benami transaction. Moreover, if it is shown by the parties to the alleged Benami transaction that such transaction is done through a registered sale deed and valid loan agreements, the burden of proof would be shifted upon the IO to prove the transaction as a Benami transaction.

Merely because the source of consideration paid by the alleged benamidar is funded by way of loan received from a party related with the alleged beneficial owner, it cannot be ipso facto held that the consideration has been provided by the alleged beneficial owner and more so when evidences has been brought on record to show that the aforesaid loan was a genuine transaction and was done at arms-length in the normal course of business. Therefore the **IO's action is not appropriate** in concluding that the transaction was a Benami transaction.

ii. Factors that will need to be considered for the purpose of determining of a benami transaction:

As per Section 2(9) of the PBPT Act, 2016 in order to be a "Benami Transaction" such transaction /arrangement w.r.t a property is to be considered as a benami—

(i) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
(ii) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,
(iii) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or
(iv) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;
(v) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

7.

(i) Procedure of seeking approval of the Resolution plan in the light of Section 30 of the Insolvency and Bankruptcy Code:

(i) **Seeking approval of CoC**: The resolution professional shall present such resolution plans to the committee of creditors for its approval by a vote of not less than sixty-six per cent of voting share of the financial creditors.

(ii) **Submission of the Resolution Plan:** The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority. [Section 30]

(iii) **Approval of Resolution Plan:** If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements as per Section 30(2), it shall by order approve the resolution plan.

(iv) **Rejection of the Resolution Plan:** Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the above requirements, it may, by an order, reject the resolution plan.

The resolution applicant shall obtain the necessary approval pursuant to the resolution plan approved, within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority or within such period as provided for in such law, whichever is later.

In the given instance, the resolution plan of Seaview Constructions will not be passed as it was not approved by a vote of sixty-six per cent of voting share of the financial creditors. Out of Total six financial creditors, four financial creditors voted on the resolution plan and two abstained from voting. Further out of 4 Financial creditors, 3 Financial creditors with the voting share (22.33% + 14.39%+15.15% = 51.87%) approved the Resolution plan. However,1 Financial creditor with voting share 26.36% voted against the resolution plan. Resolution professional stand was correct as regarding the filing of liquidation as the resolution plan was not approved by the CoC with the requisite majority of 66% of voting share.

(ii) When Financial Creditor /authorized participate in the CoC:

As per Section 21 of the IBC, for representative is not the Financial Creditor or entitled to the authorised representative of the financial creditor referred to in Section 24(6), 24(6A), or 24(5), related to the conduct of meetings of creditors, if it is a **related party** of the corporate debtor, **shall not have any right** of representation, participation or voting in a meeting of the committee of creditors.

Here the rejection of the request to Sunflower Estates, for inclusion into the committee of creditors of Seaview constructions, is valid.

Past Exam/Nov 2019/Case Study-5
(RERA, FEMA)
Decor Design Constructions Private Limited

Decor Design Constructions Private Limited (Decor Constructions) is a reputed construction company based in Pune, India and specialises in construction mid-sized apartments (approximately 20 apartments in each project). Decor Constructions was founded by 2 brothers, Mr. Ravi Rao and Mr. Giri Rao, and are the Directors of Decor Constructions. Mr. Ravi Rao studied civil engineering in the UK and worked extensively in the UK in various infrastructure and construction companies before moving back to India to establish Décor Constructions. During the year 2014, Decor Constructions commenced a new project called as Decor Dream Home, which comprises of 30 apartments, each having a super built-up area of 1,800 square feet and carpet area of 1,500 square feet. All the 30 apartments were sold by Decor Constructions within a period of 3 months and they entered into a sale agreement with the allottees in the month of November, 2014. The following were the key features of the sale agreement:

- The apartments were sold to the allottees at a square feet rate of ₹ 5,000 per square feet and the total consideration for each of the apartments were calculated based on the super built-up area.
- The application fee to be paid prior to enter the sale agreement was fixed 8% of the total consideration.
- The entire amount of consideration should be paid by the allottee within 6 months from the sale agreement, irrespective of the date / stage of completion of the construction. This is to facilitate the speedy completion of construction. Decor Constructions has already factored in a discount in the per square feet rate to compensate the allottees for the upfront payment.
- Free open car parking to the allottees who pay the entire consideration at the time of sale agreement. For other allottees, the open car parking will be allotted on payment of ₹ 200,000.
- The apartment will be handed over to the allottees within 30 months from the date of the agreement i.e. by 31st May, 2017.

All the 30 allottees made the payment to Decor Constructions in accordance with the agreement (10 of the allottees paid the full amount on the date of the sale agreement thereby getting a free open car park) and an amount of ₹ 2,700 lakhs was received by Décor Constructions. During the month of August 2016, Decor Constructions sent an e-mail to all the 30 allottees that the Promoter has filed the required forms for approval from the Municipal Corporation for water, sewerage and electricity connections and this is taking substantial time to complete, which is not in the control of the Promoter and therefore, the date of handing over will get slightly delayed to 31st December, 2017. None of the allottees responded to the communication. In the meanwhile, with the introduction of Maharashtra Real, Estate (Regulation and Development) Act with effect from 1st May, 2017, Decor Constructions registered the project under the RERA and as part of the registration stated the expected date of completion as 30th June, 2018.

Although Mr. Ravi Rao has been in India for more than three years, his ultimate aim is to settle down in Switzerland, which is the home country of his spouse, Ms. Anne Rao. Therefore, Ravi wanted to buy a colonial villa in Switzerland for an amt of EUR 2 million. Mr. Giri Rao is of the view that the FEMA rules does not allow Mr. Ravi Rao to invest in immovable property outside India when he is resident in India.

Ms. Anne Rao (spouse of Mr. Ravi Rao) who is a US citizen, wants to purchase an immovable property (apartment) in India jointly with Mr. Ravi Rao. For this purpose, Ms. Anne Rao proposed to take a housing loan in her personal name from Bank of Bengaluru, a bank operating in India. However, considering the fact she is US citizen, the Bank included pre-condition that the loan be guaranteed by Decor Constructions. Based on such request, Decor Constructions has provided the required guarantee in favour of Bank of Bengaluru. Ms. Anne Rao is also interested in investing USD 200,000 in a Special Purpose Vehicle (in the form of an unincorporated JV) which is engaging in the business of providing managed farm to its investees and provide the land after a period of 20 years. Ms. Anne Rao before attempting further transactions approached the consultant to advice on the transactions which are not capital account transactions.

In the month of June 2017, Decor Constructions sent another e-mail to the 30 allottees that the construction of the super structure of Decor Dream Home is almost complete and what is left is only to complete the interior plastering, flooring, plumbing etc. and this will get completed by 31st March, 2018 and the slight extension of the timeline is only on account of labour shortage at Pune due to the extensive construction spree happening in the city. Décor Dream Home also suggested to the allottees that they were ready to handover the apartment in the month of December, 2017 (before receiving the occupancy certificate) to the allottees for them to get the interior/furnishing work done so that the allottees can occupy the apartments in March/April, 2018 as soon as occupancy certificate is received.

All the 30 allottees were not happy on account of the further delay in completion and filed a complaint against Decor Constructions under the Maharashtra RERA provisions. Out of the 30 allottees, 25 allottees sought cancellation of the sale agreement and refund of the amounts paid by the allottees along with interest at 21% p.a. The balance 5 allottees wanted to be compensated by Decor Constructions for the delay in completion-but do not want to cancel the sale agreement.

Decor Constructions has submitted before the RERA authorities the following:

- Notwithstanding the registration of the project under RERA as per the requirements of Section 3 of the RERA, the sections relating to compensation for delay etc. do not apply to the project since the date of commencement of project / date of sale agreement is prior to the date when RERA came into effect.
- Even otherwise, the date of completion stated in the RERA registration is 30th June 2018 and therefore, the date of handover finally indicated allottees is 31st March 2018, which is well within the timelines and therefore, there is no non-compliance with the RERA requirements.
- The Company had already informed the reasons for the delay of the project upto 31st December, 2017 in August, 2016 itself and there was no response / issue raised by the allottees at that time.

  Further, Decor Constructions has also agreed to provide the apartments for interior work during December, 2017 and therefore, it is effectively agreed to handover the apartment as per the revised timelines communicated in August, 2016.

- Even presuming the applicability of the RERA provisions, there is no unanimity in the decisions of the allottees on the way forward (since 25 have opted for cancellation and 5 have opted for compensation) and therefore, this cannot be anyway given effect to under RERA.

Accordingly, Decor Constructions has submitted that they are not liable for any compensation to be paid under RERA and have re-iterated that they will handover the apartments to the allottees by the revised timelines indicated in the e-mail sent in June, 2017.

ANSWER THE FOLLOWING QUESTIONS:

1. What is your view regarding the terms of the agreement relating to the open car parking arrangement with the allottees?
   (A) Decor Constructions is free to stipulate any terms and conditions in this regard, since this is a transaction between a willing buyer and a willing seller.
   (B) Decor Constructions is required to provide open car parking for all allottees on equitable terms and there cannot be a discrimination based on payment schedule.
   (C) Open parking areas cannot be sold for consideration since they are to be considered as common area of the Project.
   (D) Open parking is part of internal development works and is part of overall project costs which can be charged by the Promoter equally to all allottees.

2. One of the allottees of Decor Dream Home have-reached out to you for your advice on whether the 'collection of the entire consideration by Decor Constructions without regard to the stage of constructions is appropriate.
   (A) Appropriate. The terms/timing of payment are governed by the sale agreement between the promoter and allottee.
   (B) Not appropriate. The timing of payment should be in line with the stage wise completion / construction schedule.
   (C) Appropriate, since the necessary discount has already been factored into the consideration by Decor Constructions.
   (D) Appropriate, provided Decor Constructions has obtained the approval of the terms at the time of registration of the Project under RERA.

3. Advice of the consultant to Ms. Anne Rao for the transaction which do not fall under the definition of a capital account transaction under FEMA, 2002 WILL be:
   (A) Transactions which alter the assets and liabilities of non-residents in India.
   (B) Transactions which alter the assets and liabilities (including contingent liabilities) of residents outside India.
   (C) Transactions relating to transfer of a security by a branch in India of a company resident outside India.
   (D) Transactions which alter the assets and liabilities (including contingent liabilities) of non-residents in India.

4. Mr. Vishy Rao, brother of Mr. Ravi Rao, is a resident of Singapore and he owns an immovable property in Chennai which he inherited from his father, who was a resident of India. Can Mr. Vishy Rao continue to hold the property?
   (A) No, he cannot hold transfer or invest in India, since he is resident outside India.
   (B) Yes, he can continue to hold in India, since he is a person of Indian Origin and the property is located in India.
   (C) Yes, he can continue to hold the property, since this was inherited from a person who was resident in India.
   (D) Yes, he can continue to hold the property, since his brother (Mr. Ravi Rao) uses the property whenever he travels to Chennai.

5. Decor Constructions is in the process of entering into certain business transactions with international agencies and in this context Mr. Girl Rao seeks your views on the maximum amount that can be paid by Decor Constructions under the Liberalised Remittance Scheme and how much he can pay in his own individual capacity under the Scheme, per year?
   (A) Decor Constructions - USD 250,000; Individually - USD 250,000.
   (B) Decor Constructions - USD Nil; Individually - USD 250,000.
   (C) Decor Constructions - No limit for specified objects; Individually - USD 200,000.
   (D) Decor Constructions - USD 500,000 (USD 250,000 for each director); Individually - USD Nil, since the same is considered under Decor Constructions' limit.

6. Answer the following questions in the context of the provisions relating to RERA, 2016:
   (i) Analyse whether the provisions of RERA (which came into effect from 1st May, 2017) are applicable to the Decor Dream Home project and if Decor Constructions is liable for obligations under RERA.
   (ii) Analyse based on the facts of the case, regarding each of the averments of Décor Constructions with regard to its obligations under RERA for the alleged delay in handover of the apartments to the allottees and whether it is liable for payment of compensation under RERA.

7. Examine / advise regarding the below questions relating to the Foreign Exchange Management Act, 1999 :
   (i) How would you advise Mr. Ravi Rao with regard to his aim of acquiring a colonial villa in Switzerland when he is a resident in India?
   (ii) Evaluate the implications of the transactions proposed to be entered into by Ms. Anne Rao, including the consequential / related transactions.

ANSWER TO CASE STUDY 5

1. (C)
2. (A)
3. (D)
4. (C)
5. (B)

DESCRIPTIVE ANSWERS

6. (i)

The project was commenced in November, 2014 and was in progress on the effective date of coming into force of RERA, 2016 i.e. on 1st May, 2017. As per Section 3(1) of RERA, 2016, the promoter shall make an application to the Authority for registration of the project that is ongoing on the date of commencement of this Act and for which completion certificate has not been issued within a period of three months from the date of commencement of this Act.

Accordingly, **the provisions of RERA are said to be applicable** to the Décor Dream Home Project as no completion certificate has been issued within a period of three months from the date of commencement of this Act i.e., uptill July end 2017.

(ii)

Return of amount and compensation (Section 18)

This Section provides for the return of amount and compensation.

If the promoter fails to complete or is unable to give possession of an apartment, plot or building, in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from

the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

However, where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

If the Promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

According to the relevant provisions, Décor Constructions will not be liable under RERA for handover of the apartments to the allottees as it was within the expected date of completion i.e., 30th June, 2018. Therefore, Decor Constructions shall not be liable for payment of compensation.

ALTERNATE SOLUTION

Analysis of each of Averments of Décor Constructions with regard to its obligations under RERA for the alleged delay in handing over the apartments to the allottees:

AVERTMENT (1): Even though, the date of completion stated in RERA registration is 30th June, 2018 and therefore, the date of handover finally indicated to the allottees is 31st March, 2018 which is well within the timelines and therefore, there is no non- compliance with the RERA requirements

As per Section 18, if the promoter fails to complete or is unable to give possession of an apartment, plot or building, in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

On a plain reading of this provision, it becomes clear that date of completion referred to in this provision is the date specified in the agreement. The word "therein" refers to the "agreement" and not the date of completion revised by the Promoters unilaterally while registering the project. Hence, the submission of Décor Constructions that as till the date of completion mentioned in the registration certificate is not crossed, there is no delay in not valid.

AVERTMENT – 2: The Company had already informed the reasons for the delay of the project upto 31st December, 2017 in August, 2016 itself and there was no response / issues raised by the Allottees at that time. Further, Décor Constructions has also agreed to provide the apartments for interior work during DECEMBER,2017 and therefore, it is effectively agreed to handover the apartment as per the revised timelines communicated in August, 2016.

From the facts of the case, it appears that Décor Constructions is of the view that since the complainants did not object to the extended time, hence, the complainants by their conduct agreed to extend the period of delivery of the possession of the flats. This is not acceptable because a party cannot take unilateral decision and impose it upon the other party. The parties have decided to withdraw from the project since the flats were not delivered on time and no where have they agreed to the new dates as unilaterally declared by the Company. The handover of the apartments prior to obtaining the occupancy certificate is mere paper possession and possession without such certificate is illegal and cannot be permitted in law. **Therefore, this offer has been rejected by the complainants and have exercised their right to claim back their money.**

AVERTMENT – 3: Even presuming the applicability of the RERA provisions, there is no unanimity in the decisions of the allottees on the way forward (since 25 have opted for cancellation and 5 have opted for compensation) and therefore, this cannot be anyway given effect to under RERA.

Section 18 offers two options to the allottees – one is for return of the amounts, or compensation, if the allottees decide not to withdraw from the project. **It is not necessary for unanimity in the decision of the allottees and the promoter is liable to refund / compensate the allottees based on the option that they choose.**

7. (i)

As per FEMA, 1999 under Section 6(4), a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

The RBI vide A.P. (DIR Series) Circular No. 90 dated 9th January, 2014 has issued a clarification on Section 6(4) of the Act. According to which a person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transactions is not in contravention to extant FEMA provisions.

Accordingly, Mr. Ravi Rao aim of acquiring a colonial villa in Switzerland when he is resident in India is possible and in compliance with the above provision.

(ii)

In the given case, Ms. Anne Rao proposed for two types of investments in India:

(i) Purchase of immovable property in India Jointly with Mr. Ravi Rao
(ii) Investing USD 2,00,000 in special purpose vehicle

W.r.t. part (i) of the transaction proposed by Ms Anne Rao, according to **Section 6(3)**, the Reserve Bank may, by regulations, prohibit, restrict or **regulate the giving of a guarantee** or surety in respect of any debt, obligation or other liability incurred by a person resident outside India.

Therefore, proposed transaction as to purchase of immovable property to be entered by Ms. Anne Rao, is valid on the guarantee of Décor Construction.

W.r.t. part (ii) of the transaction proposed, investments (or financial commitment) in JV/WOS abroad by Indian parties through the medium of a Special Purpose Vehicle (SPV) **are also permitted** under the Automatic Route if the Indian party is not appearing in the Reserve Bank's caution list or is under investigation by the Directorate of Enforcement or included in the list of defaulters to the banking system circulated by the Reserve Bank/any other Credit Information Company as approved by the Reserve Bank.

As in the given case, investment in a Special Purpose Vehicle in the form of an unincorporated joint venture, **is invalid** in line with the above provision.

Alternate Solution to Part (ii)

As per the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, the person resident outside India **is prohibited** from making investments in India in any form, in any Company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes **to engage in agricultural or plantation activities**.

Accordingly, Ms. Anne Rao cannot invest in the aforesaid business since managed farm business is included under prescribed business of agricultural and plantation activities.

Past Exam/Nov 2020/Case Study-1
(PBPTA, RERA)
Mis Sun Energy (Pte.) Limited

PART A

That one Mis Sun Energy (Pte.) Limited hereinafter addressed as the "petitioner" had invested in an Indian Company 'Z', a company promoted by RR, by way of shares and debentures. The petitioner held 51 per cent of the share capital of 'Z' respectively.

The petitioner filed writ petition with Hon'ble High Court seeking for issuance of writ of prohibition, restraining the official respondents from in any manner proceeding with the show cause notice dated 19-5-2017, issued by the Initiating Officer (Rank of Deputy Commissioner Income Tax-Regular Company Circle) under section 24(1) under the PBPT Act,1988, calling upon the petitioner to show cause as to why 51% shares and debentures were held by the petitioner in an Indian Company 'Z' not be treated as a "benami property" and wanted to impose penalty under the PBPT Act, 1988.

The petitioner were of the view that the Adjudicating Authority is biased and may take adverse view on the case of the petitioner and the petitioner even challenged the composition of the Adjudicating Authority on their membership and qualification. The petitioner also sought for issuance of a writ of Certiorari, to quash the impugned show cause notice dated 19-5-2017, issued under section 24(3) of the Prohibition of Benami Property Transactions Act, 1988, intimating the petitioner that pursuant to the provisional attachment of shares and debentures, enforced, the petitioner was restricted/prohibited from dealing in any manner and from exercising any rights in relation to the shares and debentures.

The petitioner stated that none of the transactions were benami transactions and the petitioner was not a benamidar and the shares and debentures were not benami property. The transactions done by the petitioner were completed well before the amendment to the PBPT Act, 1988. (The amendment received the assent of the President of India on 11-8-2016 and the Act came into force with effect from 1-11-2016)

It was alleged by the petitioner that after receiving substantial investment from the petitioner, RR was alleged to have siphoned money out of 'Z', refused to make necessary disclosures and comply with the mandatory filings required under the Companies Act, 2013 and when the petitioner sought for transparency of the transactions, RR and various companies controlled by him initiated litigation against the petitioner with a view to prevent the petitioner from examining the affairs of 'Z'.

In the meanwhile, RR filed company petition before the NCLT to restrain the petitioner from exercising its rights in relation to the shares and debentures and also approached the High Court in this regard, where the Court initially granted an ex parte interim injunction, which was vacated after the petitioner entered appearance and contested the matter, by order dated 1-6-2017 and RR's plea was dismissed.

The petitioner explained about the shareholding pattern in 'Z' and the pattern of investment made in the company and how the debentures and shares were allotted to the petitioner. It was submitted that on the date of issuance of the impugned show cause notice, the Initiating Officer had no jurisdiction to issue the same, as he was not the gazette initiating officer under the Act and thus lacked statutory jurisdiction even to issue the impugned orders. The transactions done by the petitioner with the Indian company were completed in all aspects long before the Amendment Act came into force i.e., on 01-11-2016 based upon the provisions of section 18 read with section 24 of the Act.

It was further submitted by the petitioner that the case of the Initiating Officer was solely based upon the date on which, the Gazette Notification was uploaded by the Directorate of Printing at the Government of India press to justify the jurisdiction of the Initiating Officer to initiate proceedings. It was submitted that the notification would come into operation as soon as it is published in the Gazette of India, i.e., the date of publication of Gazette and this being the correct legal position, the contention of the Initiating Officer referring to the date on which the notification was uploaded in the official website, was not sustainable based upon the provisions of section 2(21) of the Act.

PART-B

Further to the above case scenario M/s Sun Energy (Pte.) Limited had in the month of January 2014 pre-booked a commercial office unit of approximately 1200 sq. ft. with M/s J V Realty Limited, a leading developer in that area in their "S COURT" Greater Noida project developed in phases launched then by paying an amount of ₹ 25,00,000/-as booking amount out of ₹ 1,00,00,000 the total cost of flat but no Builder-Buyer agreement was entered into between the parties except that an allotment letter was issued by the developer mentioning the unit details.

This project being developed over an area of approximately 15000 sq mts and having over I 00 office units in its plan outlay and the company had paid till April 2017 almost 90% of the entire cost of the property based upon percentage of completion (progress) of the stage of construction but the developer had failed to provide neither possession nor had completed the project and was also not responding to their complaints on one pretext or the other.

The legal counsel of M/s Sun Energy (Pte.) Limited in the month of May, 2017 informed the Board of Directors of the company about Real Estate (Regulation and Development) Act, 2016 (for short "the RERA"). They further informed that RERA was enacted by the Parliament as Act 16 of 2016 in the year 2016. Some of the provisions of the RERA came into force on a date prescribed by the Central Government under the notification published in the official gazette. Different dates were appointed for different provisions of the RERA.

By Notification No. S.0.1544 (E), dated 26- 4-2016, the Central Government appointed 1st day of May 2016 as a date on which some of provisions of the RERA came into force, namely, Sections 2, 20 to 39, 41 to 58, 17 to 78 and 81 to 92. By Notification No. S. 0.1216, dated 19-4-2017 some more provisions of the RERA came into force, namely, Sections 3 to 19, 40, 59 to 70 and 79, 80 w.e.f 1st May, 2017. Meaning thereby that on May 1, 2017, all 92 provisions of the Real Estate (Regulation and Development) Act, 2016 (RERA or the Act) were brought into force.

The Act has introduced new obligations on real estate developers and in cases of default, prescribes penal liabilities and the company can contemplate bringing a legal suit against the developers under RERA. The developer on the other hand is of the view that RERA is not applicable to this project as the same was launched and construction commenced much before the RERA came into force.

ANSWER THE FOLLOWING QUESTIONS:

1. Which of the following is correct statement as per Prohibition of Benami Property Transactions Act, 1988?
   (A) Prohibition to hold benami property.
   (B) Prohibition of benami transactions.
   (C) Prohibition of right to recover property held benami.
   (D) Prohibition on re-transfer of property by benamidar.

2. As per the provision of Prohibition of Benami Property Transactions Act, 1988 the appellate tribunal or the adjudicating authority may in order to rectify any mistake apparent on face of the record, amend any order made under section 26 and section 46 respectively within a period
   (A) of two years from the end of the quarter in which the order was passed.
   (B) of three years from the end of the quarter in which the order was passed.
   (C) of one year from the end of the month in which the order was passed.
   (D) of one year from the date of passing of order.

3. Where a builder is planning to develop a particular project in different phases spread over couple of yrs, then he is required to obtain registration under Real Estate (Regulation and Development) Act, 2016.
   (A) Only once for the entire project indicating all the phases.
   (B) For each phase separately.
   (C) As and when project commences registration will be required.
   (D) As and when a particular phase is being developed registration of that phase will be required.

4. A promoter shall not accept a sum of more than_____percentage of the cost of the apartment, plot or building, as an advance payment or an application fee from a person without first entering_____a under the provisions of Real Estate (Regulation and Development) Act, 2016.
   (A) 15%, Sale Deed.
   (B) 10%, written agreement for sale.
   (C) 15%, Sale Deed which is duly registered.
   (D) 10%, written agreement to sale which is duly registered.

5. Where a Real Estate Agent contravenes the provisions of Sec 9/Sec 10 of the Real Estate (Regulation and Development) Act, 2016 he shall be liable to penalty as determined by the Authority of_____.
   (A) ₹10,000.
   (B) ₹ 10,000 for every day during which the default continues.
   (C) ₹10,000 for every day during which the default continues upto 5% of the cost of the plot, apartment or building of the project for which sale has been facilitated.
   (D) ₹10,000 for every day during which the default continues upto 2% of the cost of the plot, apartment or building of the project for which sale has been facilitated.

6. In the light of given case study state the quantum of penalty imposed whosoever enters into any Benami Transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016.
7. State the qualifications for appointment of Chairperson and Members of the Adjudicating Authority under the Prohibition of Benami Property Transactions Act, 1988.
8. In the light of the given case study decide stating the provisions of the Real Estate (Regulation and Development) Act, 2016, whether M/s Sun Energy (Pte.) Limited can initiate legal proceedings against the developer M/s J V Realty Limited under the said Act or the contention of the developer that the said Act is not applicable to the project is correct.
9. From the provisions of the Real Estate (Regulation and Development) Act, 2016, you are of the view that the Act is applicable to the developer then decide as per the provisions of the said Act, can the company seek refund of the entire amount paid to the developer till date along with interest? Whether apart from principal and interest, can the company also seek certain compensation from the developer?

ANSWER TO CASE STUDY 1

1. Options B, C, & D
   Note: In the light of the Preamble of the Prohibition of Benami Property Transaction Act, 1988, Options B, C, & D, are correct Options
2. Option C
3. Option B
4. Option D
5. Option C

Descriptive Answers

6. Quantum of Penalty for Benami Transactions [Section 53]

As per Section 53 of the Prohibition of Benami Property Transactions Act, 1988: [substituted for Benami Transactions (Prohibition) Act, 1988 by the Benami Transactions (Prohibition) Amendment Act, 2016 w.e.f. 01.11.2016]:

Where any person enters into a benami transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, the beneficial owner, benamidar and any other person who abets or induces any person to enter into the benami transaction, shall be guilty of the offence of benami transaction. Whoever is found guilty of the offence of benami transaction referred to above shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five per cent of the fair market value of the property.

7. As per Section 9 of the Prohibition of Benami Property Transactions Act, 1988 as amended by the Benami Transactions (Prohibition) Amendment Act, 2016 w.e.f. 01.11.2016:

   (1) A person shall not be qualified for appointment as the chairperson or a Member of the Adjudicating Authority unless he:
   (a) Has been member of the Indian Revenue Service and has held the post of Commissioner of Income tax or equivalent post in that service
   (b) Has been a member of the Indian legal service and has held the post of joint Secretary or equivalent post in that service.
   (2) The Chairperson and other members of the Adjudicating Authority shall be appointed by the Central Government in such manner as may be prescribed.
   (3) The Central Government shall appoint the senior most member to be the chairperson of the Adjudicating Authority.

8. As per Section 3(1) of The Real Estate (Regulation & Development) Act, 2016, (the Act) the promoter shall make an application to the Authority for registration of the project that is ongoing on the date of commencement of this Act and for which completion certificate has not been issued within a period of three months from the date of commencement of this Act.

   Further Section 3(2) of the Act says that no registration of the real estate project shall be required:

   (a) where the area of land proposed to be developed does not exceed 500 square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases;
   (b) where the promoter has received completion certificate for a real estate project prior to commencement of this act;

As per the facts, "S COURT" greater Noida project was launched before the enforcement of the Act. As M/s Sun Energy (Pte.) Limited had pre-booked in January 2014 with M/s J V Realty Limited. So it was an ongoing project on the date of commencement of this Act and for which completion certificate has also not been issued within a period of three months from the date of commencement of this Act.

Further project was developed over an area of approximately 15000 sq. mts. and having over 100 office units in its plan outlay, which exceed 500 square meters and the number of apartments exceeding eight inclusive of all phases.

Hence in the given case, M/s Sun Energy (Pte.) Ltd can initiate legal proceedings against developer M/s J V Realty Limited under the Act stating the violation of the above mentioned provisions under the Act and the contention of the developer that the said Act is not applicable to the project, is incorrect.

9. Return of Amount and Compensation (Section 18)

Section 18 of the of The Real Estate (Regulation & Development) Act, 2016, (RERA) provides for the return of amount and compensation.

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—
(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason:

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

However, where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this sub-section shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the Rules or Regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

Therefore in the given case study as per the provision of Section 18 reproduced herein above, the Company can seek refund if they wish to withdraw and also claim interest apart from compensation.

Past Exam/Nov 2020/Case Study-2
(PMLA, FEMA)
Mr. Kamal

Mr. Kamal is engaged in the real estate business of development of townships through his company- M/s P Homes Ltd. During the course of business, he has accumulated enormous amount of wealth in the form of cash which was generated through illegal businesses. Police cases under several sections of various Indian laws have also been registered against Mr. Kamal.

Mr. Kamal has a son Mr. Vimal who was residing in India during F.Y. 2016-17. He left for UAE on 25th August 2017 to undergo training for a period of 4 years. Mr. Shyam, brother of Mr. Kamal, has a daughter, Ms. Priyadarshini pursuing higher studies in UAE. Mr. Shyam intends to:

(a) Open a bank account in foreign currency in UAE.
(b) Remit money from India to his daughter in her account for studies.

Separately, Ms. Priyadarshini has requested Mr. Shyam to sponsor a chess tournament in UAE which will involve remittance amounting to USD 85,000 (after conversion). Mr. Shyam generally remits money through TZB Bank Ltd. after complying necessary formalities.

On the other hand, since Mr. Vimal's interest lies in India, he intends to invest money in India in the following manner:

(a) Incorporating a Company in India followed by infusion of capital in the said company.
(b) Buying an agricultural farm in his individual capacity.

Above investments require funding which will be sought from Mr. Kamal.

From the business of real estate, total wealth generated by Mr. Kamal amounts to approx. ₹ 775 Crore. The said amount was utilized by him in the following manner:

(a) Around ₹100 crore were used for meeting certain cash expenses and paying certain bribes.
(b) ₹ 325 crore were transferred through hawala transaction to Mr. Vimal.

Transferring money through hawala route was chosen by Mr. Kamal since the money available with him in his bank account was not sufficient to remit legally under various provisions of Foreign Exchange Management Act, 1999. Therefore, he decided to strike a deal with Mr. Bhola, a hawala agent operating in India. Terms of the deal are as under:

- Mr. Kamal will pay ₹ 325 crore + commission in cash to Mr. Bhola.
- Mr. Bhola, through his counterparts in UAE, will pay equivalent USD (after conversion) to Mr. Vimal against invoice for professional services dated 1st October 2018.

Further Mr. Kamal and Mr. Shyam are promoters and directors of M/s KS Cinemas Ltd., a company engaged in the business of producing motion films in India.

For a very large upcoming film project, M/s KS Cinemas Ltd. has taken loan from TZB Bank Ltd. amounting to ₹ 350 crore after mortgaging all the assets of the company including rights related to the film. However, due to controversies surrounding the film, the Censor Board withheld the certification of the film.

Even the Honorable High Court turned down plea of the producers that the film is not against the interest of the country or public at large. The Reserve Bank of India during the course of annual audit sent a notice to TZB Bank Ltd on suspicion of non-compliance of the provisions of the Foreign Exchange Management Act, 1999 by TZB Bank Ltd. In the said notice, the Reserve Bank of India sought certain information on the transactions carried out by Mr. Shyam. However, lawyer of TZB Bank Ltd. suggested not to provide any response to such notice, since such notice is generally issued to every bank as a part of audit procedure and is of routine in nature.

One of the disgruntled crew members filed a complaint against Mr. Kamal in police station under Indian Penal Code (IPC) for investigation. The complaint was accompanied with the details of how Mr. Kamal acquired massive amount of wealth and huge properties in his name and also in joint names. The accused person accumulated movable and immovable properties and assets not only in India but in abroad also. Those properties were acquired otherwise and were not included in their disclosed assets. Their criminal acts indicated misappropriation of public money. Accordingly, the complaint was registered under the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988.

Later on, the investigation was taken over by the CBI., while the CBI. was proceeding with the investigation, the Enforcement Directorate on the basis of allegation made, lodged Enforcement Case Information Report (ECIR) against Mr. Kamal. Similarly, as per the said ECIR when complaint was filed under Section 45 of the Prevention of Money Laundering Act, 2002, cognizance of the offence was taken against Mr. Kamal under section 3 of the Prevention of Money Laundering Act, 2002, punishable under section 4 of the said Act. The Enforcement Directorate issued a notice dated 27th January 2018 to Mr. Kamal, which was received by him on 31st January, 2018 directing him to pay penalty.

Subsequently, an order was issued by the authorities to provisionally attach properties belonging to Mr. Kamal. Mr. Kamal now intends not to challenge the action taken against him under the Prevention of Money Laundering Act, 2002 before the Adjudicating Authorities. On 01st May, 2018 a meeting was held with you in the said meeting Mr. Kamal informed that he wanted to engage you to advise for understanding, powers and remedy for his matters under the various provisions of the Foreign Exchange Management Act, 1999 and the Prevention of Money Laundering Act, 2002.

ANSWER THE FOLLOWING QUESTIONS:

1. Which of the following remittance will require prior approval of Government of India for drawl of foreign exchange under the Foreign Exchange Management Act, 1999?
   (A) Payment related to 'call back services' of telephones.
   (B) Opening of foreign currency account abroad with a bank.
   (C) Remittance of prize money / sponsorship of sports activity abroad by a person other than International / National / State Level bodies, if the amount involved is USD 90,000.
   (D) Remittance of freight of vessel charted by a Public Sector Undertaking.

2. As per the provisions of the Prevention of Money Laundering Act, 2002, person on whose behalf a transaction is being conducted is known as:
   (A) Client.
   (B) Financial Institution
   (C) Beneficial Owner.
   (D) Authorized Dealer.

3. Under the Prevention of Money Laundering Act, 2002, Adjudicating Authority consists of following:
   (A) 3 persons including chairman.
   (B) 4 persons including chairman.
   (C) 2 persons one of whom can be appointed as a chairman
   (D) 5 persons including a member from Ministry of Law and Justice.

4. Among other things, what is the qualification of a person to be appointed as a Public Prosecutor before the Special Court under the provisions of the Prevention of Money Laundering Act, 2002?
   (A) Min 10 years of experience as an advocate.
   (B) Min 5 years of experience as an advocate.
   (C) Min 7 years of experience as an advocate.
   (D) Min 15 years of experience as an advocate.

5. Under the PMLA, 2002, property can be provisionally attached for_____.
   (A) Not exceeding 60 days.
   (B) Not exceeding 90 days.
   (C) Not exceeding 180 days.
   (D) Not exceeding 300 days.

6. Answer the following in light of the provisions of the Foreign Exchange Management Act, 1999: Advise Mr. Kamal whether:

   I. he can invest in M/s P Homes Ltd. engaged in the business of building low budget homes.
   II. he can buy agricultural farm in his individual capacity.
   III. he can make payment through foreign currency notes.

7. For investing activities in India by Mr. Kamal, he approached you on 1st May 2018 with a notice dated 27th January, 2018 received by him from the office of Enforcement Directorate on 31st January 2018 directing him to pay penalty. Kindly advise Mr. Kamal on timelines to pay the penalty and powers of the officers to recover the same. Mr. Kamal has informed that he doesn't intend to file an appeal.

8. On suspicion of non-compliance of the provisions of the Foreign Exchange Management Act, 1999 by TZB Bank Ltd., the Reserve Bank of India had sent a notice to the bank seeking certain information on the transactions carried out by Mr. Shyam. However, lawyer of TZB Bank Ltd. had suggested not to provide any response to such notice since such notice is generally issued to every bank as a part of audit procedure and is of routine in nature. Explain the powers of the Reserve Bank of India in case of non-compliance to notice.

9. Explain the following in light of the provisions of the Prevention of Money Laundering Act, 2002:
   i. Money Laundering does not mean just siphoning of funds. In light of this statement, explain the significance and aim of the Prevention of Money Laundering Act, 2002 and its three distinct stages.

ii. Mr. Kamal seeks your advice on the remedy available with him under the Act against the said attachment order.

iii. Properties confiscated under the provisions of the Prevention of Money Laundering Act, 2002 shall be available for disposal by Ministry of Finance as and when necessary. Examine correctness of the statement.

ANSWER TO CASE STUDY 2

1. Option D
2. Option C
3. Option A
4. Option C
5. Option C

DESCRIPTIVE ANSWERS:

6.

(I) As per Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, no person resident outside India shall make an investment in India, in any form, in any company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage in real estate business. Since Mr. Kamal is a person resident in India, he can invest in M/s P Homes Ltd. engaged in the business of building low budget homes.

(II) Yes, Mr. Kamal can buy agricultural farm in his individual capacity, since prohibitions as regard the purchase of agricultural farm is exercised in favour of person resident outside India. In other words there is no specific prohibition on person resident in India on buying of agricultural farm in his individual capacity.

(III) A person resident in India can open, hold and maintain with an authorized dealer in India, a Resident Foreign Currency (Domestic) Account, out of foreign exchange acquired in the form of currency notes, Bank notes and travellers' cheques from any of the sources like, payment for services rendered abroad. Yes Mr. Kamal can make payment through foreign currency notes through an authorized dealer.

7. Recovery of Fine or Penalty [Section 69 of the Prevention of Money Laundering Act, 2002]

Where any fine or penalty imposed on any person under Section 13 or Section 63 of Prevention of Money Laundering Act, 2002 is not paid within 6 months from the day of imposition of fine or penalty, the Director or any other officer authorized by him in this behalf may proceed to recover the amount from the said person in the same manner as prescribed in Schedule II of the Income- tax Act, 1961 for the recovery of arrears and he or any officer authorized by him in this behalf shall have all the powers of the Tax Recovery Officer mentioned in the said Schedule for the said purpose. Accordingly, Mr. Kamal must pay penalty latest by 31st July, 2018.

8. Reserve Bank's powers to issue directions to authorized person [Section 11]

(1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorized persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security.

(2) The Reserve Bank may, for the purpose of ensuring the compliance with the provisions of this Act or of any rule, regulation, notification direction or order made thereunder, direct any authorized person to furnish such information, in such manner, as it deems fit.

(3) Where any authorized person contravenes any direction given by the Reserve Bank under this Act or fails to file any return as directed by the Reserve Bank, the Reserve Bank may, after giving reasonable opportunity of being heard, impose on the authorized person a penalty which may extend to ten thousand rupees and in the case of continuing contravention with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

As per above provisions, Reserve Bank of India may impose penalty on TZB Bank Ltd. for non - compliance to notice.

9.

(I) Money laundering does not mean siphoning of fund. It actually refers to a whole process or an entire system by which money is actually generated from serious crimes but they are given such shape (by disguising its origin into a series of transactions) that it looks like it has originated from legitimate sources.

The Prevention of Money Laundering Act, 2002 As stated in the Preamble to the Act, it is an Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and to punish those who commit the offence of money laundering.

Money laundering is a single process however; its cycle can be broken down into three distinct stages:

i. **Placement:** It is the first and the initial stage when the crime money is injected into the formal financial System.
ii. **Layering:** Then under the second stage, money injected into the system is layered and moved or spread over various transactions in different accounts and different countries. Thus, it will become difficult to detect the origin of the money.
iii. **Integration:** Under the third and final stage, money enters the financial system in such a way that original association with the crime is sought to be obliterated so that the money can then be used by the offender or person receiving as clean money.

(II) **Section 25** of the Prevention of Money Laundering Act, 2002 (the Act) empowers the Central Government to establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authority and the Authorities under the Act.

Section 26 of the Act deals with the rights and time frame to make an appeal to the appellate Tribunal. Any person aggrieved by an order made by the Adjudicating Authority may prefer an appeal to the Appellate Tribunal within a period of 45 days from the date on which copy of the order is received by him. The appeal shall be in such form and be accompanied by such fee as may be prescribed. The Appellate tribunal may extend the period if it is satisfied that there was sufficient cause for not filing it within the period of 45 days.

The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

According to **Section 42** of the Act, any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of the order of the Appellate Tribunal.

In the light of the above provisions of the Act, Mr. Kamal is advised to prefer an appeal to the Appellate Tribunal in the first instance.

(III) Management of Properties confiscated (Section 10)

Under Section 10 of the Prevention of Money laundering Act, 2002:

The Central Government may, by order published in the Official Gazette, appoint as many of its officers (not below the rank of a Joint Secretary to the Government of India) as it thinks fit, to perform the functions of an Administrator.

(1) The Administrator appointed under sub-section (1) shall receive and manage the property in relation to which an order has been made under sub-section (5) or sub- section (6) or sub-section (7) of Section 8 or Section 58B or sub-section (2A) of Section 60 in such manner and subject to such conditions as may be prescribed.

(2) The Administrator shall also take such measures as the Central Government may direct to dispose of the property which is vested in the Central Government under Section 9.

In view of the above, the state that the properties under the Act shall be available for disposal by the Ministry of Finance as and when necessary is correct.

Past Exam/Nov 2020/Case Study-3
(PBPTA, RERA)
SSTPL

SSTPL is one of India's leading television manufacturers and has its manufacturing plant in Chennai, with more than 200 dealers across the country. SSTPL specializes in manufacturing LED Smart televisions both for direct retail sales as well as contract manufacture for other television manufacturers. SSTPL has a very robust Board of Directors who are highly involved in the operations of the entity.

During one of the Board Meetings held in the month of July 2019, the Board of Directors reviewed the amounts receivable from the dealers of SSTPL and noted the following:

AGE	Amount in Lakh	Number of Dealers
0 to 180 days	1505	135
180 to 720 days	280	34
> 720 days	905	1
Total	2,690	170

The CFO went on to explain that the amount which is outstanding for more than 2 years is receivable from DMPL and the Company has been following up with the dealer on a regular basis. The independent director on the Board asked the CFO to explore the possibility of taking action against DMPL under the 'IBC 2016'.

The CFO informed that the financial creditors of DMPL has already commenced the process and the IRP reached out to the CFO last week to understand the claims of SSTPL against DMPL.

The IRP identified the following assets and liabilities of DMPL:

- Bank loans taken by DMPL from Bank A amounting to ₹1500 lakh & Bank B amounting to ₹ 1050 lakh.
- Loan taken from the son Mr. 'X' of the promoter of DMPL amounting to ₹ 75 lakh attended
- Board Meetings to provide guidance/directions on policy making process.
- Payable to SSTPL ₹ 905 lakh.
- Outstanding wages to workmen amounting to ₹ 75 lakh.
- Statutory employer contributions to the tune of ₹ 30 lakh.
- Realisable value of the fixed assets of DMPL, ₹ 2800 lakh.
- Receivables from various customers, ₹ 225 lakh, out of which 50% is not realisable.
- Bank balance off ₹ 22.5 lakh.

The IRP also received information that MCL, a Company registered in Germany, pursuant to an agreement entered with DMPL and supplied spares to DMPL for an amount of EVR 500,000 (INR 400 lakh) (though this claim is not disputed by DMPL, the same was not recorded in the books of accounts of DMPL inadvertently). Since this amount was not paid by DMPL even after several reminders, MCL filed an application under the IBC 2016.

However, this application was rejected by the Adjudicating Authority since as per the agreement between MCL and DMPL, any disputes between the parties are to be decided by the courts in Germany. DMPL, in its agreement, with its distributors, specified that the distributors be necessarily required to purchase spares for 2 models of cars on a bundled basis (the sale price fixed based on fair market value/mutual discussion). On 14th April 2020, ACL, another supplier of DMPL, to whom DMPL owed INR 75 lakh, also wanted to initiate Corporate Insolvency Resolution Process against DMPL for non-payment of undisputed dues.

During the aforesaid Board Meeting of SSTPL, the CFO also placed a revised draft agreement to be entered into with all the dealers after introduction of GST and as part of the same, the following clauses were proposed to be included:

- Dealers are required to obtain specific approval of SSTPL prior to making change in the marketing model or technical developments to the prejudice of customers.
- Specify the geographical area where the dealers can market the cars.
- Limit the operation of service centres by specifying dealers who can operate service centres.
- Bar transactions or transfer of cars and spares between dealers.
- Mandate the floor price at which services may be provided by the dealers.
- Higher pricing of substitutable products and services.
- Mandate the dealers to acquire certain number of cars of the base version, when ordering high end variants.

The agreement envisaged that no sale would be made to dealers who do not comply with the above conditions. The Directors of the Company felt that some of these clauses are not in compliance with the provisions of the Competition Act 2002.

ANSWER THE FOLLOWING QUESTIONS

1. What is the percentage share of Bank A in the Committee of Creditors of DMPL under IBC, 2016 proceedings?
   (A) 57.14%.
   (B) 58.82%.
   (C) 41.27%.
   (D) 42.13%.
2. Out of the below, identify who is a related party of DMPL under the IBC, 2016?
   (A) Mr. A, who holds 15% shares in DMPL.
   (B) Indigenous Private Limited, who has one common independent director (with no shareholding) with DMPL.
   (C) Mr. X, who although not an employee or director of DMPL, is close to the promoter and attends Board Meetings to provide guidance/directions on policy making process;
   (D) Ms. Y, who controls the composition of Board of Directors of SSTPL.
3. Does the contract entered into by DMPL with its distributors cause an appreciable adverse effect on competition under the Competition Act, 2002?
   (A) Yes, since this is in the nature of a tie-in arrangement.
   (B) No, this is a contract between a 'willing buyer' and 'willing seller' and they are free to determine the contract terms;
   (C) Yes, since transaction is in the nature of predatory pricing by DMPL to reduce competition from other spares manufacturers.
   (D) No, the contract actually promotes and sustains competition in the market.
4. The plan of SSTPL to consider a higher cost of substitutable goods and services for the dealers is covered under which of the below factors under the Competition Act, 2002?
   (A) Appreciable adverse effect on competition.
   (B) Abuse of dominant position.
   (C) Price rigging.
   (D) Collusive pricing.
5. Can ACL file Corporate Insolvency Resolution Process against DMPL under IBC, 2016?
   (A) Yes, ACL is an operational creditor and all the conditions under IBC, 2016 have been fulfilled.
   (B) No, ACL is not a financial creditor.
   (C) No, since the amount of default is less than the minimum amount of default (₹ 100 lakh) for being covered under Section 4 of IBC, 2016;
   (D) Yes, since the amount of default is not, disputed by DMPL and there is no ongoing dispute.
6. Answer the following questions:

i. Advice the IRP with regard to the appropriateness of the order of the Adjudicating Authority regarding, the application made by MCL under the provisions of the Insolvency and Bankruptcy Code, 2016.

ii. Calculate the amount receivable by SSTPL from DMPL based on the facts given in the case study (assume-no liquidation costs) as per Section 53 of the Insolvency and Bankruptcy Code, 2016.

iii. Evaluate the terms of the agreement proposed to be entered into by SSTPL with the dealers based as per the provisions of the Competition Act, 2002.

ANSWER TO CASE STUDY 3

1. Option (C)
2. Option (C)
3. Option (A)
4. Option (B)
5. Option (C)

DESCRIPTIVE ANSWERS

6. (i)

Enabling provisions for cross border transactions: India is no more an isolated business place. India is now part of global business hub. Indian businesses have investments outside India while many businesses outside India have presence in India. India is now a global village. Enabling provisions in the Code are Sections 234 and 235 for this purpose.

Agreements with Foreign Countries: The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

Letter of request to a country outside India in respect of assets: If, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, is of the opinion that assets of the corporate debtor or debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234 of Insolvency and Bankruptcy Code, 2016, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.

The Adjudicating Authority on receipt of an application and, on being satisfied that evidence or action relating to assets, is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a Court or an authority of such Country competent to deal with such request. [Section 235]

Accordingly, in the given case, order of the Adjudicating Authority of rejection of filing an application under IBC, 2016 by MCL (a Company registered in Germany) is not in order because as per Section 235, the Adjudicating Authority on receipt of an application on being satisfied that evidence or action relating to assets, is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a Court or an authority of such Country competent to deal with such request.

(ii)

Section 53 of the Insolvency & Bankruptcy Code, 2016 lays the provisions related to distribution of assets or the proceeds from the sale of the liquidation assets. Distribution of proceeds from the sale of the liquidation assets: The proceeds from the sale of the liquidation assets shall be distributed in the following order of priority —

(a) the insolvency resolution process costs and the liquidation costs paid in full;
(b) the following debts which shall rank equally between and among the following :—
    i. workmen's dues for the period of 24 months preceding the liquidation commencement date; and
    ii. debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
(d) financial debts owed to unsecured creditors;
(e) the following dues shall rank equally between and among the following:—
    i. any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
    ii. debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
(f) any remaining debts and dues;
(g) preference shareholders, if any; and
(h) equity shareholders or partners, as the case may be.

Realisable value of the fixed assets + realisable value of receivables (50% of Rs. 225 lakhs) + Bank Balance Amount= (Rs 2800 + 112.5 + 22.5) lakhs = Rs. 2935 lakhs
Less outstanding wages to workmen = Rs.75 lakhs*
Less unpaid dues on account of statutory employer's contribution treating as workmen's dues = 30 lakhs
Less amount debts owed to a secured creditor** = (1500 + 1050) = Rs. 2550 lakhs
Less Loan taken from Mr. X = 75 lakhs
Balance amount available = 2935 – (75+30+2550+75) lakhs = 205 lakhs (which to be shared between SSTPL and ACL***)

Therefore, amount receivable by SSTPL (205 / 980**x905) = Approx. Rs. 189.31 lakhs.**

* It is assumed that outstanding wages of Rs. 75 Lakhs due to the workmen relate to the period of 24 months preceding to the date of commencement of liquidation. [The question does not mention the date of commencement of liquidation. Moreover, the term IRP needs to be replaced by the term Liquidator since it is a case of Liquidation of a Corporate Person].

** It is assumed that the both the banks have relinquished their security interest and their securities have been realized by the Liquidator for inclusion in the Liquidation estate. [In fact, consolidated amount of Rs. 2800 lakhs being the realizable value of fixed assets validates this assumption.]

***In respect of MCL, a Company registered in Germany, the Adjudicating Authority (AA) has rejected its application filed under IBC, 2016. Further, no direction has been issued by the AA regarding the outstanding amount of Rs. 400 lakhs. MCL has also not approached the Appellate Authority for revival of rejected application. No stay order has been issued favouring MCL. In addition, MCL has not filed any suit in Germany against DMPL for recovery of dues till the date of commencement of liquidation. In such a case, from the facts of the quest ions which are not elaborated in nature and from the limited information available, MCL cannot be treated as an operational creditor at par with SSTPL or ACL.

**** After considering SSTPL (Rs. 905 lakhs) and ACL (Rs. 75 lakhs) as operational creditors.

(iii)

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on or decision taken by any association of enterprises or association of persons, including cartels' engaged in identical or similar trade of goods or provision of services shall be presumed to have an adverse effect on competition which:

(a) directly or indirectly determines purchase or sale prices
(b) limits or contracts production, supply, markets, technical development, investment or provision of services
(c) Shares the market or source of production or provision of services by way of allocation of geographical area of market / type of goods or services / number of customers in the market / any other similar way.
(d) directly or indirectly results in bid rigging or collusive bidding

Any agreement entered into between enterprises or persons at different levels of the production chain in different markets in respect of production, supply, distribution, storage, sale or price of trade in goods or provision of services shall be a void agreement if it causes or is likely to cause an appreciable adverse effect on competition in India including:

(a) Tie-in agreement
(b) Exclusive supply agreement
(c) Exclusive distribution agreement
(d) Refusal to deal
(e) Resale price maintenance

Accordingly the clauses proposed in the revise draft agreement by SSTPL, is limiting and restricting to the production of goods or provision of services or market therefore specifying geographical areas where dealers can market the cars , restricting technical or scientific development relating to goods or services to the prejudice of consumers; resulting in denial of market access by limiting the operations of service centers, bar on the transactions of car and spares between dealers themselves, imposes unfair price in purchase or sale by mandating floor price, higher pricing of substitutable products and services and imposing the dealers to acquire certain numbers of cars while ordering high end variants

These all terms of agreement entered by SSTPL with dealers shows the abuse of dominant position as per section 4 of the Competition Act, 2002.

Past Exam/Nov 2020/Case Study-4
(PBPTA, Competition)
The decade of 1960

The decade of 1960 was known as the golden period for goldsmiths in India and there was tremendous interest in the minds of the people to buy and wear gold jewelry. Hard work and expertise in making this jewelry made many goldsmiths millionaires in a very short period. Two such goldsmiths were Mr. Selva Chetty and Mr. Thiagu Chetty, brothers who lived in Sivaganga district, Tamil Nadu. Using the boom period, the Selva ventured to start several new business, one of which was a small real estate company called Gangaikondan Holiday Properties Limited (GHPL).

In the year 1970, Mr. Thiagu migrated to the United Kingdom and started his jewelry business there. He used to visit India every year and give substantial sums to Mr. Selva to invest in India on behalf of Mr. Thiagu and for his benefit to use once he comes back to India Mr. Selva mentioned to him that it may be worthwhile to invest the money in buying large tracts of landnear Sivaganga and the same is expected to appreciate significantly in the next 10 years. Mr. Thiagu was very much interested in this and therefore, in the year 1989, Mr. Selva purchased 10 acres of land from the Government in his name, in the capacity as fiduciary relationship/trustee of Mr. Thiagu and hold the property on behalf of and for the benefit of Mr. Thiagu. Mr. Selva used the land for cultivation of crops and was using the crops for his consumption and for sale. The proceeds from the sale was deposited by Mr. Selva in his bank account.

In the meantime, Mr. Selva got married and was blessed with a son Mr. Venkat. In the year 1971, when Mr. Venkat was 6 years old, Mr. Selva acquired a new residential house comprising of 4 individual units in the name of Mr. Venkat since he felt that buying the new home in his son's name will be auspicious for Mr. Selva and the new home. For this purpose, Mr. Selva took a 5 year loan from Bank of Sivaganga and was repaying the loans promptly on the due dates and got back the title deeds from the Bank once the loan was repaid. The new home was occupied by Mr. Selva and his family and Mr. Selva rented out 2 portions on rent to tenants. Mr. Selva paid the property taxes for the property and maintained the property on his own account. In 1980, Mr. Selva was blessed with another child who was named Ms. Bhagyalakshmi. In 1984, Mr. Selva prepared his will as per which he considered that the residential house will belong to Mr. Venkat and Ms. Bhagyalakshmi in equal measure, which was not disclosed to anyone.

GHPL commenced construction of a large apartment complex in an upcoming industrial belt of Sivaganga. There was tremendous expectation that several large companies were going to set up factories in the location and therefore, the demand for housing expanded significantly. A lot of housing companies commenced projects in the location.

In one of the discussions between the real estate companies, GHPL was approached by other leading real estate developers who were constructing high rise apartments in the vicinity to have a tacit (unwritten) understanding for jacking up the prices of the apartments and also in unbundling of the open car parking given to the allottees from the total price and charging separately for the same. This would help the companies in providing the best-in-class facilities to the apartment buyers at the same time ensure good profitability for the companies.

GHPL did not immediately agree to the same but wanted to evaluate the implications of such an agreement. One of the real estate developers wanted to extend the understanding to the infrastructure projects by these companies in UAE also (since many of them are constructing homes in UAE as well).

In the year 1986, Mr. Venkat got married and declared that he is the absolute owner of the residential house since the house is in his name and was purchased by his father in his name purely for his benefit when he was a minor and to help him settle down in his life. He then asked for vacation of the property by Mr. Selva and his family as well as the tenants. Mr. Selva was enraged by this act of Mr. Venkat and filed a suit for declaring the property as a benami property where Mr. Venkat was a benamidar and he was the rightful owner of the same. They discussed the matter with various consultants for determination of a benami transaction as decided by Hon'ble Supreme Court of India.

In May 2017, GHPL is evaluating the acquisition of another large real estate company in Sivaganga and is contemplating the implications of the Competition Act, 2002 in this regard.

ANSWER THE FOLLOWING QUESTIONS:

1. The CFO of GHPL seeks your views to understand which of the following would not be a violation of the provisions of the Competition Act, 2002?

(A) Predatory Pricing.
(B) Limiting production of goods.
(C) Agreement for Protection of rights under the Designs Act, 2000.
(D) Denial of market access.

2. What is the term of the members of the Competition Commission under the Competition Act, 2002 which is reviewing the agreement / tacit understanding between the real estate companies in the case study?
(A) 5 years, eligible for re-appointment for one more term.
(B) 5 years, eligible for re-appointment.
(C) 5 years, not eligible for re-appointment.
(D) Upto the discretion of the Central government.

3. Assuming that the acquisition of another real estate company by GHPL happened in the year 2019, what is the maximum amount of assets and revenue that can be acquired by GHPL for being accepted from the provisions of Section 5 of the Competition Act, 2002
(A) Post-acquisition (incl. GHPL) asset value off ₹ 350 crore and ₹1000 crore respectively.
(B) Asset value off ₹ 350 crore and turnover off ₹ 1000 crore of the target entity being acquired.
(C) Post-acquisition (incl. GHPL) value off ₹ 1000 crore or turnover of ₹ 3000 crore of the target entity.
(D) Asset value off ₹ 350 crore or turnover of ₹ 1000 crore of the target entity being acquired.

4. Assuming that the proposed combination is covered under Section 5 of the Competition Act, 2002, and GHPL gave notice to the Commission on 15th May, 2018, what is the latest date by when the combination will come into effect (no orders have been passed by the Commission)?
(A) 13th August 2018.
(B) 15th May 2019.
(C) 11th December 2018.
(D) 11th November 2018.

5. Under the Prohibition of Benami Property Transactions Act, 1988, who is responsible for issuing notice for furnishing evidence to Selva and Venkat?
(A) Approving Authority
(B) Adjudicating Authority.
(C) Initiating Officer
(D) Administrator.

6. Answer the following questions:
(I) Discuss the judicial pronouncements on tests for determination of a benami transaction as decided by Hon'ble Supreme Court of India under Prohibition of Benami Property Transactions Act, 1988.

(II) Analyse the case with regard to Mr. Selva's contention regarding the house purchased by him in the name of Mr. Venkat and Mr. Selva's rights under the Prohibition of Benami Property Transactions Act, 1988 to recover the property.

(III) GHPL reaches out to you for your advice regarding the proposal from the other real estate developers under the Competition Act, 2002.

ANSWER TO CASE STUDY 4

1. Option (C)
2. Option (B)
3. Option (C)
4. Option (B)
5. Option (A)

DESCRIPTIVE ANSWER

6.

(I) Judicial pronouncements on tests for determination of a benami transaction:

In the matter of Bhim Singh & Anr vs Kan Singh (And Vice Versa) 1980 AIR 727, 1980 SCR (2) 628, the Hon'ble Supreme Court of India, observed –

The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus:

(a) The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction;

(b) if it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary;

(c) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and

(d) the question as to what his intention was has to be decided on

(i) the basis of the surrounding circumstances,

(ii) the relationship of the parties,

(iii) the motives governing their action in bringing about the transaction and

(iv) their subsequent conduct etc.

All the four factors stated above may have to be considered cumulatively [O P Sharma vs. Rajendra Prasad Shewda & Ors. (CA 8609-8610 of 2009) (SC)].

In the matter of Valliammai(D) by LRS.V.Subramaniam and Others (2004) 7 SCC 2330 the Honorable Supreme Court observed that the essence of a benami transaction is the intention of the party or parties concern and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him nor justify the acceptance of mere conjectures or surmises as a substitute for proof.

(II) "Benami transaction" as per Section 2(9) of the Prohibition of Benami Transaction Act, 1988 means, a transaction or an arrangement where the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual.

In the instant case, Mr. Selva purchased the house in the name of his son Mr. Venkat through a 5 year bank loan and used 2 units for his family and rented out 2 portions on rent.

In the light of the above provisions, the said transaction is not a benami transaction and Mr. Venkat is not a benamidar and is a real owner.

Right of Mr. Selva under Section 4 of the PBPTA, 1988

No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shal l lie by or on behalf of a person claiming to be the real owner of such property.

Moreover, the transaction in question was registered in the year 1978. The suit was filed in the year 1986, which was before coming into force of the PBTP Act in 1988. Since, the PBTP Act cannot have any retrospective applicability.

Accordingly, Mr. Selva's right is prohibited to recover the property.

(III) As per Section 3 of the Competition Act, 2002, any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, shall be presumed to have an appreciable adverse effect on competition, which—

(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding.

However, any agreement entered into by way of joint ventures, if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services, shall not be considered to be an anti-competitive agreement.

Therefore the proposal of other leading real estate to have understanding with GHPL, in the light of facts, will increase efficiency in providing best class facilities to the apartment buyers and at the same time ensure good profitability for the companies. This proposal shall not be an anti-competitive agreement.

Past Exam/Nov 2020/Case Study-5
(PMLA, FEMA)
office of WWL Mumbai

An Investigation was carried out at the office of WWL Mumbai by the Assistant Director under the Prevention of Money Laundering Act, 2002, in the process they came across violation of the FEMA, 1999. The Assistant Director discussed the case with you and apprised the matter as under:-

WWL is based in Mumbai and is India's premier watch manufacturing company and specializes in designing and manufacturing high-end watches. Its products are sold across premier stores in India and abroad. WWL was established by Mr. Virender Kohli, a first-time entrepreneur. The marketing department of WWL introduced new models in the past 4 months and expects these watches to be a major attraction in the global markets especially UK, France and US markets. For the purpose of advertisements, WWL engaged the services of Mr. George Mckenzie, a prominent NBA player and Ms. Rudy Hobbs, a Miss Universe winner and agreed to pay a "guaranteed" fee of USD 1,000,000 each plus 5% bonus based on the sales of the new models in 1st year. The marketing strategy was highly successful and Virender earned a significant amount through the sale of 10% stake in WWL to a private equity investor.

This was invested in his various businesses to acquire agricultural farm land (to grow and export opium), acquiring and selling (export) of antiquities etc. A Marks majority of his dealings on the farm and antiquities businesses were done through cash transactions or through a specific bank account maintained with ABC Bank Limited. Amounts were received in cash from his international customers through a hawala agent known to Mr. Virender. He also purchased villas in India and in Spain using the money earned through his farm and antiquities businesses. Mr. Virender also established Sure Returns Private Limited, a small non-banking finance company for securing the lives of his employees and their families. Virender invested an amount of ₹5 crore in Sure Returns out of the funds received from his antiquities business.

WWL sent 10 watches to his 500 dealers abroad, clearly marked as riot for sale and other promotional material, for display in dealer shops etc. The value of the items were approximately INR 6 crore. He also sent 1 WATCh for each of his dealers as a token of gift and appreciation (total value of INR 40 lakh). The CFO of WWL is of the view that since these products have been sent free of cost and not for sale, these need not be included in the export declaration to be filed by WWL.

Mr. Virender attended one of the manufacturing conferences held in Mumbai, in which he met one Mr. Alex Smith, who runs a watch designing studio in Italy and showed quite a few exhibits to Mr. Virender. Mr. Virender was impressed by the designs and the prices quoted by Alex. Alex was also amenable to receive funds in cash in India through an intermediary and then provide the material to Virender from Italy. Based on same, Mr. Virender arranged for making cash payment upto INR 3 crore to an intermediary in Delhi & the material was received from Alex in a month. During his visit to India, Alex noted that his Euro passport got expired and he did not realise the same. Since he did wanted to leave India immediately, he got in touch with a travel agent, who helped him get a forged passport, for which Mr. Alex paid INR 3 lakh in cash.

In order to clear the imported material critical for its manufacturing process, WWL used cash amounting to INR 30 lakhs to pay amounts to various intermediaries to facilitate timely and smooth import process and the amounts were paid by the intermediaries to Mr. Raghav Kapoor. Using this money, Mr. Raghav purchased a 1 acre farm house in Munnar in the name of his spouse, Ms. Anu Kapoor, who was not aware of the source of the funds and was residing in the farm house along with her parents. The ED, as part of the proceedings against Mr. Raghav Kapoor sought to attach and confiscate the farm house owned / purchased in the name of Ms. Anu. This was challenged by Mr. Raghav on the basis that this property was owned and possessed by Anu who is not charged under a scheduled offence under the PMLA, 2002. With Mr. Alex's help, Mr. Virender transferred an amount of INR 260 lakh to an intermediary in Delhi and invested the amount to incorporate a shell company in the Isle of Mann. The funds were then transferred back by the Shell Company to the bank account of WWL. For this, WWL raised export invoices in its books on the Shell Company for providing professional services relating to watch designing. Based on these invoices, WWL claimed export incentives under the relevant laws in India and received INR 15 lakh as export incentive.

On 30th March 2018, WWL made a large sale to one of the dealers in Switzerland for EURO 8 million and had received EURO 3 million by 15th May 2018 and did not receive the balance EURO 5 million until 30th October 2018, i.e. 7 months from the date of sale. After several reminders and threating calls to stop further shipment, another EURO 1 million was received on 10th October 2018 and the balance remained outstanding as at 31st December 2018. The CFO of WWL reaches out to Mr. Z and seek Mr. Z support to evaluate the level of compliances as stipulated under the Foreign Exchange Management Act, 1999.

Based on investigation carried out, the Assistant Director sought to arrest Virender and also wanted to attach the property for contravention of provision of Prevention of Money laundering Act, 2002 (in short 'PMLA, 2002')

After the discussions the Assistant Director sought your views on powers for attachment of property involved in money-laundering and on punishment for the offence of money laundering under the provisions of Prevention of Money Laundering Act, 2002.

ANSWER THE FOLLOWING QUESTIONS:

1. Out of the below, which are the items that require inclusion in the export declaration by WWL under the, Foreign Exchange Management Act, 1999?
   (A) Goods imported free of cost for re-export.
   (B) Publicity materiality supplied free of cost; ·
   (C) Gift of goods for a value of INR 10 lakh.
   (D) Unaccompanied personal effects of travellers.

2. Out of the below, what is not part of the responsibility of ABC Bank Limited under the Prevention of Money Laundering Act, 2002?
   (A) Report suspicious transactions undertaken by Mr. Virender and the Group;
   (B) Furnish all-information requested by the Director;
   (C) Verify the identity of the clients and beneficial owners;
   (D) Maintain records of transaction for a period of 5 years;

3. A friend of Mr. Virender is an Indian citizen resident outside India, is seeking to transfer his agricultural property held by him in India. Who can he transfer the property to?
   (A) Any person resident in India.
   (B) Any person resident outside India if he is a citizen of India or a person of Indian origin.
   (C) Any person resident in India and any person resident outside India if he is a citizen of India or a person of Indian origin.
   (D) Neither any person resident in India nor any person resident outside India if he is a citizen of India or a person of Indian origin.

4. Mr. Virender bought gold watches worth INR 25 lakh from Italy through the green channel which he asked his Italian dealer to pay and deduct from their monthly payments to WWL. Is this an offence under the Prevention of Money Laundering Act, 2002?
   (A) Yes, because he came through the green channel and evaded duty of customs.
   (B) No, whilst it is an offence, it is not actionable under the Prevention of Money Laundering Act, 2002.
   (C) No, since he did not pay any cash for the purchase.
   (D) Yes, since import of gold items from European countries requires specific consent as per the agreement entered with foreign countries as per Sec 56 Prevention of Money Laundering Act, 2002.

5. Does the Assistant Director have powers to arrest a person under the PMLA, 2002?
   (A) Director or Deputy Director or Assistant Director have the powers to arrest an offender without prior approval of Central Government
   (B) Any arrest under the Prevention of Money Laundering Act, 2002 requires the prior approval of the Central Government
   (C) Only a Director or Deputy Director have the powers to arrest without prior approval of the Central Government
   (D) Any arrest under the Prevention of Money Laundering Act, 2002 requires the prior approval of the special court.

6.

(I) The Enforcement Directorate wanted to take your view on powers for attachment of property involved in money-laundering and your views on punishment for the offence of money laundering under the provisions of the Prevention of Money Laundering Act, 2002. Express your views on the same.

(II) The Enforcement Directorate, as part of the proceedings against Mr. Raghav Kapoor sought to attach and confiscate the farm house owned /purchased by Anu, This was challenged by Mr. Raghav on the basis that this property was owned and possessed by Anu who is not charged under a scheduled offence under the Prevention of Money Laundering Act, 2002. Advice Mr. Raghav on the validity or otherwise of his contention.

(III) The CFO of WWL reaches out to Mr. Z and seek Mr. Z support to evaluate if there is a non-compliance under the Foreign Exchange Management Act, 1999 regarding the sale made to the dealer in Switzerland and the receipt of the proceeds and if so, the quantum, the consequences and the future course of action that needs to be taken by WWL relating to the same.

ANSWER TO CASE STUDY 5

1. Option (C)
2. Option (A)
3. Option (A)
4. Option (A)
5. Option (B)

DESCRIPTIVE ANSWERS

6.

(I) Attachment of property involved in money-laundering [Section 5 of the Prevention of Money Laundering Act, 2002]

1. Where the Director or any other officer (not below the rank of Deputy Director authorized by the Director) for the purposes of this section, has reason to believe on the basis of material in his possession, that—
   (a) any person is in possession of any proceeds of crime; and
   (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

   he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

   Conditions for Attachment: Provided that no such order of attachment shall be made unless, in relation to the scheduled offence:
   - a report has been forwarded to a Magistrate u/s 173 of the Code of Criminal Procedure, 1973, or
   - a complaint has been filed by a person authorized to investigate the offence mentioned in that Schedule, before a Magistrate or Court for taking cognizance of the scheduled offence, as the case may be, or
   - a similar report or complaint has been made or filed under the corresponding law of any other Country.

2. The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment forward a copy of the order, along with the material in his possession, to the Adjudicating Authority, and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.
3. Every order of attachment made shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (3) of Section 8, whichever is earlier.
4. The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

   Section 4 provides for the Punishment for Money-Laundering - 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.

   But where the proceeds of crime involved in money-laundering relate to any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985, the Max punishment may extend to 10yrs instead of 7yrs.

(II) **Section 2(1)(u) of the Prevention of Money Laundering Act, 2002 ,** "proceeds of crime" can be understood as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken/held outside the country, then the property equivalent in value held within the country or abroad.

As per the stated facts, farm house was purchased by Mr. Raghav on the name of his spouse Ms. Anu who was not aware of sources of the funds. ED sought to attach the farm house and confiscate as a part of proceeding against Mr. Raghav. Here the contention of Mr. Raghav is not valid because the said property was derived from the proceeds of crime.

(III) Period within which export value of goods/software/ services to be realized: -

(I) The amount representing the full export value of goods / software/ services exported shall be realized and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time.

(a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time;

(b) further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the said period, as the case may be.

Delay in Receipt of Payment:

Where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,

(a) the payment therefor if the goods or software has been sold and
(b) the sale of goods and payment thereof, if goods or software has not been sold or reimport thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf;

Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

Quantum: In the given case, out of total sale of EUR 8 million, an amount of EUR 4 million was received within the stipulated time period of 9 months and the balance EUR 4 million is outstanding for a period of more than 9 months. Accordingly, WWL is required to apply for an extension of time with the Authorized Dealer giving sufficient and reasonable reasons for the delay in receipt.

As per Section 8, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank. WWL will act in compliance with the above provisions.

Past Exam/Jan 2021/Case Study-1
(IBC, Competition Act)
TJSB Sahakari' Bank: Ltd

Part—A:

TJSB Sahakari' Bank Ltd. (hereinafter called 'Petitioner') has sought the Corporate Insolvency Resolution Process of M/s. Unimetal Castings Ltd. (hereinafter called the 'Corporate Debtor') on the ground, that the Corporate Debtor committed default in repayment of loan facilities granted to the Corporate Debtor to the extent of ₹ 6,38,78,417/- including interest of ₹ 2,07,95,568/-, under Section 7 of IBC, 2016 (hereafter called the "Code') r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

The Petition reveals that the following credit facilities were sanctioned on 25-02-2013 to the Corporate Debtor by SVC Bank consortium wherein the Petitioner Bank is the consortium member:

Sr. No	Facility	By TJSB (Petitioner Bank)	By SVC Bank
1	CC Limit	60,00,000	3,90,00,000
2	OBD limit	-	1,00,00,000
3	Term Loan 1	45,50,000	1,63,80,000
4	Term Loan 2	90,00,000	75,55,000
5	Term Loan 3	1,11,50,000	36,90,000
6	Term Loan 4	50,00,000	1,77,81,000
7	Term Loan 5	1,50,00,000	-
Total		5,10,00,000	9,44,06,000

The Petitioner on 04-08-2015 issued recall notice to the Corporate Debtor under the provisions of Multistate Co-Operative Societies Act, 2002 and further issued SARFAESI notice on 29-03-2016.

The Corporate Debtor submitted that:

(a) It is a medium enterprise as defined under the Micro, Small and Medium Enterprises Development Act, 2006 ((MSMED Act').

(b) The declaration of the account of the Corporate Debtor as Non-Performing Asset ('NPA') w.e.f. 30-06-2015 is illegal, void and non-est as the same is in contravention of Regulations and Circulars issued by the Government, Reserve Bank of India, etc.

(c) The claim of ₹ 6,38,78,417 as claimed in the Petition is not due and payable by the Corporate Debtor.

(d) The Corporate Debtor being a medium enterprise is statutorily recognized as extremely important for the national economy and certain rights are provided u/s 9, 10 of MSMED Act.

(e) The Corporate Debtor is entitled to request the consortium members including the Petitioner herein for restructuring the credit facilities as provided under RBI guidelines such as "Prudential guideline on restructuring of advances by banks" and "Guidelines for rehabilitation of sick, micro and small enterprises". The Central government has also notified the "Framework for revival and rehabilitation of micro, small and medium enterprises". Despite the request of the Corporate Debtor in the year 2014 and 2015 the Petitioner or any other Financial Institution has not made any attempts to restructure the facilities granted to the Corporate Debtor.

(f) Consequent to the meeting of the District Level Sick Unit Rehabilitation Committee held on 15-03-2016 under the chairmanship of the District Collector of Kolhapur and the meeting convened by the Joint Director of Industries, Pune, the petitioner by necessary implications agreed to undertake the exercise of getting the requisite Eco-Techno viability report of the Corporate Debtor in order to assist the eligibility/entitlement for the purpose of availing the rehabilitation program but the petitioner failed to do that.

(g) The issue of SARFAESI dated 29-03-2016 by the petitioner under section 13(2) of the SARFAESI Act, 2002 shows their high handedness in exploiting its dominant position vis-a-vis the Corporate Debtor.

The Corporate Debtor further contended that, the claim of the Petitioner is barred under Article 137 of the Limitation Act since whilst the date of alleged default was on 30-06-2015 i.e. the date on which the account was declared as Non-Performing Asset (NPA), the cause of action (i.e. the actual default) would have arisen much prior to the date of NPA. Hence, the period of limitation would run starting even prior to 30-06-2015 and since this Petition was filed on 23-08-2018 this Petition is barred by limitation.

For the above contention of the Corporate Debtor, the Petitioner submitted that the loan was shown in the balance sheet of the Corporate Debtor which is an acknowledgement of liability and hence the debt is not barred by limitation. The Corporate Debtor has not disputed the fact that the loan was shown as a liability in the balance sheet of the Corporate Debtor.

The adjudicating authority having satisfied with the fact that the Corporate Debtor defaulted in making payment towards the liability to the petitioner, ruled that the petition deserves to be admitted under IBC 2016.

Another operational creditor, M/s. Wonder Bearings Limited, who underwent a corporate insolvency resolution process which got completed on 15-03-2016, filed a petition under IBC 2016 on 10-05-2017 with regard to its dues from Unimetal Castings amounting to ₹ 1,50,80,000.

The Petitioner "TJSB Sahakari Bank Limited" seeks your view on the various provisions of The Insolvency and Bankruptcy Code, 2016 with regard to above matter.

Part-B:
In another independent development various appeals were filed by the appellants/suppliers against the orders passed by the Hon'ble Competition Appellate Tribunal (hereinafter referred to as COMPAT) before the Hon'ble Supreme Court of India. The COMPAT, by the said judgment, has upheld the findings of the Competition Commission of India (for short, CCI) that the appellants/suppliers of Liquefied Petroleum Gas (LPG) Cylinders to the Indian Oil Corporation Ltd. (for short, IOCL) had indulged in cartelization, thereby influencing and rigging the prices, thus, violating the provisions of Section 3(3)(d) of the Competition Act, 2002 (for short, the Act).

These suppliers have filed the instant appeals on the ground that there was no cartelization and they have not contravened the provisions of the Act. For the sake of convenience these suppliers will be referred to as the appellants hereinafter. We may point out at the outset that all these appellants are manufacturing gas cylinders of a particular specification having capacity of 14.2 kg. which are needed for use by the three oil companies in India, namely, IOCL, Bharat Petroleum Corporation Ltd. (BPCL) and Hindustan Petroleum Corporation Ltd. (HPCL) [all are public sector companies].

It is also a matter of record that apart from the aforesaid three companies there are no other buyers for these cylinders manufactured by the appellants. Insofar as IOCL is concerned, it is a leading market player in LPG as its market share is 48₹, Thus, in case a particular manufacturer is not able to supply its cylinders to the aforesaid three companies, there is no other market for these cylinders and it may force that company to exit from its operations. The technical bid of the subject tender was opened on 3-3-2010 and the price bids of 50 qualified bidders were opened on 23-3-2010. According to the Director General, there was a similar pattern in the bids by all the 50 bidders who submitted price bids for various States. The bids of a large number of parties were exactly identical or near to identical for different States. The Director General had observed that there were strong indications of some sort of agreement and understanding amongst the bidders to manipulate the process of bidding.

As per the Director Generals report, the process of bidding followed by the IOCT in the tender was as under:

- The bidders would submit their quotations with the bid documents.
- The existing bidders, who were existing suppliers, were required to submit the price bids and technical bids.
- The bidders were to quote for supplies in different States of India in keeping with their installed capacity.
- After price bids were opened the bidders were arranged according to the rates in the categories of L-1, L-2 and L-3.
- The rates for the supplies in different States were approved after negotiations with L-1 bidder. In case the L-1 bidder could not supply a required number of cylinders in a particular State, the orders of supplies went to L-2 and also L-3 bidder or likewise depending upon the requirement in that State as per fixed formula provided in the bid documents.

The Director General after analyzing the bids came to the conclusion that there was not only a similarity of pattern in the price bids submitted by the 50 bidders for making supply to the IOCL but the bids of large number of parties were exactly identical or near identical in different States. It was also found that bidders, who belonged to same group, might submitted identical rates.

The similarity of the rates was found even in case of bidders whose factories and offices were not located at one and the same place in the States and where they were required to supply was far off from their factories located in different place.

The D.G. had found further that though the factors like market conditions and small number of companies were different, there was large scale collusion amongst the bidding parties, He also arrived at a finding to the effect that the LPG Cylinder Manufacturers had formed an Association in the name of Indian LPG Cylinders Manufacturers Association and the members were interacting through this Association and were using the same as a platform. The date for submitting the bids in the vase of the concerned tender was 3-3-2010 and just two days prior to it, two meetings were held on 1st and 2nd March, 2010 in Hotel Sahara Star in Mumbai. As many as 19 parties took part and discussed the tender and, in all probability, prices were fixed there in collusion with each other. The D.G., reported that the bidders had agreed for allocation of territories, e.g., the bidders who quoted the bids for Western India had not generally quoted for Eastern India and that largely the bidders who quoted the lowest in the group in Northern India, had not quoted generally in Southern India. The D.G. also concluded that this behavior created entry barrier and that there was no accrual of benefits of consumers nor were there any plus factors like improved production or distribution of the goods or the provision of services.

Ultimately, the D.G. came to the conclusion that there was a cartel like behavior on the part of the bidders and that the factors necessary for the formation of cartel existed in the instant case. It was also found that there was certainly a ground to hold concerted action on the part of the bidders. The D.G. had also noted that the rates quoted for the year 2009-10 and in years previous to that were also identical in some cases. Thus, he came to the conclusion that the bids for the year 2010-11 had been manipulated by 50 participating bidders. It was thereafter that the CC] decided to supply the D.G.s investigation report to the concerned parties and invite their objections.

The Director General seeks your advice in light of Petition filed before the Hon'ble Supreme Court of India against the order passed by the Hon'ble Competition Appellate Tribunal.

ANSWER THE FOLLOWING QUESTIONS:

1. TJSB Sahakari Bank would like your views on which of the following will not be considered as insolvency resolution costs under the Code :
   (A) The amount of any interim finance and the costs incurred in raising such finance;
   (B) The fees payable to any person acting as a resolution professional:
   (C) Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional;
   (D) Any costs incurred at the expense of the Government to facilitate the insolvency resolution process.

2. When can the COC of Unimetal Castings Ltd. take the decision to liquidate the Company?
   (A) by simple majority any time during the resolution process but not before the confirmation of the resolution plan and preparation of the information memorandum;
   (B) by 2/3 majority any time during the resolution process but before the confirmation of the resolution plan and preparation of the information memorandum;
   (C) by 2/3 majority any time during the resolution process but not before the confirmation of the resolution plan and preparation of the information memorandum;
   (D) by 3/4 majority any time during the resolution process but before the confirmation of the resolution plan and preparation of the information memorandum.

3. Is Wonder Bearings Ltd eligible to initiate insolvency resolution process against Unimetal Castings Ltd?
   (A) Not eligible, since requirement is to have completed the resolution process 24 months preceding the date of application;
   (B) Eligible, there is no bar for a company who underwent insolvency resolution process to initiate proceedings as long as the other requirements (existence of debt etc.) under IBC 2016 is met;
   (C) Eligible, since requirement is to have completed the resolution process 12 months preceding the date of application;
   (D) Not eligible, prior consent of the adjudicating authority is required for filing an application for insolvency process by Wonder Bearings, since it has itself undergone an insolvency process.

4. Which of the following is not the objective of Competition Act, 2002?
   (A) Promote practices having adverse effect on Competition;
   (B) Sustain competition in market;
   (C) Protect the interest of consumers;
   (D) Ensure freedom of trade for Indian and foreign players in markets in India,

5. An Association of manufacturers of die cast products will not be considered as a cartel if the objective of the association is to:
   (A) limit the distribution of die cast material only to petroleum industry in view of the huge demand and higher realization;

(B) regulate the production of die cast products to ensure optimal sale prices;
(C) represent the industry issues on a collective basis to the government;
(D) monitor and regulate the number of dealers in each state/city.

6. Analyze and answer the following questions in the context of the case study:
   i. Evaluate the position taken by the adjudicating authority that the petition deserves to be admitted having satisfied with the fact that Unimetal Castings has defaulted in making payment towards the liability to the petitioner.
   ii. In light of the provisions of the Competition Act 2002, whether there was any collusive agreement between the participating bidders which directly or indirectly resulted 'in bid rigging of the tender floated by IOCL?
   iii. Unimetal Castings Ltd. seeks your views regarding the impact of the clarifications issued by Ministry of Corporate Affairs (MCA) regarding approval of resolution plans under section 30 and 31 of Insolvency & Bankruptcy Code, 2016 vide general circular (GC) dated 25" October, 2017.
   iv. TJSB Sahakari Bank seeks your advice on the time-limit for completion of the insolvency resolution process as per IBC 2016.

ANSWER TO CASE STUDY

(1) (C)
(2) (B)
(3) (C)
(4) (A)
(5) (C)
(6)

(i) Given situation is based on the case law, B.K. Educational Services Pvt. Ltd. vs. Parag Gupta and Associates, of Supreme Court, Civil Appeal No.23988 of 2017, dated 11.10.2018, in which principle was laid down that the Limitation Act, 1963 is applicable to applications filed under Sections 7 and 9 of the Insolvency and Bankruptcy Code, 2016(Code) from the inception of the Code .i.e. from 28th May, 2016.

In the given case study, the Corporate Debtor, Unimetal Castings Ltd. contended as under:
   i. Claim of the Petitioner, TJSB Sahakari Bank Ltd. is barred under Article 137 of the Limitation Act, 1963.
   ii. Whilst the date of alleged default was 30.6.2015 (i.e. the date on which the account was declared as Non-Performing Assets (NPA)) and the cause of action (i.e. actual default) arises much prior to the date of NPA.
   iii. The period of limitation would have started even prior to 30.06.2015 and as the petition was filed on 23.08.2018, so it is barred by limitation.

As per the facts given in the case study, acknowledgement of liability in the Balance Sheet of the Corporate Debtor reflects that default has already occurred i.e on 30.6.2015 and the application for initiation of Corporate Insolvency Resolution process was filed on 23.08.2018.

Where the liability is shown in the balance sheet, it is a clear acknowledgement of debt by the Corporate Debtor as was held in Bajan Singh Sharma Vs Wimpy International Limited, 185(2011) DLT 428 and in many other judgements.

In the light of the aforesaid ruling, the limitation period of 3 years will begin from the date of coming of Code into enforcement i.e from 28th May 2016.

Therefore, the position taken by the Adjudicating Authority is correct and the petition deserves to be admitted since the application filed under Section 7 of the Code is within the limitation period and the Corporate Debtor has defaulted in making payment towards the liability of the petitioner

(ii) As per Section 3(3) of the Competition Act, 2002 the identical bid price is not possible unless there is some sort of prior and collective understanding. Further the contact and meeting between the members of IOCL and Association, before submission of bids is also valid evidence of the existence of an understanding among the parties.

In the case study as per given facts, it was found that there was large scale collusion amongst the bidding parties. LPG Cylinder manufacturers formed an association, Indian LPG Cylinder manufacturers Association and the members of IOCL were interacting through this association. Two days before the date of bids i.e. on 1st& 2nd March, 2010 two meetings were held and 19 parties took part and discussed the tender and prices were fixed there in collusion with each other. This resulted in bid rigging of the tender floated by IOCL.

In view of the above, it can be concluded that there was collusive agreements between the participating bidders which directly or indirectly resulted in bid rigging of the tender floated by IOCL.

(iii) Impact of Clarification Issued by MCA:

Vide General Circular IBC/01/2017 dated 25th October, 2017, Ministry of Corporate Affairs issued a clarification regarding approval of resolution plans under Section 30 and 31 of Insolvency and Bankruptcy Code, 2016.

The said clarification is sought in view of the requirement under Section 30(2)(e) of the Code for the resolution professional to confirm that each resolution plan received by him does not contravene any of the provisions of the law for the time being in force.

The matter has been examined in the Ministry in the light of provisions of Sections 30 and 31 of the Code which provide a detailed procedure from the time of receipt of resolution plan by the resolution professional to its approval by the Adjudicating Authority and there is no requirement for obtaining approval of shareholders/members of the corporate debtor during this process.

This clarification clears that the requirement of Section 30(2) (e) of the Code is to ensure that the resolution plan(s) considered and approved by the Committee of Creditors and the Adjudicating Authority is in compliant with the provisions of the applicable laws and therefore is legally implementable.

Section 31(1) of the Code further provides that a resolution plan approved by the Adjudicating Authority shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(iv) As per Section 12 of the Insolvency and Bankruptcy Code, 2016, the Corporate Insolvency Resolution Process (CIRP) shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

The Resolution Professional shall file an application to the Adjudicating Authority to extend the period of the Corporate Insolvency Resolution Process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the Committee of Creditors by a vote of sixty- six per cent of the voting shares.

On receipt of an application, if the Adjudicating Authority is satisfied that the subject matter of the case is such that CIRP cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days.

Provided that any extension of the period of CIRP shall not be granted more than once. Accordingly, in the said case, time limit for competition of CIRP, will be:

01	Petition for initiation of corporate insolvency resolution was filed on 23.08.2018
02	Insolvency resolution process will be commenced within 14 days i.e, latest by 01.09.2018
03	Insolvency resolution process will be completed by 180th day from insolvency commencement date (date of admission of the application) i.e., latest by 28.02.2019.
04	Further may extend till 29.05.2019.

Amendment of Section 12(3) of IBC(Amendment) Act, 2019

Section 12(3) of the IBC was amended by way of the Insolvency and Bankruptcy (Amendment) Act, 2019 and two provisos were added:

Proviso 1 states that a CIRP must mandatorily be completed within 330 days from the insolvency commencement date, including any extension of the period of the CIRP granted and the time taken in legal proceedings in relation to the resolution process.

Proviso 2 states that, when the CIRP of a Corporate Debtor (CD) has been pending for over 330 days, it must be completed within 90 days from the date of the amendment.

Thus, the overall timeline for completing a CIRP now stands at 330 days from the date of insolvency commencement date.

Past Exam/Jan 2021/Case Study-2
(PMLA, RERA)
Visio India Private Limited

Visio India Private Limited (Visio) is an upcoming watch manufacturing company and is based in Vishakapatnam. The Company was started during the year 2008 by Mr. Srinivas Kumar and his wife, Ms. Kruthi who is a Chartered Accountant.

In order to meet their expanding operations in Delhi, Visio had in the month of January 2014 pre-booked a commercial office unit of approximately 1200 sq.ft. with M/s JV Realty Limited, a leading developer in that area in their "SAPPHIRE COURT" Greater Noida project launched then by paying an amount of ₹ 25,00,000 as booking amount (50% of the total consideration) but no Builder-Buyer agreement was entered into between the parties except that an allotment letter was issued by the developer mentioning the unit details. This project was being developed over an area of approximately 15,000 sq. meters and having over 100 office units in its plan outlay,

Visio had paid almost 90% of the entire cost of the property based upon percentage of completion (progress) of the stage of construction as of April 2017 but the developer had failed to provide neither possession nor had completed the project and was also not responding to their complaints on one pretext or the other.

The legal counsel of Visio, Mr. Aswin Nakshatra, in the month of May, 2017 informed Ms. Kruthi about Real Estate (Regulation and Development) Act, 2016 (for short "the RERA"). He further informed that RERA was enacted by the Parliament as Act 16 of 2016 in the year 2016 and by May 1, 2017, all 92 provisions of the Real Estate (Regulation and Development) Act, 2016 (RERA or the Act) were brought into force. The Act has introduced new obligations on real estate developers and in cases of default, prescribes penal liabilities and Visio can contemplate bringing a legal suit against the developers under RERA.

JV Realty on the other hand is of the view that RERA is not applicable to this project as the same was launched and construction commenced much before the RERA came into force.

One of the group companies of JV Realty, Good Looking Homes Private Limited (GLHPL) was into construction of high rise apartment complexes & commenced a large project "Kailash Giri Views" in Vizag.

GLHPL took the approvals under RERA and came up with the marketing strategy including a 94 pages brochure consisting various pictures showing following features included in the project:

(a) Balcony at each floor.
(b) Drawing room to be constructed with designed tiles at floor.
(c) Italic Marble at bedroom.
(d) Granite at kitchen.
(e) Swimming pool at the top floor.
(f) All rooms to be Centrally Air-conditioned.
(g) All floors and lifts will have CCTV camera.
(h) Open parking slot for one car,
(i) Ground covering Net for Cricket and Football.
(j) Handover of the apartments within 36 months from date of agreement,

It was also mentioned in the marketing brochure that the building will have 9 floors with elevators and stair case and the total number of flats to be constructed would be 218 as approved by RERA,

For the purpose of various projects, JV Realty had obtained several loans from banks and financial institutions and there were certain allegations that some of the loan funds were siphoned off by the promoters of JV Realty for other purposes. In five different cases, banks and financial institutions had granted credit facilities against hypothecation / charge over certain assets. In each of these cases, JV Realty was charged under certain provisions of the PMLA (for offences under paragraph 2 of Part A of the Schedule) and orders were passed for attachment of properties charged to banks and financial institutions affecting their vested rights under other statutes such as Recovery of Debts and Bankruptcy Act (RDBA), Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act (SARFAES]) and Insolvency and Bankruptcy Code (IBC).

The adjudicating authority is of the view that:

- The provisions of PMLA prevail over RDBA, SARFAES] and IBC

- It is not only a "tainted property" that is to say a property acquired or obtained, directly or indirectly, from proceeds of criminal activity constituting a scheduled offence which can be attached, but also any other asset or property of equivalent value of the offender of money-laundering which has a link or nexus with the offence (or offender) of money- laundering.
- If the "tainted property" is not traceable, or cannot be reached, or to the extent found is deficient, any other asset of the person accused or charged under PMLA can be attached provided it is near or equivalent in value, the order of confiscation being restricted to take over by the government of illicit gains of crime.
- An order of attachment under PMLA is not illegal only because a secured creditor has a prior secured interest in the property, within the meaning of the expressions used in RDBA and SARFAESI. Similarly, mere issuance of an order of attachment under PMLA does not render illegal a prior charge of a secured creditor, the claim of the latter for release fromm PMLA attachment being dependent on its bonafides.
- In case of secured creditor pursuing enforcement of "security interest" in the property sought to be attached under PMLA, such secured creditor having initiated action for enforcement prior to the order of attachment under PMLA, the directions of such attachment under PMLA shall be valid and operalive subject to satisfaction of the charge of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.
- If the order confirming the attachment has attained finality or if the order of confiscation has been passed or if the trial of a case under Section 4 of the PMLA has commenced, the claim of a party asserting to have acted bonafide or having legitimate interest in the nature mentioned above will be inquired into and adjudicated upon only by the special court.

During the course of Kailash Giri View project, it was observed that whilst the construction was for 9 floors, the total flats constructed were 225 due to efficient realignment of the blocks and square feet area of the individual apartments. It was also observed that due to unavoidable reasons, the swimming pool could only be made at the ground floor only and would be allowed to those occupants only who will specifically pay for the swimming pool facility. On completion of 34 months, GLHPL sent an email to all allottees that due to unforeseen circumstances the project is getting delayed by 6 months as the structure is almost complete and the work related to interior, plastering, plumbing etc., will be completed very soon.

ANSWER THE FOLLOWING QUESTIONS:

1. Which of the following is not a condition to be fulfilled for attachment of the property of JV Realty for alleged offences under the PMLA?
   (A) Approval of the Special Court for the attachment;
   (B) Submission of report to a Magistrate under Section 173 of the Code of Criminal Procedures;
   (C) Filing of compliant for taking cognizance of the scheduled offence;
   (D) None of the options.
2. What is the punishment which Mr. Bala Ganesh, the managing director of 2 JV Realty is liable for under PMLA?
   (A) No punishment, since the offence was not performed personally by him;
   (B) minimum of 3 years and maximum of 7 years, with fine;
   (C) minimum of 3 years and maximum of 10 years, without fine;
   (D) minimum of 3 years and maximum of 10 years, with fine.
3. On receipt of a complaint under PMLA, if the adjudicating authority has reasons to believe that JV Realty has committed an offence under section 3 or is in possession of proceeds of crime, it may serve notice within not less than_____days calling upon them to indicate the source of their income, earnings or assets etc.
   (A) 15 days
   (B) 60 days
   (C) 30 days
   (D) 7 days
4. JV Realty has decided to charge an amount of ₹ 5,00,000 on Visio for an open car parking. Ms. Kruthi is of the view JV Realty cannot charge this amt since this is not mentioned in the original agreement
   (A) Yes, this cannot be charged since this is not mentioned in the original agreement between Visio and JV Realty;
   (B) Yes, this cannot be charged since JV Realty cannot charge for open car parking under RERA;
   (C) No, this can be charged since the requirement for non-charging for open car park under RERA is only for residential complexes and is not applicable for commercial office space;
   (D) This is purely based on mutual agreement between both parties.

5. As per RERA, what is the maximum amount of advance or application fee which can be collected by GLHPL from its customers ?
   (A) 15₹ of cost of apartment on entering into a Sale Deed:
   (B) 10₹ of cost of apartment on entering into a written agreement to sell;
   (C) 10₹ of cost of apartment on entering into a Sale Deed which is duly registered;
   (D) 10₹ of cost of apartment on entering into a written agreement to sell which is duly registered.

6. Analyze and answer the following questions in the context of the case study :

(i) In the light of the given case study, evaluate if Visio can initiate legal proceedings against JV Realty for their resultant rights towards delay in completion or whether the contention of the developer that RERA is not applicable to the Project is correct.

(ii) Discuss the provisions of powers of Director to impose fine under PMLA,2002

(iii) Based on the provisions of PMLA, analyse with reasons, the contentions of the adjudicating authority with regard to the following :

(a) Whether the provisions of RDBA, SARFAESI and IBC prevail over PMLA?

(b) Whether interest created in a property prior to event of money laundering leading up to the attachment of property takes priority over the attachment?

(c) Whether a mere nexus between the attached property where it did not qualify as "proceeds of crime" under the PMLA and the party accused of money laundering was sufficient for the attachment to take place ?

ANSWER TO CASE STUDY

(1) (A)
(2) (B)
(3) (C)
(4) (B)
(5) (D)
(6)

(i) Whether Visio can initiate proceedings against JV Reality?

According to Section 18 of the Real Estate (Regulation and Development) Act, 2016 (the Act),

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

However, where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms & conditions of the agreement for sale, he shall be liable to pay such compensation to allottees in the manner as provided in this Act.

In the case study, Visio had paid almost 90% of the entire cost of the property. The developer had failed to provide neither possession nor had completed the project.

Hence, Visio can initiate legal proceeding against JV Realty Ltd.

Whether the contention of the developer that RERA is NA to the project is correct ?

As per Section 3 of the Act, RERA applies to projects that are ongoing on the date of commencement of the Act and completion certificate has not been issued within a period of three months from the date of commencement of the Act. In the given case study, completion certificate of the project was not granted till April 2017 (even after RERA was formulated).

Hence, the contention of JV Realty Ltd. that RERA is not applicable to them, is incorrect.

(ii) Powers of director to impose fine under the PMLA, 2002

Section 13 of the Prevention of Money Laundering Act, 2002, deals with the powers of the Director to impose fine, which is as follows:

(1) **Inquiry from Director:** The Director may, either of his own motion or on an application made by any authority, officer or person, may make such inquiry or cause such inquiry to be made, with regard to the obligations of the reporting entity.

(2) **Audit of records on direction of director:** If at any stage of inquiry or any other proceedings before him, the Director having regard to the nature and complexity of the case, is of the opinion that it is necessary to do so, he may direct the concerned reporting entity to get its records, audited by an accountant (i.e. Chartered Accountant) from amongst a panel of accountants, maintained by the Central Government for this purpose.

(3) **Bearing of expenses:** The expenses of, and incidental to, any audit specified above shall be borne by the Central Government.

(4) **Failure in compliance with the obligations:** If the Director, in the course of any inquiry, finds that a reporting entity or its designated director on the Board or any of its employees has failed to comply with the obligations, then, he may-

(a) issue a warning in writing; or

(b) direct such reporting entity or its designated director on the Board or any of its employees, to comply with specific instructions; or

(c) direct such reporting entity or its designated director on the Board or any of its employees, to send reports at such interval as may be prescribed on the measures it is taking; or

(d) by an order, impose a monetary penalty on such reporting entity or its designated director on the Board or any of its employees, which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure.

(5) **Forwarding of copy of order:** The Director shall forward a copy of the order passed above to every banking company, financial institution or intermediary or person who is a party to the proceedings.

(iii) (iii)

(a) Whether the provisions of RDBA, SARFAESI and IBC prevail over PMLA?

Section 71 of Prevention of Money Laundering Act, 2002, which deals with the overriding effect of the act, provides that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Thus, it can be construed that the provisions of Prevention of Money Laundering Act, 2002, shall prevail over RBDA, SARFAESI and IBC, till the time nothing inconsistent therewith is contained in any other law for the time being in force.

(b) Whether interest created in a property prior to attachment of property, takes priority over attachment?

As per Section 5(4) of the Prevention of Money Laundering Act, 2002, nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under Section 5(1) from such enjoyment.

"Person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

Accordingly, an order of attachment under money laundering Act is not said to be illegal merely because a person interested (i.e., third party) had a prior interest in such property and further issuance of an order of attachment under PML Act cannot, by itself, render illegal the prior statutory right of a person interested in attached property.

Therefore, interest created in a property prior to attachment of property, takes priority over attachment.

(c) Whether mere nexus between the attached property whether it qualify as a proceeds of crime and the party accused of money laundering, is sufficient for the attachment of property?

According to Section 5 of the Prevention of Money Laundering Act, 2002, where the Director or any other officer for the purposes of this section, has reason to believe, on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

Hence, it is necessary that the attached property should qualify as 'proceeds of crime'.

However, mere nexus between the attached property whether it qualify as a proceeds of crime/not, the party accused of money laundering, is sufficient for the attachment of such property to take place.

Past Exam/Jan 2021/Case Study-3

(FEMA, Competition)

The eastern part of India

The eastern part of India is very well known for the production of tea and it is exported world over. However, the large amount of pendency of the payments by tea mills to tea producers has been a cause of worry and it was decided that a common platform is an essential requirement to provide solution to this.

Accordingly, the Eastern Produce Co-operative Society was formed to ensure the timely collection of sale proceeds from mills. The Society developed a charter, in form of memorandum for its members, to regulate and control supply, price, term of sales collection of sale proceeds and recovery if required. This memorandum is binding on all the members of the Society.

The Society extends the support to growers, by giving them offer to sell their entire farm produce to Society at mutually agreed price; which the Society will further sale to mills. But the farmers who avail this facility have to necessarily sell the entire farm produce to the Society, and the farmer cannot sell any portion of his farm produce directly in the open market.

Further, in order to trade with the mills, deal with regulatory authorities, and financial institution, the Society decided to promote a Company named Eastern Ltd. The extracts from latest audited financial statements of Eastern Ltd are as follows;

Sr. No.	Particular	Amount (in ₹ crores)
l.	Proceed (Net of taxes) from sale	3,500
2	Operating assets	700
3	Paid-up share capital	490
4	Net profit	100

With passage of time, Eastern Ltd became the big hit, for the role it plays as an intermediary and in incredible transformation in process of sale of tea by farmers.

Mr, Gaurav who is CEO of Eastern Ltd, heard about forward integration as method of expansion and growth strategy. Mr. Gaurav prepared a proposal, which was duly approved by Board of Directors and then by the members of Eastern Ltd company to takeover Eastern Tea Ltd, by acquiring controlling stake from open market. Eastern Tea Ltd is in the business of running tea mills, with a global presence. Mr. Gaurav's wife, Ms. Sheetal, was residing in Singapore and Mr. Gaurav wanted to send an amount of USD 20,000 per month to her for her maintenance. However, the CFO of Eastern Ltd mentioned to him that this is not in accordance with FEMA.

Around 60% of sales by Eastern Tea Ltd constitute exports of tea majorly to Iran. One year back Eastern Tea Ltd opened one branch office in Iran, as Iran Starts buying tea from India, in order to settle trade balance; because Iran is blocked from the global financial system; including using U.S. dollars to transact its oil sales. On such branch office, during last financial year, an amount of ₹ 150 crores were incurred as expenditure for the Branch through the EEFC account maintained by Eastern Tea Ltd.

For last financial year, the turnover of Eastern Tea Ltd was recorded at ₹ 1,200 crores, which was ₹ 110 crores more than year earlier to last financial year, whereas operating assets as on reporting date were ₹ 280 crores. The paid-up share capital was ₹ 130 crores.

After acquisition both the entities were not merged, and both kept their respective separate identity.

For the purpose of enhancing its global sales, Eastern Tea decided to pay commission for exports of tea under the Rupee State Credit Route at 6% of invoice value. Further, Eastern Tea also decided to send a gift hamper to its 20 top distributors totaling to a value of USD 1,00,000 (INR 70 lakhs),

Eastern Tea Ltd has strong domestic Network or tie-up with retail shops and stores through which they sale their tea under brand name 'leaf which constitute around 40% of sale. Such retail shops and stores are provided with instruction not to charge the price more then what is suggested by Eastern Tea Ltd although lower prices can be charged and specific jurisdiction is given to each retailer for resale.

According to Mr. Saurabh, who is head of marketing at Eastern Ltd, also now look after marketing at Eastern Tea Ltd, in order to acquire substantial market share (in term of new customers), Eastern Tea Ltd has to sell tea at the prices lower than cost. Ignoring the resistance from the governing body of Eastern Tea Ltd, the new pricing policy implemented. Resultantly price decreased from ₹ 150 per kg to ₹ 130 per kg. But in order to restrict loss, on account of selling tea at price lower than cost, Eastern Tea Ltd asked all the shopkeepers and stores, not to sell more than 5 kg of leaf tea to a customer.

The Eastern Produce Co-operative Society promoted another company named South Ltd, whose object clause includes; provide weather research and forecast reports, other necessary technical knowledge or guidance to members of parent's society apart from conducting market research for Eastern Ltd.

In one market research conducted by South Ltd, it was found that North Ltd, which holds major market share (around 30%) in retail packed tea under brand name 'Taste' (Price of which is ₹ 150 per kilogram). For latest financial year, the turnover of North Ltd is recorded at ₹ 3,000 crores whereas operating assets are of ₹ 570 crores and paid-up share capital is ₹ 365 crores.

Since acquisition of Eastern Tea Ltd by Eastern Tea Ltd, remains largely successful, hence showing trust in un-organic growth, a bear-hug letter was sent to senior management of North Ltd.

Since North Ltd is already undisputed market leader, they refuse the bear hug offer. Eastern Ltd with help of South Ltd performs a hostile acquisition and both the companies acquire around 25.5₹ stake in voting rights each; by tender notice over the stock exchange. Post acquisitions of North Ltd,

Eastern Ltd got the dominance over the Market, Hence Eastern Ltd decided to re-price their product which is renamed also 'Taste leaf" with a new price of ₹ 155 per Kilogram and to support the price rise, Eastern Ltd also started restricting supply in the end market.

Eastern Ltd also entered in memorandum of understanding with West offshore Ltd, which is $ 21 million (assets base) company for transfer of technology.

ANSWER THE FOLLOWING QUESTIONS:

1. The CFO of Eastern Tea Ltd seeks your views on whether the gifts sent to distributors requires to be included in the export declaration
   (A) Yes, since the aggregate value of the gifts to all distributors is more than the prescribed limit;
   (B) No, since no amounts are received from the distributors for the products;
   (C) No, since the individual value of the gifts to each distributor is less than the prescribed limit;
   (D) Yes, any item exported should be included in the declaration, unless when returned back to India.
2. How much can Gaurav remit to his wife living in Singapore for her maintenance every year?
   (A) A maximum of USD 2,50,000 with the approval of the Reserve Bank of India;
   (B) A maximum of USD 2,50,000 under the liberalized remittance scheme;
   (C) Any amount subject to the approval of the central government;
   (D) Any amount subject as long as he prove that the amt has been earned by him legitimately in India.
3. Evaluate if the commission paid by Eastern Tea Ltd is in accordance with FEMA
   (A) Yes, it is a current account transaction and can be freely remitted;
   (B) Yes, it is below the limit of 10% of invoice of exports of tea under Rupee State Credit Route;
   (C) No, it cannot be remitted until and unless the export proceeds are received;
   (D) No, payment of commission for such exports is prohibited.
4. Takeover (acquisition) of Eastern Tea Ltd by Eastern Ltd, will be considered as combination if
   (A) Assets of enterprise created after merger is equal to ₹ 2,000 crores;
   (B) Turnover of enterprise created after merger is equal to f 6,000 crores;
   (C) Turnover of enterprise created after merger is more than ₹ 6,000 crores;
   (D) Assets of enterprise created after merger is more than ¥ 6,000 crores.
5. The decision of Eastern Tea Ltd not to sell more than 5 kg of tea per customer purchase can be categorized as
   (A) Exclusive supply agreement;
   (B) Exclusive distribution agreement;
   (C) Refusal to deal;
   (D) None of the options
6. Analyze and answer the following questions in the context of the case study :
   (i) In your view, explain with reasons if Eastern Produce Co-operative Society can be considered as 'Cartel'?
   (ii) Does Eastern Ltd hold dominance over the market, and if yes identify the circumstances where it abuses its dominant position?
   (iii) Explain briefly the applicability of Competition Act to the combinations described in the case study and the regulatory aspects thereof.
   (iv) Evaluate if Eastern Ltd is in compliance with the provisions of FEMA with regard to the expenditure incurred for maintaining a branch abroad.

ANSWERS TO CASE STUDY

1. (A)
2. (B)
3. (B)
4. (C)
5. (D)
6.

(I) Whether Eastern Produce Co-operative Society can be considered as 'Cartel'?

As per 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 amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

From the above, it may be noted that the term 'cartel' has been given inclusive meaning. Although, Eastern Produce Cooperative Society was formed to ensure the timely collection of sale proceeds from mills, it also developed a charter, in the form of a memorandum for its members, to regulate and control the supply, price, term of sale, collection of sale proceeds and also recovery, if required. This charter, in the form of a memorandum, was binding on all the members of the Society.

Hence, Eastern Produce Cooperative Society is a 'Cartel' within the meaning of Section 2 (c) of the Competition Act, 2002.

(II) Whether Eastern Ltd holds dominance over the market?

Yes, Eastern Ltd holds dominance over the market because as per Explanation (a) to Section 4 of the Competition Act, 2002, "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.

Circumstances where dominant position is abused

(a) **Predatory Pricing after the acquisition of Eastern Tea Ltd** – Eastern Ltd acquired a substantial network of the retailers after the takeover of Eastern Tea Ltd and due to such takeover, it tried to penetrate the market using predatory pricing [refer Section 4(2)(a)(ii) of the Competition Act, 2002]. Eastern Tea Ltd reduced the price of the leaf tea from ₹ 150 to ₹ 130 per kilogram which was lower than the cost incurred, whereas other players in the market like North Ltd were selling leaf tea at ₹ 150 per kilogram.

As per Explanation (b) to Section 4 of the Competition Act, 2002, the term "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(b) **Increasing the price after the acquisition of North Ltd –** After the hostile acquisition of North Ltd by Eastern Ltd with the help of another group company South Ltd, Eastern Ltd raised the price of its tea leaf 'Taste leaf' from ₹ 130 to ₹ 155 per kilogram, even though North Ltd was originally selling its tea leaf 'Taste' at ₹ 150 per kilogram. According to Section 4 (2) (b) (i) of the Competition Act, 2002, there shall be an abuse of dominant position under Section 4 (1), if an enterprise or a group limits or restricts the production of goods or market therefor through unfair or discriminatory price.

(c) Cap on quantity

In order to restrict loss, on account of selling tea at price lower than cost, Eastern Tea Ltd asked all the shopkeepers and stores, not to sell more than 5 kg of leaf tea to a customer. That would also be considered as abuse of dominance.

(III) Provisions of the Competition Act, 2002 to "Combination"

In the context of Eastern Ltd, the regulatory aspects of 'combination' as mentioned in Section 5 of the Competition Act, 2002 are given as under:

Sr. No	Nature of Combination	Facts of the case	Criteria for considering "combination"	Whether "Combination" or Not
1	Acquisition by single acquirer but different goods [Section 5 (a)(i)(A)]	Eastern Ltd acquired Eastern Tea Ltd	Joint Asset over ₹ 2,000 crores or Turnover Over ₹ 6,000 crores	**No. It is not a combination.** Hint: Joint turnover is ₹ 4,700crores (3,500+1,200) which is less than ₹ 6,000 crores. The joint assets base of ₹ 980 crores (700+280) which is less than ₹ 2,000 crores.
2	Acquisition by a group with similar goods [Section 5 (b) (ii) (A)]	Eastern Ltd acquired North Ltd with the help of another group company South Ltd	Group assets over ₹ 8,000 crores or turnover over ₹ 24,000 crores	**No. It is not a combination.** Hint: Joint asset base of the 'group' is only ₹ (980+570) 1,550 crores and aggregate turnover is also ₹ 7,700 crores. (4700+3000)
3	MOU for transfer of technology	Eastern Ltd enters into an MOU with West Offshore Ltd for transfer of Technology	No criterion prescribed for for considering the transfer of technology as "Combination"	**Not Applicable.**

Note – Limits are quoted in section 5 of the Competition Act 2002 and further modified through notification number S.O. 675(E) dated 4th March 2016

Regulation of Combinations

According to Section 6 (1) of the Act, no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

Further Section 6 (2) of the act says, any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission in the specified form along with a requisite fee, disclosing the details of the proposed combination, within thirty days of:

(a) **Approval of the proposal** relating to merger or amalgamation by the Board of Directors of the enterprises concerned with such merger or amalgamation;

(b) **Execution of any agreement** or other document for acquisition or acquiring of control.

Further Section 6 (2A) of the Act provides, no combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission or the Commission has passed orders under Section 31, whichever is earlier.

(IV) Whether eastern Ltd is in compliance of FEMA, 1999 for expenditure incurred on maintenance of its branch office abroad?

Eastern Tea Ltd opened one branch office in Iran, and on such branch office, during last financial year, an amount of ₹ 150 crore were incurred as expenditure for the branch through the EEFC account maintained by Eastern Tea Ltd.

As per Foreign Exchange Management Act, 1999, no branch can be opened in Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau or Hong Kong without prior permission of the Reserve Bank.

As the case study does not reflect anywhere about the prior permission of the RBI, the expenditure by Eastern Tea Ltd is not in compliance under FEMA, 1999.

Past Exam/Jan 2021/Case Study-4
(FEMA, RERA)
Mr. Zebra

Mr. Zebra is a real estate mogul who has developed and constructed several apartment complexes in Mumbai through his real estate company Delight Homes Private Limited (DHPL) which was into the business of construction of residential premises. In May 2019, Zebra propose to start a new residential project named "Delight Morning Dews". The project plan constituted 50 apartments with a mix of both 3 BHK and 2 BHK apartments. DHPL ensured that the sanction plan etc. was approved appropriately under RERA.

DHPL devised the advertisement and marketing content for the project so it can be splashed across the national and local newspapers and television channels, Mr. Zebra was of the view that the project need not be highlighted in the website of the regulatory authority since the same does not get a lot of views from the prospective customers and it is more efficient to reach the customer directly through social media/television platforms. Further, to ensure more customers are attracted, DHPL started the commercial marketing before applying for the registration of the project under RERA.

DHPL also incorporated a subsidiary, Delight Interiors and Consultancy Private Limited (DICPL) in India for engaging in the business of providing consultancy. services on interior designing etc. Mr. Zebra made his only daughter Ms. Rekha as the managing director of DICPL. Rekha completed her masters in interior design in the London School of Design and had her own design studio in London, which got her critical acclaim in the art and design society: DICPL became a huge hit based on the proof of concepts it delivered in the London School of Design and got many orders from customers located in the UK.

In the agreement to sale entered into with the allottees, DHPL did not specify the stage-wise time schedule of the completion of the project, including the provisions for civic infrastructure like water sanitation & electricity. Also, DHPL did not include any terms with regard to cancellation of allotment etc. in the agreement. These clauses were not insisted by the allottees since they were more than eager to buy their apartments and DHPL did not see any reason to amend these agreements at a later date.

During the process of construction, DHPL intended to transfer the project another real estate construction company, Value Homes Private Limited (VHPL) through an assignment agreement. No approval from the allottees or regulator was considered necessary since the agreement made it clear that VHPL will take over all obligations of DHPL and there will not be any difference for the regulator or the allottees in terms of the quality of constructions or timing of delivery.

One of the customers of DICPL was interested in investing in the share capital of DHPL if the same is allowed by the provisions of FEMA. However, Mr. Zebra indicated to him that FEMA prohibits a person resident outside India to make investment ina company involved in real estate business. However, Ms. Rekha believes that the customer can invest as long as the money is paid directly to the bank account of DICPL through the normal banking channel and the FIRC clearly denotes that this is for the purpose of equity investment into DICPL.

DICPL entered into various contracts to provide consultancy services to real estate companies. Due to a downturn in the demand for real estate in the U.K. due to Brexit, some of its customers faced a lot of difficulty in making payments to their suppliers and DICPL had invoices outstanding amounting to GBP 2 million for more than 2 years (which include GBP 5,00,000 outstanding for more than 3 years).

For the purpose of construction, VHPL decided to import certain raw materials such as PVC boards and light fittings from China for a value of USD 10,00,000. VHPL paid an amount of USD 80,000 on receipt of the products and decided to hold back the balance USD 20,000 for a period of 1 year to ensure satisfactory performance of the products. The Authorised Dealer is of the view that this is not in accordance with the requirements of FEMA.

Out of the 50 apartments, VHPL decided to retain the title to 10 of the apartments and entered into a "lease" agreement with the allottees for a period of 99 years. The consideration for the lease was 95% of the consideration for an outright sale (along with stamp duty to be paid by the allottees) and the lease allottees were required to pay ₹ 1,000 per month as rent with maintenance charges at actuals (in line with what was to be paid by the other apartment owners). VHPL was of the view that these agreements are outside the purview of RERA since there is no sale involved.

ANSWER THE FOLLOWING QUESTIONS :

1. A branch set and controlled by DICPL located in the U.K. will be considered as :
   (A) Resident in India;
   (B) Resident outside India;
   (C) Resident in India, if funds are remitted back by the Branch to India on annual basis;
   (D) Resident outside India if significant portion of its funds are directly received from its customers located outside India.

2. One of DICPL's customers visits India and during the visit, pays an amount of USD 2,000 which was owed by the customer through cash. Is this a permissible transaction under FEMA ?
   (A) Yes, this is money rightfully owed to DICPL and money was received in foreign exchange;
   (B) No, unless DICPL had a money changer's license to accept foreign currency;
   (C) No, unless DICPL obtain prior approval of the Reserve Bank of India for such transaction;
   (D) Yes, as long as DICPL deposits the money in its bank account.

3. An advertisement in the Guardian Newspaper (London edition) by DICPL for an amount of GBP 20,000 requires the permission of :
   (A) the Central Government;
   (B) the Board of Directors of DICPL;
   (C) the Ministry of Finance, Department of Economic Affairs;
   (D) the authorized dealer.

4. Evaluate Mr. Zebra's contention that the customer of DICPL cannot invest in DHPL.
   (A) The customer can invest in DHPL since DHPL, although a real estate company, is involved in the construction of residential premises only;
   (B) The customer cannot invest — Mr. Zebra is right in pointing out that FEMA prohibits investment by a person resident outside India in real estate activities;
   (C) The customer can invest with the prior approval of the Reserve Bank of India;
   (D) The customer can invest since the FIRC indicates that the money is for investment in equity capital and has come through the normal banking channel.

5. The allottees who obtained the apartments under Lease seek your guidance on whether those apartments would fall within the purview of RERA?
   (A) No, since there is no sale transaction and transfer of title to the allottee and therefore it will not fall under RERA;
   (B) Yes, this would be covered under RERA since substantial portion of the consideration is paid and the lessee is also responsible for paying stamp duty, maintenance etc.,;
   (C) No, since the entire sale consideration is not paid upfront and the lease is for 99 years only;
   (D) Yes, since VHPL and DHPL are registered promoters under RERA.

6. Analyze and answer the following questions in the context of the case study :

(i) Evaluate the marketing strategies adopted by DHPL with regard to the provisions of RERA.
(ii) Evaluate with reasons if DICPL is in compliance with the FEMA provisions with regard to collection of export proceeds. Explain the steps to be taken by DICPL to ensure compliance with FEMA.
(iii) What is your advice to VHPL with regard to the position taken by the authorized dealer?
(iv) Advice the allottees of Delight Morning Dew regarding the assignment agreement entered into between DHPL and VHPL in the context of RERA provisions. What are the obligations of DHPL and VHPL under RERA?

ANSWERS TO CASE STUDY 4

1. (A)
2. (B)
3. (C)
4. (A)
5. (C)
6.

(i) According to Section 3 of the Real Estate (Regulation & Development) Act, 2016 (the Act), no promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any matter any plot, apartment or building, in any real estate project or part of it in any planning area without registering the real estate project with the Real Estate Regulatory Authority established under this Act.

Section 3 of the Act further provides that no registration of the real estate project shall be required where the area of land proposed to be developed does not exceed 500 sq. meters or the no. of apartments proposed to be developed does not exceed eight inclusive of all phases;

In the given case study, since the number of apartments are more than 8, hence registration was required under RERA. As DHPL has not taken registration under RERA, hence it cannot have opted for commercial marketing of the project.

(ii) According to Foreign Exchange Management (Export of Goods and Services) Regulations, 2015:

(1) The amount representing the full export value of goods / software/ services exported shall be realized and repatriated to India within nine months or within such period as may be specified by the Reserve Bank of India, in consultation with the Government, from time to time, from the date of export, provided. Further the Reserve Bank of India, or subject to the directions issued by that Bank in this behalf, the authorized dealer may, for a sufficient and reasonable cause, extend the said period. In the present case study, an amount of GBP 2 million is outstanding for more than 2 years (which include GBP 5,00,000 outstanding for more than 3 years) is not in compliance with the FEMA provisions.

Apart from the above compliance, the following steps must be taken by DICPL to ensure compliance with FEMA:

1. DICPL is responsible for ensuring that the full export value of the goods exported are realized through an authorized dealer in the manner specified in the Fore ign Exchange Management (Manner of Receipt and Payment) Regulations, 2016.
2. In respect of export of services to which none of the Forms specified in these Regulations apply, the exporter may export such services without furnishing any declaration, but shall be liable to realize the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.
3. A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special pe rmission of the Reserve Bank of India, take all reasonable steps to realize and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing—

(a) that the receipt by him of the whole or part of that foreign exchange is delayed; or

(b) that the foreign exchange ceases in whole or in part to be receivable by him.

4. DICPL is also required to apply to RBI for getting the required directions for the purpose of securing the payment for the services performed, since there is a delay in receipt of payment in accordance with the provisions.

(iii) advise to VHPL regarding the position taken by the authorized dealer

In terms of the FEM Regulations, remittances against imports should be completed not later than six months from the date of shipment, except in cases where amounts are withheld towards guarantee of performance, etc.

The Authorized Dealer (AD) can consider granting extension of time for set tlement of import dues up to a period of six months at a time (maximum up to the period of three years) irrespective of the invoice value for delays on account of disputes about quantity or quality or non-fulfilment of terms of contract; financial difficulties and cases where importer has filed suit against the seller.

While granting extension of time, AD must ensure that:

a. The import transactions covered by the invoices are not under investigation by Directorate of Enforcement / Central Bureau of Investigation or other investigating agencies;
b. While considering extension beyond one year from the date of remittance, the t otal outstanding of the importer does not exceed USD one million or 10 per cent of the average import remittances during the preceding two financial years, whichever is lower; and
c. Where extension of time has been granted by the AD, the date up to which extension has been granted may be indicated in the 'Remarks' column.

In the given case study, VHPL decides to pay USD 80,000 on receipt of products and hold back USD 20,000 for a period of 1 year to ensure satisfactory performance (total bill amount of raw materials was USD 1,00,000)*.

As per the above provisions, VHPL can do so. Hence, the contention of AD that VHPL cannot withhold the amount for satisfactory performance is not correct.

*Note: In the given case study, the value of import material from China is given as USD 10,00,000. It is further given that VHPL paid an amount of USD 80,000 on receipt of the products and decided to hold back the balance USD 20,000 for a period of 1 year. The total of these two amounts (80,000 and 20,000) comes to 1,00,000. Hence, the total invoice amount of USD 10,00,000 seems to be a typographical error.

(iv)Advise to allottees:

As per the facts given in the case study, the position taken by DHPL and VHPL with regard to transfer of project is incorrect. In terms of Section 15 of the RERA, DHPL shall not transfer or assign his rights and liabilities in respect of the project to VHPL without obtaining the prior written consent of two-thirds allottees of the (except the promoter).

Further, prior written approval of the RERA Authority is also mandatory. Hence, the transfer from DHPL to VHPL of the project is not valid in accordance with the RERA.

Therefore, the allottees are advised that in order to enable the transfer effective, steps must be taken by DHPL to get prior consent of two-thirds allottees and also the written approval of the RERA Authority.

Obligations of the promoters: Section 15 of the RERA, 2016 provides for the obligations of promoter in case of transfer of a real estate project to a third party under:

1. The promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter and without the prior written approval of the Authority,

   However, such transfer or assignment shall not affect the allotment or sale of the apartments, plots, or building as the case may be in the real estate project made by the erstwhile promoter.

2. On the transfer or assignment being permitted by the allottees and the Authority, the intending promoter shall be required to independently comply with all the pending obligations under the provisions of this Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.

Any transfer or assignment permitted under provisions of this section shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder.

Past Exam/Jan 2021/Case Study-5
(IBC, Competition)
Mr. Rohit Writer

Mr. Rohit Writer is a well-known industrialist based in Pune, India and is the founder director of M/s. Good Phones Private Limited (Good Phones), a fixed line and mobile phone manufacturer. Good Phone is one of the largest telephone companies in India and its products are much sought after in India and abroad.

Mr. Rohit visits various countries as part of his business travels and during these visits he spends significant time in Philanthropic activities and social gatherings and because of this, he is quite well known in business circles globally. Mr. Rohit has a penchant for investing his money in buying various real estate property all over India and passed this trait on to his son, Mr. Rahul Writer as well. Mr. Rahul completed his MBA from Stanford University and is assisting Mr. Rohit in his business. Mr. Rohit also has a daughter, Ms. Sonali Writer, who studies Art in Italy and has opened her own Art Studio in Milan. Mr. Rohit is very proud of Sonali and supports her financially for her stay in Italy as well as expenses towards maintaining the studio.

The marketing dept of Good Phones introduced various new models in the last couple of months with new technology such as 2 selfie cameras, faster processor and sleeker look. Good Phones expect these phones to be major attraction in the global markets due to attractive price range and therefore want to promote these phones extensively on a global basis. For the purpose of advertisements, Good Phones engaged the services of Mr. David Smith, a prominent baseball player & Ms. Emma Drew, a Miss Universe winner and agreed to pay a 'guaranteed' fee of USD 5,00,000 each plus 10₹ bonus based on the sales of the new models in year 1.

Mr. Rohit sent 5 sample mobile phones and 5 fixed line phones to his dealers abroad (numbering 1000 dealers), clearly marked as not for sale and other promotional material such as brochures, 3D moulds for display in dealer shops etc. The value of the items was approximately INR 4 Crores. He also sent 1 mobile phone to each of his dealers as a token of gift and appreciation (total value of INR 0.50 Crores). Mr. Srinivas Rajan, the CFO of Good Phones indicated him that since these products have been sent free of cost and not for sale, these need not be included in the export declaration to be filed by Good Phones.

On 15" February, 2018, Good Phones made a large sale to one of the dealers M/s. Delayed Ringtone Enterprises, for USD 5 million and has received USD 2 million by 15'" May, 2018 and did not receive the balance USD 3 million until 15" August, 2018, i.e. 6 months from the date of sale. After several reminders and threatening calls to stop further shipment, another USD 1 million was received on 10" October, 2018 and the balance remained outstanding as at 31st December, 2018.

Based on the success of Good Phones, Mr. Rohit incorporated a new company, M/s Stay Connected Private Limited, (Stay Connected) as Internet service provider and purchased a large consignment of networking equipment for providing internet operations through dedicated broadband lines along with a landline facility. This would then provide Mr. Rohit quite a few synergies with the existing Good Phone business and enable him to become an end to end Telecom Czar. Mr. Rohit held 60% stake in Stay Connected and the balance 40% was held by a foreign collaborator. Along with all the networking equipment, Stay Connected hired transponders from a company in Australia and paid AUD 10 million through its authorized dealer. Stay Connected also entered into an agreement with foreign collaborator (holding 40% stake) to pay royalty and technical fees for the support provided by them.

During his visit to Milan to meet Ms. Sonali, Mr. Rohit obtained EUR 10,000 from his Italian dealer for his use during his stay in Italy and instructed the dealer to reduce the sum from the payments to be made by the dealer for the supplies from Good Phones. Out of such funds, Mr. Rohit used EUR 5,000 towards purchasing sweepstakes tickets in Milan, Italy, but, he did not win any money in the sweepstakes event.

Mr. Rahul, after gaining experience in India, wanted the business in the U.A.E. (by establishing a subsidiary of Good Phones in the U.A.E.) and therefore decided to move to the U.A.E. along with his wife. For this purpose, he wanted to dispose off some of the properties owned by him in India.

Accordingly, Mr. Rahul sold an apartment in Mumbai owned by him to Mr. Stuart Cooper, being an Overseas Citizen of India and a fellow student of his at Stanford University. Mr. Stuart Cooper was planning to come to India in the next couple of months to take up a job and therefore, wanted to secure a place for his stay. The remittance from Mr. Stuart was received in India through banking channels.

Mr. Rahul also sold a villa and his agricultural land in Pondicherry to Mr. Rajesh Subramanium, his professor at Stanford, who was a person of Indian origin. The payment for the villa and agricultural land was paid by Mr. Rajesh (50%) from his FCNR account and the balance in USD traveller cheques, which will be of use to Mr. Rahul when he visits U.A.E.

After obtaining his U.S. visa, Mr. Rahul purchased a ranch (farm house) in Texas for USD 2 million, using USD 1.50 million from RFC account and USD 500,000 sent from his INR account through normal banking channels.

Mr. William Rutherford, one of Mr. Rohit's business acquaintances and a citizen of UAE, is very much interested in Indian culture and practices and therefore stays in India for 8 months (from April, 2018 to November, 2018) to attend an art of living course and to learn/practice yoga. William believes that he has been resident in India for more than the prescribed 182 days and therefore, is a resident in India under FEMA.

Mr. Rohit, in his penchant for purchasing various properties, zeroed in on an exclusive apartment complex in Bangalore having state-of-the art facilities. He purchased two 4-bedroom apartments costing INR 2 crores each, one in the name of Ms. Sonali and one in the name of Mr. Srinivas Rajan, since Mr. Rohit wanted Mr. Srinivas Rajan to feel happy and trusted. Both the apartments were given on rent to a large multinational bank and he received a rent of INR 0.20 Crores per year for each of the apartment in the bank accounts of Ms. Sonali and Mr. Srinivas Rajan respectively, after 4 years, Mr. Srinivas Rajan transferred the property back in the name of Mr. Rrohit at zero consideration.

Mr. Rohit also purchased a 3-bedroom apartment in the same complex in his name, jointly with his brother, Mr. Sunil Writer. The property (along with the stamp duty) was paid for by Mr. Rohit and was being used by Mr. Sunil for his stay though the property was pending registration due to Mr. Rohit'stravel abroad.

Once the property was transferred back by Mr. Srinivas Rajan, Mr. Rohit wanted to sell the same to Mr. Arjun De Silva, a citizen of Sri Lanka.

However, he was advised by Mr. Srinivas Rajan that Mr. Arjun De Silva cannot acquire property in India and therefore Mr. Rohit proposed to lease it to Mr. Arjun De Silva for a period of 20 years for an upfront consideration of INR 1 Crore and an annual rent of INR 8 Lacs payable in advance.

During the review of the bank reconciliation statements of Good Phones, Mr. Srinivas Rajan noted that an amount of INR 2 Crores had been received in one of the bank accounts without any details relating to the same. Mr. Srinivas Rajan informed this to Mr. Rohit and Mr. Srinivas Rajan suggested to Mr. Rohit to immediately transfer that money out of the bank of Good Phones to Mr. Rohit's personal bank account, so that the Company's bank account are cleared and there are no reconciling items, which Mr. Rohit agreed to. Out of INR 2 Crores, Mr, Rohit used INR 1.75 Crores for acquiring further 20% stake in Stay Connected from the foreign collaborator and balance INR 0.25 Crore for purchasing a stunning diamond set for his wife, Ms. Anjali Writer, as a gift for her 50th birthday.

The extract of the last audited financial statements of Stay Connected was provided by Mr. Srinivas Rajan to Mr. Rohit to evaluate (FMV) his acquisition as per the provisions of the Prohibition of Benami Property Transactions Act, 1988:

Particulars	**Amount in INR (Crores)**
Immovable property (market value INR 8.00 Crores)	5.00
Other fixed assets (net of depreciation of INR 1.00 Crore)	4.00
Inventory	2.00
Receivables and Loans and Advances	1.50
Deferred Advertisement Costs	0.50
Advance tax paid	1.00
Total Assets	**14.00**
Shareholders' Funds (including 1,000,000 equity shares of INR 10 each, fully paid- up)	4.00
Provision for taxation	0.50
Loans from Banks	3.00
Trade payables (including provision for unascertained liabilities-INR 1 Crore)	6.50
Total Liabilities	**14.00**

Other information:

(i) Contingent Liabilities - INR 2.00 crores (including INR 0.50 Crores relating to arrears' on cumulative preference shares).

(ii) The Board of Directors has proposed a dividend payout of INR 1 crore to the equity shareholders, which is pending approval of the shareholders.

The Bank, on noting the large transactions on Mr. Rohit's personal bank account, tipped the Income Tax Authorities regarding the same and the Initiating Officer summoned information from Mr. Rohit and Mr. Srinivas Rajan regarding the transactions to start proceedings under the Prohibition of Benami Property Transactions Act, 1988 (PBPT Act, 1988) and investigate the matter under The Foreign Exchange Management Act, 1999 (FEMA,1999).

Mr. Rohit and Mr. Srinivas Rajan reached out to you in order to understand the various violations and implications during the course of various proceedings under the said Act's.

ANSWER THE FOLLOWING QUESTIONS:

1. Out of the below, what are the transactions that require prior approval of the Government of India?
   (A) Payment of "guaranteed" fee by Good Phones to Mr. David Smith and Ms. Emma Drew;
   (B) Payment of Royalty and Technical Fees by Stay Connected to the foreign collaborator;
   (C) Payment of hiring charges for the transponders by Stay Connected;
   (D) Payment of INR 1.75 Crorés by Mr. Rohit to acquite shares of Stay Connected from the foreign collaborator.

2. Is the use of EUR 5,000 towards purchasing sweepstakes by Mr. Rohit as per the provisions of FEMA, 1999 ?
   (A) No, drawl of foreign exchange for purchasing lottery tickets, sweepstakes etc. is prohibited under FEMA, 1999;
   (B) No, Mr. Rohit should have obtained the prior approval of the RBI before purchasing the sweepstakes ticket;
   (C) FEMA, 1999 will not be applicable, since the money was directly obtained by Mr. Rohit from his Italian dealer outside the country;
   (D) None of the options.

3. Is the purchase of Ranch in Texas by Mr. Rahul in accordance with FEMA, 1999 ?
   (A) No, Rahul as a citizen of India cannot purchase a Ranch outside India;
   (B) Yes, there is no specific limit under FEMA, 1999 with regard to purchase of immoveable property outside India;
   (C) No, Rahul can purchase assets outside India only if the purchase is jointly with a relative, who is resident outside India, and there is no outflow of funds;
   (D) No, since Rahul has used funds from his INR account for making the payment to the extent of USD 500,000.

4. In case Mr. Rohit is proven guilty of violating the provisions of PBPT Act, 1988, what is the maximum punishment that he is liable for under the PBPT Act, 1988 ?
   (A) Rigorous imprisonment for a term of one to seven years, with a fine which may extend to 25₹ of the fair market value of the property;
   (B) Rigorous imprisonment for a term of three to seven years, without fine;
   (C) Rigorous imprisonment for a term upto seven years, with fine which may extend to 50₹ of the fair market value of the property;
   (D) Fine which may extend to 25₹ of the fair market value of the property.

5. Assuming that the transactions relating to the receipt of INR 2 Crores in the bank account of Good Phones and the subsequent transactions are considered as benami transactions, can the Initiating Officer take action against Mr. Srinivas Rajan ?
   (A) Yes, he is the CFO of Good Phones and therefore responsible for ensuring compliance with the Law;
   (B) No, he has not received, held, or acquired the proceeds in his account or benefitted from the same;
   (C) Yes, since he abets Mr. Rohit in transferring the money from the bank account of Good Phones to Mr. Rohit's personal account;
   (D) No, he is responsible only for Good Phones and he has ensured that the funds are not retained in the books of Good Phones/used by Good Phones for its business.

6. Answer the following questions in the context of the provisions relating to Foreign Exchange Management Act, 1999 :

   (i) Mr. Srinivas Rajan reaches out to you to confirm his views regarding inclusion/exclusion of the items sent free of cost to the dealers in the export declaration.

   (ii) Examine the validity/appropriateness of the sale of immoveable property by Mr. Rahul to Mr. Stuart Cooper and Mr. Rajesh Subramanian.

7. Examine/advise regarding the below questions relating to the PBPT Act, 1988 :

   (i) Examine the appropriateness/impact of the PBPT Act, 1988 on 3 apartments purchased by Mr. Rohit in Bangalore. How does the transfer back of the apartment by Mr. Srinivas Rajan to Mr. Rohit affect your conclusion?

   (ii) The Initiating Officer, who is probing the transactions relating to the INR 2 Crores received and spent by Mr. Rohit, seeks your advice to identify the bhenami properties/transaction, the benamidars, the beneficial owner.

   (iii) Explain the provisions of Fair Market Value (FMV) in relation to a property as per section 2(16) of PBPT Act, 1988.

   (iv) What is the process to be followed by the Initiating Officer for attachment of the property under PBPT Act, 1988 ?

   (v) Discuss the provisions with regards to issue of notice, attachment of property involved in benami transactions and manner of service of notice under PBPT Act, 1988,

ANSWERS TO CASE STUDY

(1) (C)
(2) (A)
(3) (D)
(4) (A)
(5) (C)
(6)

(i) In the light of Regulation 4 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, trade samples of goods, may be exported without furnishing the declaration on the items, sent free of cost. In the given case, sending 5 sample mobile phones and fixed line phones to 1000 dealers is exempted and does not require Good Phones to give declaration for export.

With regard to sending mobile phones to the dealers as gift for a total value of INR 0.50 crore (i.e., 50 lakh), as per the above Regulation, the exemption for sending gifts by an export is available only if the value of the goods is not more than ₹ 5 lakh in value. In the case study, since the value of the goods is more than the exempted limit, they need to be included in the export declaration.

(ii) Validity of the Sale of immovable property by Mr. Rahul can be given in the light of Regulation 3 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018.

Sale of immovable property to Mr. Stuart Cooper: Mr. Staurt Cooper, being an Overseas Citizen of India is entitled to acquire an apartment in Mumbai owned by Mr. Rahul and funds were received in India through Banking Channels.

Sale of immovable property to Mr. Rajesh Subramanium: Whereas in case of Mr. Rajesh Subramanium, being NRI, he may acquire immovable property in India other than agricultural land/farm house/plantation property. Therefore, Mr. Rajesh Subramanium can acquire Villa but not an agricultural land from Mr. Rahul. Further, payment was made partly from FCNR account and in USD Travellers cheques, which was against the mode of payment prescribed in the said regulation.

Therefore, sale of immovable property by Mr. Rahul to Mr. Stuart Cooper is valid, whereas to Mr, Rajesh Subramanium, the said transaction is invalid.

(7)

(i) In the given case study, Mr. Rohit purchased 3 flats in Bangalore in the name of Ms. Sonali, Mr. Srinivas Rajan, and jointly with his brother Sunil.

Apartment purchased in the name of Ms. Sonali- The property has been purchased by Rohit in the name of his daughter Ms. Sonali, is covered under the exemption given in Section 2(9) of the Prohibition on Benami Property Transaction Act, 1988 (i.e., property purchased in the name of his child). Thus, it is not a benami transaction.

Apartment purchased in the name of Mr. Srinivas Rajan- This is a case of benami transaction as the property is in the name of Srinivas Rajan but the consideration is paid by Rohit.

Apartment purchased jointly in the name of Rohit and his brother Sunil- A property jointly held in the name of brother and they appear as joint owners. Hence, this is not a benami transaction.

Prohibition on retransfer of property by benamidar: As per Section 6 of the Prohibition on Benami Property Transaction Act, 1988, (PBPT, Act) in cases where benamidar re-transfers any benami property held by him to the beneficial owner or any other person acting on his behalf, then such a transaction of a property shall be deemed to be null and void.

In the said above case transaction of transfer back of the apartment by Mr. Srinivas Rajan to Mr. Rohit is void.

(ii) Advise to the Initiating Officer:

Following are the benami transactions and benamidars:

Transaction	Benami Property / Benamidar / beneficial owner
Receipt of INR 2 crore in the bank account of Good Phones	Good Phones is a Benamidar w.r.t said benami transaction of INR 2 crore.
Transfer of INR 2 crore from the bank account of Good Phones to Mr. Rohit's personal bank account	Mr. Rohit is the Beneficial owner
Acquisition of shares of Stay Connected using the benami money	Shares of Stay Connected becomes benami property as per Section 2(8) of PBPT Act. Mr. Rohit is a beneficial owner.
Purchase of Jewellery as gift for Ms. Anjali Writer	The jewellery becomes benami property. Mr. Rohit is a Benficial owner as he purchased jewellery by paying consideration from unknown sources. Ms. Anjali is a Benamidar, as jewellery has been purchased in her name.

(iii) According to Section 2(16) of the Prohibition of Benami Property Transaction Act, 1988, fair market value, in relation to a property, means—

(1) the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and

(2) where the price referred above is not ascertainable, such price as may be determined in accordance with such manner as may be prescribed in Rule 3 of the PBPT Rules, 2016.

As per the said Rule, the price of unquoted equity shares shall be the higher of

(a) its cost of acquisition;

(b) the fair market value of such equity shares determined, on the date of transaction, by a merchant banker or an accountant as per the Discounted Free Cash Flow method; and

(c) the value, on the date of transaction, of such equity shares as determined by the formula given in the Rules.

(iv) As per Section 24 of the Benami Transactions (Prohibition) Act, 1988, where the Initiating Officer on the basis of material in his possession has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.

Where the Initiating Officer is of the opinion that the person in possession of the property held benami, may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as prescribed in Rule 4 of the Benami Transactions Prohibition Rules, 2016, for a period not exceeding ninety days from the last day of the month in which the notice is issued.

The Initiating Officer, after making inquiries, pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority; or revoke the provisional attachment of the property with the prior approval of the Approving Authority;

Where the Initiating Officer passes an order continuing the provisional attachment of the property or passes an order provisionally attaching the property, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.

(v) Notice and attachment of property involved in benami transaction [Section 24 of PBPT Act, 1988]

Issue of show cause notice: Section 24 (1) states that where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a show cause notice to the person.

A copy of the notice shall also be issued to the beneficial owner if his identity is known. S possession of the property held benami, may alienate the property during the period specified in the notice, may, with the previous approval of the Approving Authority, by order in writing attach provisionally the property for a period not exceeding ninety days from the last day of the month in which the notice is issued.

After Inquiry: Initiating Officer, after making such inquires and calling for such reports or evidence and taking into account all relevant materials, shall, within a period of ninety days from the last day of the month in which the notice is issued —

(a) where the provisional attachment has been made

(i) pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority or

(ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority;

(b) where provisional attachment has not been made

(i) pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under; or

(ii) decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

Section 24 (5) states that where the Initiating Officer passes an order continuing the provisional attachment of the property under sub-clause (i) of clause (a) of sub-section (4) or passes an order provisionally attaching the property under sub-clause (i) of clause (b) of that sub-section as stated above, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.

Manner of Service of Notice [Section 25]

A notice under Section 24 may be served on the person named therein either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, 1908.

Past Exam/July 2021/Case Study-1
(IBC, RERA)
AR Private Limited (ARPL)

AR Private Limited (ARPL) is one of the leading real estate companies in Vishakhapatnam and has built over 20 multi storey apartments in Vizag and adjoining areas. They have a strong and professional management team and have built their reputation of delivering the projects on time. ARPL was run by two brothers, Mr. Sesha and Mr. Easwar, who were the directors of the Company.

The Government of India had established a new passport office in Vizag near the airport and therefore, the area became very prominent and the demand for housing increased. Therefore, ARPL wanted to start construction of 40 apartment(s) exclusive called "Seaview Altius" in a 3 acre plot very close to the passport office by 1st June 2017 and the project was expected to be completed in 24 months.

Mr. Srinivas Manohar, a senior officer in the Indian Navy was posted to work out of the naval base in Vizag. Since his posting is expected to be for a long term, Mr. Srinivas consulted with his spouse, Ms. Kruthi, who was a Chartered Accountant, and entered into an agreement with ARPL to purchase a 3BHK apartment for an amount of ₹ 109.94 lakhs or say ₹ 110 Lakhs (for a 1527 square- feet of carpet area @ ₹ 7200 per square feet), The carpet area includes the internal partition walls but did included the open terrace area for exclusive use of the owner and open car parking facility to be charged separately. ARPL requested Mr. Srinivas to make an advance payment of ₹ 15 lakhs for proceeding with the booking and registration. Ms. Kruthi felt that this was exorbitant, however ARPL did not agree for reducing the advance and therefore they made the payment.

A few months after booking the apartment, Mr. Srinivas got a notice from ARPL that due to unforeseen circumstances they were not in a position to complete the project and therefore, needed his consent for transferring of ARPL's rights and obligations to another reputed real estate developer, GCH Private Limited ("GCHPL"). In case he does not agree, then he can get his money refunded. Mr. Srinivas noted that around 70% of the allottees had accepted but 30% of the allottees have contested that the Promoters have not fulfilled its obligations for transfer of project to the third party and these 30% of the allottees have threatened to take legal action against ARPL. Mr. Srinivas further noted that the authority had given its written approval for the transfer of the project under Real Estate (Regulation and Development) Act, 2016 (for short "the RERA"). Mr. Srinivas was also informed that GCHPL will rectify any structural damage for a period of 4 years from the date of handing over. GCHPL also leased one of the 3BHK apartments to Mr. Srinivas (and to many other allottees) for a period of 99 years by paying 90% of the sale price along with stamp duty and registration charges and a rent of ₹ 1000 per month thereafter.

Over the last 2 years, ARPL was constructing a large commercial complex in the suburbs of Vizag and invested significant amounts on the project. For this purpose, ARPL had taken secured loan of ₹ 200 crores from Addis Bank and ₹ 50 crores from Ababa Bank. In addition, Mr. Sesha, a director in ARPL had given an unsecured loan of ₹ 10 crores to ARPL. Due to certain structural issues in the construction, ARPL could not get the approval from the regulatory department for the building and therefore, incurred a huge loss on the project and could not repay the loans taken as well as pay its vendors and workmen.

The ARPL construction workers trade union, a registered trade union under the Trade Unions Act, in which all the workmen of ARPL were members, filed an application under Insolvency and Bankruptcy Code, 2016 (in short "IBC 2016") on behalf of all the workmen for non-payment of salary to the workmen for the last 6 rnonths amounting to ₹ 15 crores. This application was however rejected by the adjudicating authority since the trade union is not an "operational creditor" or a "person" as defined under IBC, 2016. Further, no services were rendered by the trade union to ARPL to claim any dues which can be termed as debt under IBC, 2016. In the meantime, Addis Bank moved an application under Section 7 of IBC, 2016 which was admitted and an Interim Resolution Professional (in short "IRP"), who subsequently became the Resolution Professional (in short "RP") was appointed.

The Committee of Creditors (comprising of Addis Bank and Ababa Bank) was formed and a resolution plan was submitted by the Resolution Professional. Both the directors of ARPL contended that they were not invited for the meeting of the Committee of Creditors and the notice for the meeting and the draft resolution plans were not shared with them by the Resolution Professional which is not in accordance with IBC, 2016, reference was drawn to the judgement of Hon'ble Supreme Court of India in Civil Appeal 8430 of 2018 as was held in the matter of Mr. Vijay Kumar Jain. Further, Mr. Sesha contended that he should also be part of the Committee of Creditors since he is also a financial creditor for ARPL.

Answer the following questions:

1. What is the maximum amount of booking advance that ARPL can collect from Mr. Srinivas under the Real Estate (Regulation and Development) Act 2016?
   (A) ₹ 11 lakhs;
   (B) ₹ 15 lakhs;
   (C) Based on the negotiation between the allottees and builder;
   (D) ₹ 12.50 lakhs.
2. What should ARPL do to ensure they are able to collect amounts from allottees for open car parking facilitates under the Real Estate (Regulation and Development) Act, 2016?
   (A) Ensure that the same is separately mentioned in the agreement;
   (B) Prior approval is obtained from RERA as part of the registration of the property;
   (C) They cannot charge unless the option is given to the buyer to choose specifically the car parking slot;
   (D) No amounts can be charged for open car parking slots.
3. Ms. Kruthi seeks your advice on the appropriateness of the calculation of Carpet Area by ARPL under the Real Estate (Regulation and Development) Act, 2016.
   (A) Appropriate, since the method of calculation of carpet area is based on mutually agreed terms between the parties;
   (B) Not appropriate, both open terrace and internal partition walls to be excluded;
   (C) Not appropriate, open terrace to be included but internal partition walls to be excluded;
   (D) Not appropriate, open terrace to be excluded but internal partition walls to be included.
4. GCHPL contends that the apartment leased to Mr. Srinivas is not covered the under Real Estate (Regulation and Development) Act, 2016 provisions. Advice Mr. Srinivas
   (A) RERA is not applicable since it is not a transaction of sale;
   (B) RERA is not applicable, since 100% of the sale value is not paid at the time of transfer of the property and it is a 99 year lease term;
   (C) RERA is applicable, since a substantial amount is paid along with stamp duty and registration charges. Further, the monthly rent is much lower than market;
   (D) RERA is applicable since GCHPL is a registered promoter under RERA.
5. Addis Bank wants your advice with regard to its rights for selecting the interim resolution professional under the Insolvency and Bankruptcy Code, 2016.
   (A) Any financial creditor can appoint the IRP in the committee of creditors meeting by majority;
   (B) Addis Bank has the right to propose the name of the IRP in its application for corporate insolvency resolution process and the same person is appointed by the adjudicating authority if there are no disciplinary proceedings;
   (C) The Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;
   (D) Any financial creditor or operational creditor can appoint the IRP in the committee of creditors meeting by majority.
6. Examine whether the contention of 30% of the allottees is correct on the basis that Promoter have not fulfilled its obligations and have not met the required conditions for transfer of project to the third party under the provisions of the Real Estate (Regulation and Development) Act, 2016.
7. In the opinion of Resolution Professional, participation of both the directors of ARPL as member of the suspended Board of Directors is not mandatory in the meeting of Committee of Creditors under the Insolvency and Bankruptcy Code, 2016. Whether the contention of the Resolution Professional is correct vis-a-vis the judgement of the Hon'ble Supreme Court as was held in the matter of Mr. Vijay Kumar Jain (Civil appeal No 8430 of 2018). Explain briefly.
8. "Mr. Sesha, a Director of the suspended Board of Directors, financial creditor and related party of the Corporate Debtor have right to vote and be a member of the Committee of Creditors." Examine this statement under the provisions of the Insolvency and Bankruptcy Code, 2016.

Answer to Case study 1

1. (A)
2. (D)
3. (D)
4. (A) & (C), Both options are correct
5. (B)

Answer 6

According to Section 15 of the Real Estate (Regulation and Development) Act, 2016 (RERA), the obligations of a promoter in case of transfer of a real estate project to a third party are as follows:

(1) The promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority.

However, such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

(2) On the transfer or assignment being permitted by the allottees and the Authority under sub-section (1), the intending promoter shall be required to independently comply with all the pending obligations under the provisions of this Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.

In the instant case, the contention of 30% of the allottees is not correct as ARPL has taken prior written consent from two-third allottees i.e. 70% allottees (more that 66.67%) and prior written approval of the Authority. Thus, ARPL has fulfilled its obligations and have met the required conditions for transfer of project to the third party under the provisions of the RERA, 2016.

Answer 7

As per Section 24(3) of the Insolvency and Bankruptcy Code, 2016, the members of the committee of creditors may meet in person or by such electronic means. All the meeting of CoC shall be conducted by the RP. Notice of meeting shall be served to the following:

(a) members of Committee of creditors, including the authorised representatives;

(b) members of the suspended Board of Directors or the partners of corporate persons, as the case may be;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

The directors, partners and one representative of operational creditors, as referred above, may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings. And in their absence, shall not invalidate proceedings of such meeting.

Contention of the Resolution Professional vis-à-vis the judgement of the hon'ble Supreme Court in Mr. Vijay Kumar Jain(Civil appeal No. 8430 of 2018), is not correct. In this judgement in fact SC held that erstwhile BoD i.e. the suspended members being interested in resolution plan to be discussed by the members of the committee of creditors, must be given a copy of that plans as part of documents that have to be furnished along with the notice of such CoC meetings.

However, in light of the stated provision, Resolution professional has to give notice to all the participants as given enumerated in section 24. As members of the suspended Board of directors, they can attend the meeting as participants to deliberate on the issues, discuss and give their opinion but they cannot vote.

Answer 8

As per section 21(2) of the Insolvency and Bankruptcy Code, 2016, for the Financial creditor or the authorised representative of the financial creditor, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

Further, as per section 5(24) of the Code, related party, in relation to a corporate debtor, includes a director of the corporate debtor. Accordingly in the given instance, Mr. Sesha, a

Director of the suspended Board of Directors, is a financial creditor as had provided unsecured loan of ₹ 10 crores to the ARPL and is also a related party to ARPL.

Therefore, Mr. Sesha, shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

Past Exam/July 2021/Case Study-2
(PBPTA, FEMA)
WF Private Limited (WFPL)

WF Private Limited (WFPL) is a well-known textile brand in Bengaluru and is known for its authentic Mysore sarees and dress materials. Mr. Suresh Kumar is the founder and CEO of WFPL and has been in the business for more than 30 years. WFPL made a turnover of ₹ 80 crores in Financial Year 2016-17 and was poised to grow its business to more than ₹ 100 crores in Financial Year 2017-18. Mr. Suresh has one daughter, Ms. Revathi, who is happily married and settled in the USA and has become a US Citizen, and one son, Mr. Mahesh Kumar, who helps his father in the textile business. For the purpose of expanding his operations, Mr. Suresh purchased a ground floor shop in Indira Nagar for an amount of ₹ 3 .2 crores. The payment was made by cheque and the title deeds of the property were registered in his name after making the payment of appropriate stamp duty. Mr. Mahesh Kumar purchased an independent villa in Jaya Nagar for an amount of ₹ 7.2 crores (out of his own funds) and gave it on lease to a leading Information Technology company for a monthly rent of ₹ 10 lakhs.

On account of the continued success of the textile business, WFPL commenced exporting Mysore Sarees to all parts of the world and Suresh Kumar incorporated a company in the USA, WF LLC (WFLLC) and made Ms. Revathi as the Shareholder and Director. Ms. Revathi wanted to invest her earnings earned in USA to buy some ancestral property near Udupi, India and accordingly, purchased a large farm house which has a palatial bungalow and 8 acre farm land for an amount of ₹ 5 crores for which ₹ 4.5 crores was sent by her from USA to India through a Nationalised Bank in India. Balance ₹ 50 lakhs was paid through USD denominated traveller's cheques which she had with her and was encashed with the same Bank. She does not plan to continue the farming activity after a ·period of 5 years. WFLLC also incorporated a subsidiary in India called as WL Private Limited (WLPL) for making leather jackets and accessories and invested USD 700,000 as share capital through normal banking channels. WLPL made a payment of USD 107,000 to WFLLC as reimbursement of pre-incorporation expenses, incurred by WFLLC through its EEFC account. WLPL also obtained an external commercial borrowing from WFLLC for an amount of USD 1,000,000 for working capital purposes at an interest rate of 6 month LIBOR + 500 bps and repayable as a bullet repayment after 3 years. Notices were issued to Ms. Revathi for the alleged violation of the Foreign Exchange Management Act, 1999 from Reserve Bank of India.

Mr. Suresh Kumar had a windfall in his business during the 2017 and therefore, wanted to buy another apartment in Whitefield and therefore invested an amount of ₹ 2 crores for acquiring the apartment in the name of his wife Ms. Seethalakshmi by paying lesser stamp duty as a relaxation was given to women. Ms. Seethalakshmi was a home maker and was involved in lot of social activities through NGO, apart from taking care of the family. Earlier Ms. Seethalakshmi have visited her daughter Ms. Revathi in USA and on her return she had around USD 10,000 in currency and travellers cheques which she retained with herself not aware of the provisions of the Foreign Exchange Management Act, 1999 (FEMA, 1999).

Mr. Mukund, son in law of Mr. Suresh Kumar was also from Karnataka and was fully settled in the USA as a US citizen. He was desirous of investing his funds through his NRE Bank account in India for acquiring a good independent home in Mangaluru. So, Mr. Mukund, along with Mr. Mahesh acquired an independent villa in Mangaluru in the joint names of Mr. Mahesh and Ms. Revathi (siblings) for a total consideration of ₹ 1.10 crores. Mr. Mukund intended to buy the property as a gift to Ms. Revathi and had informed her about the same. Mr. Mukund and Mr. Mahesh each paid ₹ 30 lakhs each from their side and procured a cheque for another ₹ 20 lakhs from family friend and the balance amount of ₹ 30 lakhs was paid by Mr. Suresh Kumar in cash. The property got registered in the name of Mr. Mahesh and Ms. Revathi for an amount of ₹ 90 Iakhs and accordingly stamp duty was paid. Mr. Mahesh also purchased a small 2 BHK apartment in Koramangala for an amount of ₹ 60 lakhs in the name of his driver, Mr. Kumaraswamy, which was then rented out to a company under lease. Mr. Mahesh considered that he can get the property transferred back to his name at a later point of time.

Answer the following questions:

1. Revathi seeks your views regarding the appropriateness of the reimbursement of pre- incorporation expenses by WLPL to WFLLC under the provisions of the Foreign Exchange Management Act, 1999?
   (A) Appropriate, since the transaction is covered by Schedule II / Schedule III under the provisions the Foreign Exchange Management Act, 1999;
   (B) Not Appropriate, since the pre-incorporation expenses are specifically not allowed to be reimbursed under FEMA, 1999;

(C) Appropriate, if the same is approved-by the Central Government of India;
(D) Not Appropriate, since the amount of reimbursement is above the threshold prescribed and therefore required the approval of the Reserve Bank of India.

2. WFPL received a large export order on 15 May 2018 from a retailer in the UK for supplying material for which WFPL received an advance payment of GBP 100,000 on 15 June 2018. What is the last date by which WFPL has to supply goods under the agreement, under the provisions of the FEMAct, 1999?
(A) 15th May 2019;
(B) 15th May 2019 or as per the terms of the agreement, whichever is later;
(C) 15th June 2019;
(D) 15th June 2019 or as per the terms of the agreement, whichever is later.

3. Ms. Seethalakshmi went to visit Ms. Revathi in the USA for a holiday and after coming back noted that she had around USD 10,000 in currency and travellers cheques. She is keen to know whether she has to surrender the same to the Authorised Dealer under the provisions of the Foreign Exchange Management Act, 1999.
(A) Yes, within a period of 180 days;
(B) Yes, she has to return the travellers cheques within 180 days, but can retain the currency for future visits;
(C) No, she can retain both travellers cheques (subject to expiry date consideration) and currency for future visits;
(D) No, the amount of USD 10,000 is within the limit prescribed under FEMA for possessing foreign currency.

4. Can Mr. Mahesh get the property purchased in the name of his driver, Kumaraswamy re- transferred in his name?
(A) Yes, he can after paying the required stamp duty;
(B) No, he cannot unless Kumaraswamy agrees;
(C) No, not allowed under the Prohibition of Benami Property Transactions Act, 1988;
(D) Yes, since he was the person who funded the property.

5. With regard to the property purchased in Mangaluru in the name of Mr. Mahesh and Ms. Revathi, how much amount of the property will be considered as a benami property under the Prohibition of Benami Property Transactions Act, 1988?
(A) ₹ 1.10 crores;
(B) ₹ 20 lakhs;
(C) ₹ 50 lakhs;
(D) None of the options.

6. Examine whether the purchase of property in Udupi by Ms. Revati violates the provisions of the Foreign Exchange Management Act, 1999 as alleged in the notice received by Ms. Revati from RBI.

7. The contention of Ms. Revati that the equity investment and the external commercial borrowing investment by WFLLC are not complying with the provisions of FEMAct, 1999. Examine the contention.

8. "There is no violation of the provisions of the Prohibition of Benami Property Transactions Act, 1988 in respect of properties purchased/transactions specified in case study". Justify your answer for each property purchased/transactions as per the provisions of PBPTA, 1988.

Answer to Case study 2

1. (D)
2. (C) and (D), both options are correct
3. (A)
4. (C)
5. (B)

Answer 6

As per FEM (Acquisition and Transfer of immovable property in India) Regulations, 2018, an NRI or an OCI may Acquire immovable property in India other than agricultural land/farm house/plantation property.

Provided that in case of acquisition of immovable property, payment of purchase price, if any shall be made out of (i) funds received in India through normal banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank of India.

Provided further that no payment of purchase price for acquisition of immovable property shall be made earlier by traveller's cheque or by currency notes of any foreign country or any mode other than those specifically permitted by this clause.

In the instant case, Ms. Revathi purchased a large farm house in India which has a palatial bunglow and 8 acre farm land. Further, a portion of the payment (₹ 50 lakhs) was made through traveller's cheques.

As per FEMA Regulations, an OCI cannot acquire immovable property in India in the form of agricultural land/farm house/plantation property and cannot make payment through traveller's cheques. Thus, Ms. Revathi has violated the provisions of FEMA for purchase of property in near udupi.

Answer 7

W.r.t. Equity Investment by WFLLC in WLPL:
As per Schedule II relating to the Capital Account Transactions, investment in equity capital of a body corporate in India by a person resident outside India is a permissible transaction

Accordingly, the contention of Ms. Revati that the equity investment by WFLLC in its subsidiary in India, WLPL of USD 700,000 is not correct It is a permitted Transaction.

W.r.t. ECB investment by WFLLC: The Minimum Average Maturity Period (MAMP) will be 5 years for ECB raised from foreign equity holder for working capital purposes.

All-in-cost ceiling per annum is Benchmark rate i.e. 6-months LIBOR rate plus 450 bps spread.

All eligible borrowers can raise ECB up to USD 750 million or equivalent per F.Y under the automatic route.

Under the approval route, the prospective borrowers are required to send their requests to the Reserve Bank through their AD Banks for examination.

In the instant case, WLPL obtained an external commercial borrowing from WFLLC for an amount of USD 1,000,000 for working capital purposes at an interest rate of 6 month LIBOR + 500 bps and repayable as a bullet repayment after 3 years.

Hence, amount of borrowing & interest rate is exceeding. Therefore, WLPL has to take approval from RBI.

Hence, the contention of Ms. Revati in this regard is correct.

Answer 8

1. **Ground floor shop in Indira Nagar:** Mr. Suresh purchased a ground floor shop in Indira Nagar for an amount of ₹ 3.2 crores. The payment was made by cheque and the title deeds of the property were registered in his name after making appropriate stamp duty.

   It is not a benami property.

2. **Independent villa in Jaya Nagar:** Mr. Mahesh Kumar purchased an independent villa in Jaya Nagar for an amount of ₹ 7.2 crore (out of his own funds) and gave it on lease to a leading Information Technology company for a monthly rent of ₹ 10 Lakhs. It is not a benami property.

3. **Apartment in Whitefield:** Mr. Suresh Kumar purchased an apartment for ₹ 2 crore in Whitefield in the name of his wife Ms. Seethalakshmi by paying lesser stamp duty as a relaxation was given to women. It is not a benami property.

4. **Independent villa in Mangaluru:** This property will be a benami property as ₹ 20 lakhs has been procured from family friend and balance ₹ 30 Lakhs was paid by Mr. Suresh Kumar in cash. Also, the property got registered in the name of Mr. Mahesh and Ms. Revathi for an amount of ₹ 90 Lakhs and accordingly stamp duty was paid. The value of the apartment was ₹ 1.10 crore but got registered for ₹ 90 lakhs. Hence, it is a benami property.

5. **BHK apartment in Koramangal:** Mr. Mahesh also purchased a small 2 BHK apartment in Koramangala for an amount of ₹ 60 Lakhs in the name of his driver, Mr. Kumaraswamy then rented it out to a company under lease. It is a benami property.

6. **Farm House near Udipi:** MS. Revathi purchased farm house which has palatial bungalow and 8 acres farm land for an amount of ₹ 5 crores for which ₹ 4.5 crores was sent by her from USA to India through nationalised bank in India. Balance ₹ 50 lakhs was paid through USD denominated traveller's cheques. It is not a Benami property.

Past Exam/July 2021/Case Study-3
(Same as CSD – 22)

Past Exam/July 2021/Case Study-4
(PMLA, Competition)
Futuristic Cinemas Private Limited (FCPL)

The world of cinemas has always drawn quite a lot of dreamers and talented people into its fold and there are many artists who have become super stars through their hard work notwithstanding their humble beginnings. Mr. Sanjay Shankar is one such star who came to Mumbai from a small town in Madhya Pradesh dreaming of becoming a super star. Through his sheer hard work and commitment, he got opportunities to act in few small films and due to his great work ethic and acting skills, he became very famous and acted in almost 30 films over a period of 4 years and won many accolades. In 2020, he launched his own movie and digital media production house. Futuristic Cinemas Private Limited (FCPL), with an objective to provide opportunities to deserving professionals from humble backgrounds like himself. One such professional he met through his production house was Ms. Chaitya Prakash, a beautiful and talented dancer and both of them became close, were planning to get married soon.

FCPL started producing various movies and was reasonably successful and profitable and Mr. Sanjay was able to manage both his acting career as well as the production house along with Ms. Chaitya. In 2021, Mr. Sanjay, in his free time watched a lot of English and European digital series through online platforms and he was interested in bringing some of the best series into India by dubbing in Hindi and regional languages. Accordingly, FCPL entered into a contract with the foreign production houses and obtained the rights to broadcast these digital series in India after dubbing them in local languages. When the news of this broke out, the All India Production Houses Association (APHA) as well as All India Movie and TV Actors Association (AMTAA) opposed this move by FCPL for broadcasting this in India on the basis that this will hamper the viewership of the serials currently being made in India and thereby would adversely affect the job of local producers and artists. FCPL is of the view that the actions of APHA and AMTAA are anticompetitive in nature and therefore, not in accordance with the Competition Act, 2002. Reference was drawn from Honourable Supreme Court Judgement in Competition Commission of India Vs Coordination Committee of Artists and Technicians of W.B. Film and Television and Others. Kishor Movies Limited (KML), one of the largest production houses in India and also a member of APHA, also alleged that KML had the copy right for one of the digital series and FCPL has violated the Copyright Act as well.

Mr. Sanjay and Ms. Chaitya travelled to Switzerland for a movie and dance show and settled in Switzerland for about 15 months in Lucerne. During their stay in Switzerland, they also visited Belgium where Ms. Chaitya purchased a beautiful Belgian diamond and gold set weighing, 30 grams for a value of EUR 2000. Mr. Sanjay purchased a swiss gold chain for himself weighing 10 grams for a value of EUR 500. When returning to India, Mr. Sanjay brought EUR 6,000 in cash and Ms. Chaitya brought EUR 9,000 (EUR 4,500 in cash and EUR 4,500 in traveller's cheque). When they returned to India, a heavy media contingent were waiting outside the airport and they came through the green channel waving away to the media. Ms. Chaitya, after returning home, handover the foreign currency and traveller's cheques to her mom, Ms. Sundari, who kept the same in her bank locker.

On the other hand, KML had produced a big budget action movie with the biggest star of the country acting as the hero based on India's freedom struggle and was planning to release it just before the 75th year of Indian Independence. This was expected to be a block buster movie and in order to utilize this opportunity, KML put forth a non-negotiable condition to all single screen theatres (which had a market share of around 35% of the total theatres) that for purchasing the exhibition rights for this movie, they had to necessarily acquire the exhibition rights for their next movie which was going to release couple of months later. Some of the single screen theatres agreed to the condition and few other declined and therefore did not get the right to exhibi t the big budget movie. A few of the single screen theatres felt that KML was abusing its dominant position in the industry (being one of the largest movie production houses in the country) by forcing the theatres to buy the rights for two movies unnecessarily and thereby preventing some of the theatres to choose to acquire the rights for the big budget movie.

Note: For the purpose of above case study, 1 USD = 0.8 EUR, and 1 USD = INR 70

Answer the following questions:

1. Ms. Chaitya wanted to know if she was correct in coming by the green channel on her return to India.
   (A) Yes, the value of materials (foreign currency & jewellery) brought by her is within limits prescribed;
   (B) No, the value of foreign currency and jewellery brought into India by her was more than the limits;
   (C) No, since the value of jewellery brought into India is more than the limit and there is no limit for bringing in foreign currency (only a declaration is required);
   (D) Yes, the combined material value brought into India by Mr. Sanjay & Ms. Chaitya was within limits.

2. What is the maximum value of jewellery that can be brought into India by Mr. Sanjay while coming through the green channel?
   (A) Forty grams, with a maximum value of INR 100,000;
   (B) Twenty grams, with a maximum value of INR 50,000;
   (C) Twenty grams, with a monetary limit based on the day's market rate of jewellery in India;
   (D) None of the options.
3. Assuming that KML had earlier obtained the copyright for one of the digital series now acquired by FCPL, what is the status of the violation under the PMLA 2002?
   (A) Prima facie, FCPL is in violation of PMLA 2002 if they have infringed on the rights of KML;
   (B) No, a violation under Copyright Act is not covered under PMLA 2002;
   (C) The violation under PMLA would arise only if the copyright was acquired by FCPL using proceeds of crime relating to another offence under PMLA 2002;
   (D) None of the options.
4. Which of the following factors are not to be considered when evaluating whether the conditions put forth by KML on the single screen theatres has appreciable adverse effect on competition?
   (A) Directly, or indirectly determines the sale price of the tickets;
   (B) Tie-in arrangement;
   (C) Exclusive supply agreement;
   (D) Refusal to deal or restrict any person from dealing.
5. When evaluating the facts, the Directorate General (DG) of the Competition Commission of India has sought your views on some of the aspects that he needs to consider for evaluating the relevant geographic market when determining the position taken by APHA and AMTAA ?
   (A) Local specification requirements, language, consumer preferences, price of services;
   (B) Consumer preferences, language, existence of specialised producers, transportation costs;
   (C) Physical characteristics or end use of services, price of services, national procurement policies, local specification requirements;
   (D) Regulatory trade barriers, local specification requirements, language, consumer preferences.
6. In the light of the facts mentioned in the case study regarding the items and foreign currency brought into India by Mr. Sanjay and Ms. Chaitya, evaluate the offences as per the provisions of the prevention of Money Laundering Act, 2002 read with offences under the Customs Act, 1962.
7. Whether the contention of APHA and AMTAA are in violation of the Competition Act, 2002, vis-a-vis Hon'ble Supreme Court Judgement in Competition Commission of India Vs. Coordination Committee of Artists and Technicians of W.B. Film & Television and others. Explain briefly.
8. Evaluate with reasons whether KML was abusing its dominant position in the industry by forcing the theatres to buy the rights for two movies unnecessarily and thereby preventing some of the theatres to choose to acquire the rights for a big budget movie.

Answer to Case Study 4

1. (C)
2. (B)
3. (A)
4. (A)
5. (D)

Answer 6

Mr.Sanjay and Ms.Chaitya are guilty of offence under the Prevention of Money Laundering Act, 2002.
Mr.Sanjay & Ms.Chaitya purchased the following items from Belgium, when 1USD= 0.8EUR & 1USD= ₹70:

Ms. Chaitya:

(i) A diamond and gold necklace of 30 grams for EUR 2000([i.e. ₹ 1,75,000)
(ii) EUR 9000 (EUR 4500 in cash and EUR 4500 in traveller's cheque): [i.e. USD 5625 in cash and USD 5625 in traveller's cheque]

Mr. Sanjay:

(i) Mr. Sanjay purchased a gold chain of 10 gms for EUR 500 (i.e. ₹ 43,750)
(ii) EUR 6000 in cash [i.e USD 7500]

As per Rule 5 of Baggage Rules, 2016, a passenger residing abroad for more than one year, on return to India shall be allowed clearance free of duty in his bona-fide baggage of jewellery up to a weight, of twenty grams with a value cap of fifty thousand rupees if brought by a gentleman passenger, or forty grams with a value cap of one lakh rupees if brought by a lady passenger.

Since baggage item is also subject to duty beyond certain limit and in the case of Mr. Sanjay this limit is 20 grams with a value cap of 50,000 rupees. Since he brought the gold chain within prescribed amt (i.e. 10gms gold worth ₹ 43,750), hence Mr. Sanjay has not committed any offence u/s 135 of the Customs Act, 1962.

Ms. Chaitya brought through the green channel, jewellery which is beyond the permitted limit (forty grams with a value cap of one lakh rupees) of baggage. But Ms. Chaitya walked through the Green Channel with dutiable goods. She should have walked through the Red Channel and declared her dutiable goods. Hence, Ms. Chaitya has committed an offence under section 135 of the Customs Act, 1962.

Further as per paragraph 12 of part A of Schedule to the Prevention of Money Laundering Act 2002, offences under the Section 135 of Customs Act, 1962 regarding evasion of custom duty; and offences under the Section 132 of Customs Act, 1962 regarding false declaration, false documents, etc. are considered as scheduled offence under the Prevention of Money Laundering Act, 2002.

Therefore, Ms. Chaitya is guilty of an offence u/s 3 of the Prevention of Money Laundering Act, 2002.
Further, Ms. Sundari is holding foreign currency and traveller's cheque being proceeds of crime, is guilty of violating the provisions of the Prevention of Money Laundering Act, 2002.

Answer 7

Considering the facts, APHA & AMTAA opposed the move taken by FCPL for broad casting best European and English digital series in India. The contention of APHA & AMTAA that this will hamper the viewer ship of the serials currently being made in India and would adversely affect the job of local producers and artists.

In the light of the said scenario, both APHA & AMTAA comes under the purview of associations of enterprises as defined under section 2(h) of the Competition Act, 2002.
Enterprises – The said, APHA & AMTAA, associations are trade unions in nature, and so, by the virtue of the fact that the constituent members of the associations have been indulging in the activities relating to the production, distribution and exhibitions of the films. And therefore the said associations falls within the ambit of "association of enterprises" as used under the Act.
Agreement – the said enterprises as the members, take decisions on behalf of every such enterprise being engaged in similar kind of business, and also consult certain other organizations in order to safeguard the interest of the concerned enterprises, which further shows the collective intent of the entire associations, and fall within the ambit of "Action in Concert" as given in Section 2(b).

As association of both the enterprises APHA & AMTAA, engaged in similar business of productions, distributions and exhibitions of films and take decisions on behalf of every such enterprise engaged in similar business and their decisions reflect the collective intent. Since the associations and FCPL, both the parties working at horizontal level, hence the action of the association attract the element of "Anti-Competitive Agreement" as specifically given under Section 3(3), since the associations by causing restriction on the dubbing in hindi and regional languages series, was limiting or controlling the production, supply of the serials, in India. Moreover, the said restrictions also prevented consumers from enjoying their "right to choose" and hence in totality it caused the "Appreciable adverse effect" on the competition of relevant business in the relevant market, which is prohibited by Section 3 of the Act .

Answer 8

The facts of the case are that KML was planning to release its big budget action movie on 75 th year of Indian Independence. KML put forth a condition before the Single Screen Theatres that if they want to purchase the rights of the said action movie, they have to also purchase the exhibition rights of their next movie which was to be released in couple of months later. KML kept that as a non-negotiable condition. These Single Screen Theatres had a market share of around 35% of the total thea tres.

The majority of the Single Screen Theatres agreed to the condition because KML is the largest (number of films per year) producer, but some did not find it lucrative and hence declined. Unfortunately, the ones who declined did not get the rights to exhibit both, the movies.

Since KML put forward tie-in agreement (prohibited u/s 3(4) the Competition Act, 2002 and explained through explanation to said sub-section) as a non-negotiable condition in front of Single Screen Theatres, hence guilty under section 3(1) the Competition Act, 2002 of entering an anti-competitive agreement.

KML being the largest producer, hold the dominance over the exhibitors (as well as on other producer and distributors) but that neither prohibited and nor considered as offence. This feature of being the largest production house and a member of APHA, empowers the KML to put forward the non-negotiable condition and also influences/forces the majority of the Single Screen Theatres to agree on the condition (tie-in i.e. to purchase the rights of the film, Single Screen Theatres have to also purchase the rights of the next film) hence KML also guilty under section 4(1) of the Competition Act, 2002 of abusing the dominance.

Past Exam/July 2021/Case Study-5
(FEMA, RERA)
NC Private Limited (NCPL)

NC Private Limited (NCPL) was established in the year 2015 by Mr. Neelkant Sharma, a young but successful real estate mogul. The Company's real estate business was managed by Neelkant and his mother, Ms. SB Lakshmi. NCPL specialised in construction of medium sized luxury projects with around 80- 100 apartments in each project. With the challenges in the real estate industry, NCPL was running in a fairly profitable manner and was able to complete its projects timely and thereby earned a good name in the Bangalore market.

In 2019, Mr. Neelkant wanted to increase the presence of the NCPL brand and decided to commence 4 super premium projects in Bangalore and Mysore.

Project Name	Size	Number of apartments
Neelkant Nandanam, Bangalore	500 sq.m	12
Neelkant Sankalp, Bangalore	50,000 sq.m	500
Neelakant Shristi, Mysore	5,000 sq.m	80
Neelkant Bhagyam, Bangalore	5,000 sq.m	100

He discussed this with his father, Mr. Yagna Sharma, who is also a Director and CFO in NCPL and was evaluating the source of funds for these projects.

NCPL decided that the booking for all the projects will start after 15th December 2019 after obtaining the required permissions under the Real Estate (Regulation and Development) Act, 2016 (RERA). In the Board meeting held on 5th December 2019, it was decided that in view of the shortfall of funds at this stage, the budget for two projects was reduced. NCPL decided to reduce the number of apartments in Neelkant Nandanam to 8 and in the case of Neelkant Sankalp, the construction will take place in two phases. In the first phase, 25,000 sq.m will be developed to construct 250 apartments and the balance will be done in phase II.

NCPL started to obtain bookings for the projects from 24th December 2019 post obtaining the required approvals with the cost of the apartments ranging from ₹ 300 lakhs to ₹ 500 lakhs in the projects. NCPL also gave an extra 2% discount to those who book the apartment within 3 months from the commencement of the construction.

Ms. SB Lakshmi, apart from managing 'the real estate business was also providing independent consultancy on real estate matters in India and abroad. In 2020, she went to visit her younger brother, Mr. Anand, who was pursuing his masters in Germany. During her visit, she was invited by the Hamburg University to give a lecture to the students on nuances in real estate management and she earned a honorarium of USD 1,500. After her return, she remitted USD 150,000 to Mr. Anand for his education expenses which includes college fees, accommodation and food expenses. She also remitted an amount of USD 5,000 from her RFC account as her gift for his birthday so he could travel to the UK to watch a football match of his favourite team, Arsenal.

Mr. Manohar Reddy, a registered real estate agent, wanted to get associated with NCPL for selling the flats in Bangalore and Mysore and Manohar gave an advertisement without NCPL's knowledge, in the newspapers for the sale of the apartments with an offer that whosoever book any apartment via Manohar, they will get extra one percent discount in the booking amount.

NCPL got a very good response for the 3 projects in Bangalore. However, the project in Mysore got a lukewarm response with only 50% booking. In the Board Meeting held in March 2020, it was decided that the Company will sell the Mysore project to another third -party real estate developer, SI Projects Limited (SIPL) which was approved by 26 allottees who had purchased the apartments till date. Further, NCPL opined that the approval of 2 apartment owners were not required, since they had acquired the apartment through a transfer from the original allottees and therefore, are not to be considered for this purpose. After taking over the project and with 75% of the apartments sold, SIPL made certain changes in the layout of the project to move the position of the swimming pool from the ground floor to the roof top. This would provide more space for SIPL to include additional amenities for the use of the allottees. These changes were approved by 38 original allottees and the 2 apartment owners who had purchased through a transfer. The NCPL observed that SIPL have not adhered to the provisions of the Real Estate (Regulation and Development) Act, 2016, have altered plan and specification.

In 2020, Mr. Neelkant Sharma wanted to acquire some land in Whitefield for building a large duplex home for himself and he zeroed in on a piece of land close to his current residence, which belonged to Mr. Deepak Kumar, his cousin brother and an NRI. Mr. Deepak Kumar had emigrated to the USA in 2015 and married Ms. Ashlin, a citizen of USA in 2016. A consideration of INR 700 lakhs was agreed, out of which INR 600 lakhs was paid by Mr. Neelkant Sharma from his RFC account and the remaining amount was paid as a gift through a crossed cheque to Mr. Deepak Kumar, who deposited this in his NRO account. In 2021, Ms. Ashlin wanted to acquire one of the apartments constructed by SIPL, jointly with Mr. Deepak and agreed to remit an amount of ₹ 150 lakhs from her earnings outside India through normal banking channels. However since SIPL insisted on an immediate initial booking advance, she gave traveller's cheque for an amount of USD 10,000 during her visit to India, however the CFO of SIPL is skeptical regarding the compliance of the Foreign Exchange Management (Acquisition and Transfer of Immovable property in India) Regulations, 2018.

Answer the following questions:

1. Mr. Yagna Sharma, seeks your views on whether NCPL can obtain External Commercial Borrowings from an interested overseas investor for funding the new projects, under the automatic route?
   (A) Yes, subject to compliance with RBI ECB Regulations with regard to all in cost ceiling, minimum average retention period etc;
   (B) No, proceeds from ECB cannot be used for real estate activities;
   (C) Yes, prior approval of the Authorised Dealer is required;
   (D) No, unless the loans are obtained by NCPL from an NBFC who in turn has obtained the ECB.

2. NCPL decided to construct the Neelkant Sankalp in two phases due to shortage of funds. What shall be the impact of the decision on the project?
   (A) No, if the second phase is started immediately after completion of phase 1, no separate registration is required for the second phase;
   (B) No, both the phases are part of one project and hence, no separate registration is required;
   (C) Yes, each phase will be considered as a standalone project and separate registration is required;
   (D) None of the options.

3. Which of the projects of NCPL do not require registration with RERA?
   (A) Neelkant Nandanam;
   (B) Neelkant Bhagyam;
   (C) Neelkant Shristi;
   (D) All projects require registration.

4. What is your view regarding the position taken by NCPL on the exclusion of 2 apartment owners for the purpose of considering their need for approval of transfer of infrastructure project to SIPL?
   (A) Yes, the position is correct, since they are not the original acquirers of the apartment from NCPL and NCPL is not obligated to the current owners;
   (B) No, the position is incorrect, the subsequent owners of the apartment are also to be considered as allottees under RERA;
   (C) Yes, their position is correct, unless the original allottees obtaining NCPL's consent prior to transferring their ownership to the current apartment owners;
   (D) No, NCPL has obtained the approval from sufficient number of original allottees and therefore, they do not need to consider the other allottees.

5. Ms. SB Lakshmi seeks your advice on the next steps to be undertaken by her with regard to the foreign currency earned by her during her visit to Germany,
   (A) She is required to surrender the same to authorised person within 180 days of her return to India;
   (B) She is allowed to retain the said sum in foreign currency without any time limit;
   (C) She is allowed to retain the said sum, provided she obtains the approval of the authorised dealer;
   (D) She is allowed to retain the said sum, provided she converts the currency into traveller's cheque.

6. Evaluate with reasons, whether the remittances made by Ms. SB Lakshmi are in compliance with the provisions of the Foreign Exchange Management Act, 1999. Would your response change if the education Fee is USD 300,000 (instead of USD 150,000 as mentioned in the Case Study).

7. Examine analyse the implications of Land transfer by Mr. Deepak to Mr. Neelkant Sharma & remittance thereof under the FEM (Acquisition & Transfer of immovable Property in India) Regulations, 2018.

8. SIPL's CFO is of the opinion that stipulated booking of flat by Ms. Ashlin violates the conditions stipulated as under the Foreign Exchange Management (Acquisition and Transfer of immovable property in India) Regulations, 2018, kindly examine.

9. Whether the contention of NCPL is justified that SIPL is within their legal rights to alter the plan and specification. Examine the same in light of provision of the RERA, 2016.

Answer to Case study 5

1. (C)
2. (C)
3. (A)
4. (B)
5. (B)

Answer 6

According to Schedule III of the FEM (Current Account Transaction) Rules, 2000, individuals can avail of foreign exchange facility for the prescribed purposes within the limit of USD 250,000 only. Any additional remittance in excess of the said limit shall require prior approval of the Reserve Bank of India.

In the given case study, Ms. SB Lakshmi remitted USD, 150,000 to his brother, Mr. Anand for his education expenses including fees, accommodation and food expenses. She also remitted an amount of USD 5,000 from her RFC account as gift on account of his birthday to him.

Accordingly, here since the remittance is for the education and his maintenance along with the gift of amount are the prescribed purposes under Schedule III within the limit of USD 250,000 (i.e., USD 155,000= 150,000+5,000). Hence, no prior approval of RBI is necessitated.

Therefore the said remittances made by the Ms.SB Lakshmi is in compliance with the provisions of the Foreign Exchange Management Act, 1999.

Where if, education fee is USD 300,000, then she can remit based on confirmation from University and shall not require prior approval of the Reserve Bank of India.

Answer 7

Transfer of land by Mr. Deepak Kumar: As per the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, an NRI or an OCI may transfer any immovable property in India to a PRI. So accordingly, Mr. Neelkant Sharma can acquire immovable property belonged to Mr. Deepak Kumar (his cousin brother) and an NRI, residing outside India.

'Remittance outside India' means the buying or drawing of foreign exchange from an authorised dealer in India and remitting it outside India through banking channels or crediting it to an account denominated in foreign currency or to an account in Indian currency maintained with an authorised dealer from which it can be converted in foreign currency.

As per the fact, Mr. Neelkant Sharma, remitted INR 600 lakhs from his RFC account and remaining amount paid as gift through crossed cheque to Mr. Deepak Kumar who deposited this in his NRO account. This mode of remittance of amount in lieu of sale of immovable property, made to Mr. Deepak Kumar is in compliance with the said provisions.

Answer 8

As per the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, an NRI or an OCI may acquire immovable property in India ,Provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

Provided further that no payment for any transfer of immovable property shall be made either by traveller's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause.

As per the facts, remittance of an amount of ₹ 150 lakh to be made by Ms. Ashlin, from her earnings through normal banking channels was permissible. However, on being insisted by SIPL on making immediate initial booking advance, payment of an amount of USD 10,000 by Ms. Ashlin through traveller's cheque during her visit in India, is not permissible. Therefore stipulated booking of flat by Ms. Ashlin violates the requirements of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018.

Answer 9

Adherence to sanctioned plans and project specifications by the promoter under RERA (Section 14)

Section 14 of the RERA requires a promoter to adhere to the sanctioned plans and the project specifications. According to it the proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

If any additions and alterations are required to be carried out it shall be done with the previous consent of the concerned person. However, minor additions or alterations as may be required by the allottee can be made by the promoter. In case, certain minor changes or alterations as are necessary due to architectural and structural reasons, are to be made by the promoter, they shall be duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Further, in case of any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project, the promoter is permitted to do so but he must obtain the previous written consent of minimum two-thirds of the concerned allottees.

If an allottee brings to the notice of promoter any structural defect, etc. or some of his other unfulfilled obligation as per the agreement for sale within five years from the date of possession, the promoter shall be duty-bound to rectify such defects without further charge, within thirty days. If not so rectified within the specified time, the aggrieved allottee shall be entitled to receive appropriate compensation.

In the given case study, changes were approved by 2/3 (i.e.40/60*100) of the original allottees, therefore contention of NCPL is not justified and SIPL is within their legal rights to alter the plan and specification in compliance with the stated requirements of the RERA.

Past Exam/Dec 2021/Case Study-1
(IBC, PMLA)
Cinema world Corporation Private Limited ("CCPL")

Cinema world Corporation Private Limited ("CCPL") is a company incorporated in Mumbai, India and is engaged in the business of producing bollywood feature CCPL was founded by 111jAjay_Raihore, a well-known real estate mogul and industrialist. Mr. Ajay is engaged in his .real estate business of development of high rise apartments and providing interiors, furniture etc. in the name of Luxury Heaven Private Limited ("LHPL"). CCPL also had a subsidiary, Wonderful Imagination India Private Limited ("WIIPL") which was into imaging business for production of movies and was making substantial profits due to its professional approach and superior quality of mastering digital prints.

During the course of business, Ajay earned enormous Wealth in theform of cash through his real estate business (by mandating pavment in cash from his home buyers). This was invested in his various businesses to acquire agricultural farm land (to grow and export opium), acquiring and selling (export) of antiquities etc. and his net-worth grew to a substantial sum of ₹ 500 crores. A majority of his dealings in the farm and antiquities businesses were done through cash transactions or through a specific bank account maintained with ABC Bank Limited. Amounts were received in cash from his international customers through a hawala agent known to Mr. Ajay Rathore. He also purchased villas in India and in Spain using the money earned through his farm and antiquities businesses. Mr. Ajay Rathore also established Sure Returns Private Limited, a small non-banking finance company for securing the lives of the employees and the families with asset size of ₹450 Crores

Mr. Ajay invested an amount of ₹ 5 crore in Sure Returns out of the funds received from his antiquities business. He also used the cash generated from his agriculture, antiquities and real estate business in funding CCPL and producing movies. He also used cash to pay money to the censor board for speedy clearance of his movies and theatres for timely release.

CCPL wanted to produce a big budget film and obtained a loan from ABC Bank Limited for an amount of ₹100 crore after mortgaging all the assets of CCPL and also the rights relating to the film. CCPL also obtained a loan from LHPL for an amount of ₹25 crore and an unsecured loan of ₹20 crore from Mr. Rohit Jain, a local money lender and a friend of Mr. Ajay Rathore. Due to the disputes that arose between some of the parties involved, the movie was not certified by the Censor Board and therefore, couldn't be released. Due to the same CCPL suffered heavy losses and therefore, could not pay its financial and operating creditors. ABC Bank Limited then filed an application under the Insolvency and Bankruptcy Code, 2016 and the application was admitted. Other than the loans obtained, CCPL had a liability of ₹5 crore to its employees and ₹6 crore to the government for statutory dues.

The resolution professional appointed for CCPL reviewed the assets of CCPL and concluded that out of the total book value of various assets of ₹180 Crores (including the amounts spent on producing the movie), the recoverable value is only ₹40 crore. The RP also noted that WIIPL, the subsidiary of CCPL had substantial assets and the RP wanted to include such assets for the purpose of liquidating the claims against CCPL.

Further, pursuant to the review of the transactions at CCPL, the RP got wind of the businesses carried out by Mr. Ajay Rathore and informed the regulatory authorities about the transactions carried out.

Answer the following questions:

1. Which of the following are not functions of insolvency professional agencies under IBC, 2016?
   (A) Addressing grievance of aggrieved parties
   (B) Gathering information on the performance of insolvency resolution professionals
   (C) Suggesting the appointment of interim resolution professionals for specific companies
   (D) Monitoring, inspecting and investigating members

2. Due to the downturn in the finance industry, Sure Returns Private Limited suffered heavy losses and couldn't repay the dues to its creditors and investors. Who can initiate proceedings against Sure returns Limited under the IBC, 2016 ?
   (A) Any regulator
   (B) Directors of Sure Returns
   (C) Any creditor of Sure Returns
   (D) None, IBC 2016 does not apply

3. As per PMLA, a person who exercises ultimate effective control over a juridical person conducting a transaction is called:
   (A) Client
   (B) Beneficial owner
   (C) Authorised person
   (D) Intermediary

4. Out of the below, what is not part of the responsibility of ABC Bank Limited under PMLA, 2002 —
   (A) Report suspicious transactions undertaken by Mr. Ajay Rathore and the Group
   (B) Furnish all information requested by the Director
   (C) Verify the identity of the clients and beneficial owners
   (D) Maintain records of transactions for a period of 5 years

5. The Director wanted to provisionally attach the properties of Mr. Ajay Rathore for a period of 365 days, which was vehemently challenged by Mr. Ajay Rathore. Examine
   (A) The maximum period for which a property can be attached is for 365 days
   (B) The maximum period for which a property can be attached is for 180 days
   (C) The time limit for the provisional attachment will be decided by the Adjudicating Authority on a case to case basis
   (D) The maximum period for which a property can be attached is for 275 days

6. Answer the following questions
   (i) Identify the various transactions in the case study which are offences under the PMLA 2002, the proceeds of the crime and the parties to the crime
   (ii) Examine the correctness of the position taken by the Resolution Professional to use the assets of WIIPL for satisfying the claims against CCPL? What are the assets to be included / excluded when computing the liquidation estate of CCPL?
   (iii) Based on the facts of the case, identify the claims against CCPL and the prioritization of the claims as per IBC, 2016

Answer to Case study 1

1. (C) - Suggesting the appointment of interim resolution professionals for specific companies
2. (D) - None, IBC, 2016 does not apply
3. (B) - Beneficial owner
4. (A) - Report suspicious transactions undertaken by Mr. Ajay Rathore and the Group.
5. (B) - The maximum period for which a property can be attached is for 180 days

Answer 6:

(i) Section 2(1)(u) of the Prevention of Money Laundering Act, 2002, defines "proceeds of crime" as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;

"Proceeds of crime" include property not only derived or obtained from the schedu led offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.

S.No.	Transactions which are offences under the PMLA 2002	Proceeds of crime	Parties to crime
1	Mandating payments in cash from home buyers (through real estate business)	Wealth in the form of cash through his real estate business	Mr. Ajay
2	Acquisition of agricultural farm land (to grow and export opium)	₹ 500 crores	Mr. Ajay Seller of farm
3	(a) Acquiring and selling (export) of Antiquities	Amount received from international customers	Mr. Ajay Seller of Antiquities Purchaser of Antiquities (receiving parties in importing countries) Hawala agent
	(b) Investment in Sure Returns Pvt. Limited	₹ 5 crores	Sure Returns Pvt. Limited Mr. Ajay
4	Purchase of villas in India and Spain	Amount of cash paid to purchase the villas	Mr. Ajay The construction company to which the said amount was paid in cash

5	Funded CCPL and to produce movies by using cash generated from agriculture, antiquities and real estate business	Amount of cash paid to CCPL	Mr. Ajay CCPL
6	Amount paid to censor board for speedy clearance of his movies and to theatres for timely release	Amount paid to censor board for speedy clearance of his movies and to theatres for timely release	Mr. Ajay Rathore Censor Board

(ii) As per Section 18 of the Insolvency and Bankruptcy Code, 2016, the key duties to be performed by the Interim Resolution Professional are to collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor.

Accordingly, he takes control and custody of any assets over which corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets.

Following shall not be included in the meaning of "Assets" [Explanation to Section 18]

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

Accordingly, as per the above provision, since the assets of subsidiary of the corporate debtor is not included in the assets over which corporate debtor has ownership rights, therefore, position of the resolution professional to use the assets of WIIPL for satisfying the claims against CCPL, is not correct.

Following are the assets to be included/ excluded from computing the liquidation estate of CCPL

Assets which form part of Liquidation Estate [Section 36(3)]

Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -

(a) any assets over which the corporate debtor has ownership rights.

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realized.

Assets which do not form part of Liquidation Estate [Section 36(4)]

The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: -

(a) assets owned by a third party which are in possession of the corporate debtor, including-

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor

(iii) As per the facts, following shall be the claims against CCPL and the prioritization of the claims as per the section 53 of the Insolvency & Bankruptcy Code, 2016:

Accordingly, from the proceeds of the sale of the liquidation assets (i.e., from recoverable value ₹40 crore) claim shall be distributed in the following order of priority —

(1) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52: Amount 100 crore (from ABC Bank Limited) + 25 crore (from LHPL).

(2) wages and any unpaid dues owed to employees: Liability of ₹ 5 Crore to its employees

(3) financial debts owed to unsecured creditors: ₹ 20 crore from Mr. Rohit Jain

(4) Amount Statutory due to the Central Government and the State Government: ₹ 6 crore

Past Exam/Dec 2021/Case Study-2
(FEMA, RERA)
Mr. Raj Mishra (Similar CSD-6)

Mr. Raj Mishra is an Indian resident who moved to Punjab from Bihar around 10 years back for employment with State Titanium India Limited (STIL), after completion of his master's in business management from IIM. Raj joined STIL as an assistant manager in operations and got numerous promotions based upon his performance. A year ago, Raj was elevated from the position of Vice President - Plant Operations of Punjab Plant and transferred to a new plant of STIL in Telengana as Plant Head. Mr. Mishra is a member of the Committee on the financial matters as an employee's representative. STIL is a multi- product manufacturing company headquartered in Punjab. One of its products is in high demand abroad and around 60% of its production is exported majority to Europe followed by Australia. STIL established a branch office in central London recently and is in the process of making a bid for acquiring a textile plant there, the deal is expected to mature in six months' time. It will be a whole cash deal and the funds will be arranged through ECB (External Commercial Borrowings) in Euro currency STIL is eligible to receive FDI.

Raj, after shifting to Telengana, wanted to buy his own house and, in that process, identified a housing project `Nirmal Awas' in Gachibowli. Raj applied to CDIL, the promoter of Nirmal Awas' for a 3 BHK apartment. The project was duly registered with the relevant state authority under Real Estate (Regulation and Development) Act, 2016 (RERA). The price of the apartment will be calculated based upon the carpet area at a rate of ₹ 3,000 per square feet. The 3 BHK apartment is comprising gross area of 1200 square feet, including external walls and internal partition walls equal to 3% and 4% of the gross area of the apartment, respectively; and also including a balcony of 24 square feet and an open terrace area of 40 square feet for exclusive use of allottee of the apartment independently. Allotment for all 140 apartments were done in the month of February, 2020 to the respective allottees which included Mr.Nayak who had applied for two apartments and got the same in his own name, and Mr, Gautam who had applied for three apartments and got one in his own name, another in the name of his elder Son and another one in the name of his business firm; which will be used a guest house for the guests related to his business. Rest all had applied tor a single apartment.

Due to the nation-wide lock down, the majority of labourer. Working at `Nirmal Awas' being casual workers moved back to their villages. CDIL realised that it would be difficult to complete the project by December, 2020 (due-date committed for possession) and after some efforts CDIL decided to transfer the project to JSED, a renowned name for developing residential projects. The allottees of 93 apartments, including Mr. Nayak and Mr. Gautam agreed for the transfer of the project because they already had put a huge sum for the apartments promised to them and hence the allottees of 93 apartments gave their consent by raise of hands to CDIL to transfer its rights and liabilities in Nirmal Awas to JSED. CDIL notified the said transfer to the relevant state authority under RERA within 30 days of transferring the project. JSED is willing to re-allot the apartments after taking charge from CDIL and it also filed an application to the relevant state authority under RERA for extension of 3 months quoting such transfer of project as a major reason.

As mentioned earlier that, STIL is planning to raise funds through ECB. STIL figures out that there will be two-three months' gap between the raising of money and packing the deal of acquiring the textile plant in London. Considering the transaction cost involved, STIL decided to park the funds for such time abroad only. STIL is considering various alternatives to park such funds. Committee on financial matters asked Raj to present his views on central banks' guidelines. The authorised dealer category I bank, with whom STIL is maintaining an EEFC account has sought for more information than in previous transactions. Raj finds the same a bit irritating, in response to which the banker explains to Raj that they are bound to enhance due diligence in case of specified transactions.

STIL has a stake of 26% in a Dubai based company named Dibschi LLC. STIL has an overseas office in Dubai but at the third-party location as STIL doesn't have any office premises in Dubai. STIL is now approaching various real estate brokers to find a suitable space for opening an office in Dulai.

Sridhar, another employee of STIL left India on 26th May 2006 for employment with the subsidiary of STIL based in Germany. Sridhar was born and brought up in India and holds an Indian passport with non-resident status. Sridhar acquired a commercial property in Pune in May 2018 for which he paid out of funds held in a non-resident account. He, while being a non- resident, had also inherited an ancestral house situated in Mumbai from his deceased father, who was resident in India.

Sridhar took his mother to Germany along with him as he is the only son and decided to permanently settle there. In order to acquire bigger property there, he decided to sell both the property he owns in India; hence start looking for buyers. Through his brother- in- law, who is a real estate broker (but not charged any commission from Sridhar); he sold the inherited property for ₹ 2.5 crore and the property at Pune got sold for ₹ 4.5 crore. Since Sridhar holds NRI status for Indian income tax law purposes, hence buyers deduct tax of ₹ 52 lakh and ₹ 93.6 lakh respectively at the source. Sridhar wishes to repatriate the realised funds to his German account.

Answer the following questions:

1. With reference to the property acquired by Mr. Sridhar in Pune in May 2018, choose the correct statement out of the following considering the legal validity in the context of provisions of Foreign Exchange Management Act, 1999 and regulations made there under
   (A) Mr. Sridhar shall not acquire any immovable property in India
   (B) Mr. Sridhar may acquire the immovable property in India, but only in joint ownership with some resident in India.
   (C) Mr. Sridhar may acquire only one immovable property, but not from the fund held in a non-resident accout
   (D) Sridhar may acquire immovable property other than plantation property

2. Under RERA, the price of the apartment is based upon the carpet area and therefore it bocomes important to correctly measure the same. What shall be the carpet area of the 3 BHK apartment in Nirmal Awas?
   (A) 1146 square feet
   (B) 1100 square feet
   (C) 1136 square feet
   (D) 1052 square feet

3. STIL is now approaching various real estate brokers to find a suitable space for opening an office in Dubai. Can STIL buy office premises (immovable property) in Dubai?
   (A) STIL, being an Indian company cannot buy office premise outside India.
   (B) STIL can buy office premises in Dubai.
   (C) Only Dibschi LLC can buy office premises in Dubai for STIL.
   (D) Dibschi LLC and STIL can buy office premises jointly only.

4. With reference to the explanation given by the banker to STIL with respect to seeking of more information, which of the following is not a specified transaction?
   (A) Any transaction in foreign exchange
   (B) Any transaction in any high- value imports or remittances
   (C) Any transaction in any high- value exports or remittances
   (D) Any transaction where there is a high risk or risk of being considered as money laundering

5. Which amongst the following is not a valid alternative available with STlL to park lhe funds abroad?
   (A) Deposit the funds with a foreign bank rated AA by S & P
   (B) Deposit the fiinds with a foreign bank rated AA by Moody
   (C) Deposit the funds with a foreign branch of Indian bank abroad
   (D) Treasury bills Up- to one- year maturity rated A+ by Fitch

6. Answer the following questions :

(i) Examine the following, with reasons Based on applying the provisions of RERA 2016 :
   (a) Whether the transfer of rights and liabilities in the project 'Nirmal Awas' by CDIL to JSED is legally valid?
   (b) Whether JSED is allowed to re- allocate the allotments already done in ihe project 'Nirmal Awas' by CDIL?
   (c) Whether the application moved by JSED to seek an extension of time on the grounds of delay on account of transfer of project is maintainablc?

(ii) Since Mr. Sridhar is not aware of the local laws of the country, hence looking for your assistance io know can he repatriate funds back to his German account; if yes then how much amount of the sale proceeds can be repatriated ?

ANSWER TO CASE STUDY- 2

1. (D) - Mr. Sridhar may acquire immovable property other than plantation property
2. (B) - 1100 square feet
3. (B) - STIL can buy office premises in Dubai

4. (C) - Any transaction in any high- value exports or remittances
5. (D) - Treasury bills up to one year maturity rated A+ by Fitch

Answer 6

(i)

(a) As per section 15(1) of Real Estate (Regulation and Development) Act 2016, the promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two - third allottees, except the promoter, and without the prior written approval of the Authority.
It is also important to consider explanation to the said sub-section, which says that for the purpose of this sub-section, the allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

Explanation simply implies that Mr. Nayak and Mr. Gautam will be counted as 2 allottees rather than 5 in totality which makes the total allottees 137 in number. 2/3 rd of 137 will be 91.33. Here, 91.33 shall be considered as 92.

Note – Here, reasonable interpretation (of law) shall be constructed, 2/3 allottees shall be read as at least 2/3 allottees and shall be round-up.

Further consent by allottees of 93 apartments, including Mr. Nayak and Mr. Gautam, becomes the consent from only 90 allottees by the virtue of the explanation to section 15(1) as quoted above, and 90 is less than the required number i.e. 92.

Thus, the transfer of an interest in the project 'Nirmal Awas' by CDIL to JSED is not legally valid due to the following three reasons:

1. Consent of 2/3 allottees is not taken.
2. Consent given by allottees is not in writing.
3. Prior written approval from the state authority under RERA is not taken.

(b) As per proviso to sub-section 1 to Section 15 of the Real Estate (Regulation and Development) Act, 2016, any transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter. Hence, JSED is not allowed to re-allocate the allotments for the project 'Nirmal Awas'.

(c) According to Section 15(2) of the Real Estate (Regulation and Development) Act 2016, any transfer or assignment permitted under provisions of this section (i.e. section 15) shall not result in the extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder.

Thus, the application moved by JSED to seek an extension of time on the grounds of delay on account of transfer of project is not maintainable.

(ii) As per Section 6 (5) of the Foreign Exchange Management Act, 1999, a person resident outside India may hold, own, transfer or invest in Indian currency, security, or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

As per Regulation 8 (a) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, a person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section.

Further regulation 8 (b) provides, in the event of sale of immovable property other than agricultural land/ farm house/ plantation property in India by an NRI or an OCI, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:

(a) The immovable property was acquired by the seller in accordance with the provisions of the foreign

exchange law in force at the time of his acquisition or the provisions of these Regulations;

(b) the amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in Foreign Currency Non - Resident Account or out of funds held in Non-Resident External account;

(c) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

Thus, Mr. Sridhar can repatriate of sale proceed of both the immovable properties.

Mr. Sridhar can repatriate ₹ 1.98 crore (₹ 2.5 cr- ₹ 52 lakh), the net proceeds from the sale of an inherited ancestral house, under Regulation 8(a) with permission from RBI, whereas authorised dealer may allow repatriation of ₹ 3.564 crore (₹ 4.5 crore- ₹ 93.6 lakh), the net proceeds from sale of commercial property under Regulation 8(b).

Past Exam/Dec 2021/Case Study-3
(Competition, FEMA)
Mr, Hiren Patel

Mr, Hiren Patel is a young dynamic artificial intelligence professional with mechanical engineering qualiiicaiion and currently resides in Seattle, USA and holds NRI status. Hiren works for a Company called Navigate Automobiles LLP (Navigate). Navigate is in the business of designing, developing and Selling automobile computer operating system to make “smart cars” which is called “ignite”. Ignite is very popular among the smart Automobile manufacturers since it offers propriclary applications and services such as maps, internet explorer and blue tooth connectors etc. lgnite Automation Services (IAS) is bundled Suite of Navigate's applications and services and such apps and services are not available in isolation. In trade parlance, the OS is different from OS designed for typical cars as they have additional use features. 80% of smart cars, which are in use has Ignite as the operating system. If a car manufacturer wants to manufacture a normal Ignite car, it needs to only pass technical tests and accept the Ignite License Agreement; but in a normal car, the manufacturer are not permitted to include any of IAS such as Maps, Internet Explorer etc. If a manufacturer wants to manufacture a car having Ignite with pre-installed IAS, they have to enter into two additional agreement with Navigate i.e. Application Distribution Agreement and Anti Fragmentation Agreement. IAS couldn't be availed directly by the end- users, in case it is not pre-installed in their cars. Hiren got married to Ms. Anna Harris (a US citizen) a year back. The marriage took place in a traditional saptapadi ceremony in the backyard of Harris’ residence where only close relatives were present. Marriage was registered six months later due to a widely observed lockdown to prevent the widespread of COVID-19.

Indian traditions have a deep-rooted impact on Anna's family because the grandmother of Anna is from lndia. Anna's grandfather is also influenced by Indian culture, hence willing to migrate to India along with Anna's grandmother to spend the rest of their llfe. Considering this in the month of January 2021, Hiren and Anna acquired a luxurious apartment in their joint names in India, So that Anna's grandparenis can stay there comfortably. Half of the consideration was paid by Hiren out of the Non-Resident Account maintained by him, and the reminaining half by Anna through proper banking channel, and that too in the manner prescribed. To identify the flat and fulfil lhe legal requirement for registration of the same, Hiren took the help of his elder cousin Mr. Arya Patel, who is permanently residing in lndia.

Mr. Arya along with two of his friends owns a cement manufacturing company in lndia called ‘Strong Cement Private Limited’ (SCPL). SCPL supplies cement to various builders and retail consumers through a network of stockist and retailers. An understanding has been reached among manufacturers of cement to control the price and supply of cement, but the understanding is not in writing and it is also not intended to be enforced by legal proceedings.

In order to grow the business, SCPL wanted to acquire another company in the same business, Venture Cemennts Private Limited (VCPL). The proposed acquisition of control in VCPL by SCPL will result into creation of a combination under section 5 of the competition Act, 2002, and so a notice is furnished to the Commission for approval on 10th March, 2020. The Commission is of ihe opinion that the combination has an adverse effect on competition but such adverse effect can be eliminated by suitable modifications to such combination, hence commission proposes appropriate modifications to combination which were informed to SCPL and VCPL on 12th March, 2020. SCPL accepts some of the modifications Suggested and for the remaining modifications it submitted its Suggestions/amendments back to the Commission on 25th March. Later the commission has neither issued directions nor passed any order approving/rejecting combination.

Rock Solid Private Limited (RSPB) is the substantial supplier of clay, slate, blast furnace slag, silica sand which are essential raw materials of cement, and a shortage of the same is observed in the market. Mr.Arya, on behalf of SCPL, has executed a supply agreement with RSPL on 20th October 2020 wherein it is provided that RSPL will not supply these raw materials to any other cement manufacturer, against this the purchase commitment has been made from SCPL for all their (RSPL) output at the price mgntioned in such agreement. Magnite Cement Limitéd (MCL) who is another cemeni manufacturer is not happy with the RSPL, because RSPL has not supplied the slate and silica sand to MCL against the PO (Purchase Order) placed by MCL dated 18th October, 2020, hence the Board of Directors of MCL is considering taking legal remedy against RSPL in the capacity of the consumer. MCL has borne Ioss on account of the stock-out situation emerged from the non-availability of raw-material. It was found that only half of the consideration was paid and 30 days credit was available for making payment of the remaining balance, regarding which payment promise is made by MCL. MCL also imports clinker for its operations and has imported a significant quantlty of clinker from Vietnam for the first time under a deferred payment arrangement for a period of three and half years.

Mrs. Patel, the mother of Hiren, who also resides with her son and daughter in-law in States and holds NRI status, acquired two immovable properties (one farmhouse for residential purposes and another an agricultural land, because she studied botany during her masters and Wllling to develop botanical garden there) in their native place situated near Rajkot district of Gujarat in India in the year 2020-2021 for a total consideration equivalent to USD 4,70,000. She made payment for the same out of her non- resident account.

Answer the following questions:

(1) Which of the following options are correct with respect to import by MCL from the Vietnam based supplier under the deferred payment arrangement?

(i) Such deferred payment arrangement will be treated as trade credit because its term is less than 5 years

(ii) Such deferred payment arrangement will be treated as normal borrowings, because of duration of 3 and half years

(iii) Authorised dealer may give a guarantee in respect of deferred payment arrangement

(iv) Authorised dealer can't give a guarantee in respect of deferred payment arrangement

(A) I and III
(B) I and IV
(C) II and III
(D) II and IV

(2) The agreement is executed among SCPL and RSPL on 20th October, 2020 can be categorised as :

(A) Exclusive supply agreement
(B) Tie-in arrangement
(C) "Refuse to deal agreement
(D) None of these

(3) Whether the understanding reached among the munufacturers of cement be termed as an agreement?

(A) No. because it is not in writing .
(B) No, because it is not intended to be enforced by legal Procededings
(C) No. because it is not in writing and also not intended to be enforced by legal proceedings
(D) Yes

(4) Can MCL assume the position of the consume purpose of competition laws ?

(A) No, because only half of the consideration paid by SCL
(B) No, because SCL is not buying slate and silica sand for personal use or direct resale
(C) Yes
(D) No, because only an Individual can be a consumer

(5) Which of the following statements is correct regarding the acquisition of immovable property in India by Mrs. Patel?

(A) Mrs. Patel is not allowed to acquire any sort of immovable property in India
(B) Mrs. Patel is not allowed to acquire farmhouse and agricultural land in India
(C) Mrs. Patel may acquire the farmhouse, but not agricultural land in India
(D) Mrs. Patel may acquire both the farmhouse and agricultural land in India

(6) Answer the following questions :

(i) Evaluate, with reasons whether Navigate has dominance and has it abused its dominant position ?

(ii) Analyse the provisions of the Competition Act and evaluate whether the Commission has approved the combination between SCPL and VCPL and if so, the date of approval thereof.

(iii) Examine the following, with reasons based on applying the provisions of FEMA 1999:

(a) Can Anna acquire immovable property in India independently?

(b) Is the acquisition of the apartment by Hiren and Anna valid as per FEMA regulations?

(c) Can Anna acquire another property which is agricultural land, in joint ownership with Hiren for investment purposes?

ANSWER TO CASE STUDY- 3

1. (A) – I and III
2. (C) – Refuse to deal agreement
3. (D) – Yes
4. (C) – Yes
5. (B) – Mrs. Patel is not allowed to acquire farmhouse and agricultural land in India

Answer 6

(i) Facts in the given case are more or less similar to the case (No. 39 of 2018, Competition Commission of India dated 16.04.2019) of Umar Javeed and Google LLC, wherein legal issue also about dominance and

its abuse and act of Google found in violation of Section 4(2) of the Competition Act, 2002.

In the said case, CCI observed to form a prima facie view about the alleged abusive conduct, it would be first appropriate to define the relevant market and to determine the dominance of accused enterprise therein if any. In the present case, it is clearly mentioned that automobile computer operating system to make smart cars due to additional use features which are different from operating system designed for typical cars. Hence all Ignite Automation Services of navigate's applications and services and such apps and services were not available in insolation and so shall be excluded from the relevant market. Navigate appears to be dominant in the relevant market as 80% of smart cars, which are in use has Ignite as the operating system.

The signing of the Application Distribution Agreement and Anti Fragmentation Agreement is a pre-condition for smart automobile manufacturers to pre-install Apps and services (while using Ignite Automation Services of navigate's application). Further, IAS is also a bundled suite of Navigate's applications and services. In this manner Navigate Automobiles LLP reduced the ability of device manufacturers to develop viable alternatives with selected applications and services out of the IAS suite, hence dis- incentivize them. Thereby restricting technical development to the prejudice of consumers in violation of Section 4 of the Competition Act, 2002.

While reading Section 4 with Section 32 of the Act, it is important to note that the conduct of Navigate to tie or bundle applications and services is an attempt to eliminate effective competition from the market. There exists an element of coercion as the automobile manufacturers are coerced to purchase the IAS suite altogether which results in consumer harm through a reduction in choice of products.

(ii) Orders of Commission on certain combinations [Section 31 of the Competition Act, 2002]

As per section 31 read with the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination.

Parties after compliance need to file compliance report to the secretary of Commission within 7 days. If the parties don't accept the modification within thirty working days, the Commission by order shall direct that the combination shall not be given effect. The Commission may, however, if it considers appropriate, frames a scheme to implement its order. Such an order shall not be prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act. Such 30 days shall be excluded while the computing time period for deemed approval.

Deemed approval: If the Commission does not pass an order to approve the combination or doesn't issue the direction that combination shall not take effect until the expiry of a period of 210 days from the date of notice given to the Commission, the combination shall be deemed to have been approved by the Commission.

As per the facts, notice for the proposed combination in VCPL by SCPL was furnished to the commission for approval on 10/3/2020. The commission suggested suitable modifications to such combination and intimated to SCPL and VCPL on 12/3/2020. SCPL accepts some modifications and submits its suggestions/amendments for the remaining modifications back to commission on 25/3/2020. Thereafter heard nothing neither approval nor rejection from commission.

Accordingly, in the given case, Commission does not pass an order of approval of the combination or doesn't issue the direction that combination is rejected, therefore this shall be a deemed approval of the commission on the combination between SCPL and VCPL. Combination shall not take effect until the expiry of a period of 210 days from the date of notice given to the Commission i.e. approval to the combination will be deemed to approved from 7th October 2020.

(iii) As per regulation 6 of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, a person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, who is a spouse of a Non- Resident Indian or an Overseas Citizen of India may acquire one immovable property (other than agricultural land/ farmhouse/ plantation property), jointly with his/ her NRI/ OCI spouse, subject to following conditions:

(i) The consideration for the transfer, shall be made out of funds received in India through banking channels by way of inward remittance from any place outside India or funds held in any non-

resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank;

(ii) No payment for any transfer of immovable property shall be made either by travellers' cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause;

(iii) The marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property;

(iv) The non-resident spouse is not otherwise prohibited from such acquisition.

(a) No. Mr. Anna (a person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India) can't acquire immovable property in India, independently.

(b) No. the acquisition of a flat by Hiren and Anna, jointly is not aligned (hence legally invalid, and amount to violation) to the provisions of FEMA and relevant regulations made thereunder, because marriage has been registered and subsisted for a continuous period of fewer than two years immediately preceding the acquisition of such property.

(c) No. Anna can't acquire another property being agricultural land in joint ownership with Hien for investment purposes because;

i. The acquisition of agricultural land, farmhouse, and plantation property is specifically prohibited; and

ii. The time since the marriage took place and subsisted is less than two years; and

iii. There is a maximum ceiling limit of owning one property

Past Exam/Dec 2021/Case Study-4
(PMLA, PBPTA)
Mrs. Susan & Mr. Rahim

Mrs. Susan, an Indian citizen and Mr. Rahim, a Pakistani citizen, got married on 13.12.1985. Mrs. Susan is a housewife and is now residing in a farmhouse, B-91, Ludhiana, Punjab, with her husband. They were blessed with three children, Abhas, Razia and Shabina. Mr. Rahim obtained a Long- term Visa in India and purchased agricultural land near his house. He entered into an agreement on 10.02.1992 in the name of his wife to purchase the said property for a total sale consideration of ₹ 44 lakh. The sale deed was executed on 23.01.1993 in the name of Mrs. Susan. The sale consideration of ₹ 44 lakh was paid by Mr. Rahim by a cheque of ₹ 24 lakh from his bank account and balance from unknown sources. Mr. Rahim liked the ecology of the area of Ludhiana and therefore, he had chosen to purchase the property for his benefit. After purchase of the agricultural land, Mr. Rahim spent huge amounts to reclaim the lands and to raise crops such as coffee, pepper, orange, etc. He raised cattle and sheep farms and laid roads at his own cost. He had also fenced the agricultural land with live wires to protect the crops from wild animals. He had also installed generators and bore well etc. He named the estates 'Nelson Estate' and employed 50 workers. Mr. Rahim and Mrs. Susan had been living in Ludhiana, Punjab till 2001. During 2002, Mrs, Susan insisted to change her residence to Bangalore under the pretext of imparting education to the children. Mr. Rahim provided her with a separate residence at Bangalore registered in the name of his son, Abhas, at a cost of ₹30 lakh and paid the consideration from his funds. Mrs. Susan and the children got shiftcd their residence to Bangalore. Mr. Rahim had been paying ₹ 30,000 per month for the maintenance of Mrs. Susan and their children. Ms. Shabina wanted to marry Mr. Marzban, a citizen of Afghanistan. After marriage, Ms. Shabina got the citizenship of Afghanistan and simultaneously her Indian citizenship status got revoked.

Mr. Abhas's maternal grandfather went to the UAE for a business trip and purchased gold jewellery having weight of 5 kgs. He hid the gold jewellery in the white goods to save custom duty. He gifted that gold Jewellery to his grandson, Mr. Abhas. Mr. Abhas purchased a flat in Maharashtra at a price of ₹ 40 Lakhs in the name of his sister, Ms. Shabina, after her child was born. He took a loan of ₹ 10 lakhs from bank by mortgaging the Bangalore property and took ₹ 5 lakhs from his savings. For the balance amount, he sold the jewellery aed by his grandfather at ₹ 25 lakhs. Mr. Abhas rented the property in Maharashtra for the monthly rent of ₹ 25,000. Mr. Abhas also purchased another propery in the name of his mother in law (as she is a senior citizen female - to bear less registration cost in the form of stamp duty), consideration of which was paid out of known sources of funds by Mr. Abhas. Mr. Aslam, elder son of Mr. Abhas is settled in USA. He left India to pursue MS in civils. After his post graduation, he got a job in an MNC in USA. He visited India every year and gave substantial funds to his mother, Mrs. Heena to keep it by way of deposit in India for the benefit of Mr. Aslam. Mrs. Heena and Mr. Abhas suggested that as Aslam's substantial funds are in deposit with her and he is doing well for himself in USA, he should purchase a plot of land to build a house thereon in New Delhi. Mr. Aslam agreed on the idea and was ready to purchase a house. Mr. Aslam came to India and handed over further funds to his mother for acquiring the plot that had already been identified to be acquired on a perpetual lease.

Mrs. Heena obtained the aforesaid plot on a perpetual lease in her name jointly with Mr. Aslam. All the funds used in the purchase af the plot by Mrs. Heena were from the money deposited with her and given to her by Mr. Aslam from time to time. The possession of the plot was obtained by her jointly with Mr. Aslam and a perpetual lease deed was executed by the Delhi Development Authority (DDA). After two years from the date of purchase of property in Delhi by Mrs. Heena, she met with a car accident and died. Her younger son, Mr. Kafil filed a suit that the property was in the name of his mother, and he has 50% rights alongwith his elder brother Mr. Aslam in the property situated in New Delhi. Mr. Aslam came to India and averted that the property was purchased by his mother out of the funds that have been provided by him from time to time.

During the middle of the year 2012, Mr. Rahim's health condition deteriorated, and he was advised to go to England for treatment. During September 2012, he left India and got himself admitted in a hospital in England and remained there due to his health condition. During the period of his absence in India, he used to send money to the tune of ₹ 30,000 per month towards the maintenance of the avricultural land to Mrs. Susan. During March 2003, Mr. Rahim came back to India and found that Mrs. Susan had retrenched all the workers, sold away the property, cows, buffaloes numbering about 50, generators and the agricultural produce such as pepper, coffee, etc., and appropriated the amount without his knowledge. After a further visit to England for his treatment on 17.08.2013, when Mr. Rahim retumed to India, he was prevented from entering the estate by Mrs.Susan. Mr. Rahim filed a case against his wife, Mrs. Susan, that he is the owner

of the agriculture land in Ludhiana. He purchased the property in the name of his wife out of love and affection. She has no right to sell the property without his permission. Mrs. Susan argued that she was the owner of the property, and that the sale deed stands in her name. Further she argued that she was making negotiations for the sale of a portion of the estate within the knowledge of Mr. Rahim. Also, Mr. Rahim conveyed his no objection to selling the property and appropriating the proceeds to be paid unreservedly to Mrs.susan or to her order. She alleged that Mr. Rahim had deserted her and her children, and she had to necessarily make the provisions to support them. Also, in her support she said that there is a presumption in law that the ostensible owner is also a legal owner.

Answer the following questions

(1) Whether Ms. Susan having the ostensible ownership of the land can be considered as what for the purpose of considering a benami transaction assuming the land was purchased by Mr. Rahim from known sources?
(A) Beneficial Owner
(B) Benamidar
(C) Real Owner
(D) Non-owner

(2) Who can be considered as the benamidar for the property purchasc Bangalore ?
(A) Mr. Abhas
(B) Ms. Shabina
(C) Mrs. Susan
(D) The transaction is not a benami transaction.

(3) Whether the maternal grandfather of Mr. Abhas is liable for punishment under the Prevention of Money Laundering Act, 2002?
(A) No, he is not liable for anysStnishment under any provisions of the Prevention of money laundering Act, 2002
(B) Yes, he is liable to punishment for commitment of offence under Part C of the Schedule to the Prevention of Money Laundering Act, 2002
(C) Yes, he is liable to punishment with rigorous imprisonment for a term not be less than 3 years
(D) Yes, he is liable for punishment for commitment of offence under Part A, Paragraph 1 as well as Paragraph 12 of Schedule to the Prevention of Money Laundering Act, 2002

(4) Evaluate the legal position of mother in law of Mr. Abhas as benamidar in the case study :
(A) Yes, the mother in law of Mr. Abhas is a benamidar
(B) No, the mother in law of Mr. Abhas is not a benamidar as she is covered under the exceptions under the Act
(C) No, the mother in law of Mr. Abhas is not a benamidar as the consideration is paid out of known sources of funds
(D) No, the mother-in-law of Mr. Abhas is not a Benamidar as it is not a Benami Transaction

(5) The Regulator wanted to consider the property purchased by Mr. Rahim in Bangalore as a benami property, since it was purchased by him in his son's name and hence, Abhas is a Benamidar. Evaluate
(A) Yes, because consideration was paid by Mr. Rahim, but the property was registered in his name
(B) Yes, because Abhas is a party to the transaction despite having not paid the consideration
(C) No, because he is the son of Mr. Rahim, who paid the consideration
(D) No, because he did not participate in the negotiation of price and the payment thereof

(6) Answer the following questions :
(i) Examine with reasons whether the contention of Mr. Rahim that Mrs. Susan has no right to sell the property which was purchased by him is correct? If yes, consequences for the property.
(ii) Whether the purchase of property by Mr. Aslam jointly in the name of his mother is a Benami Transaction? Support your opinion with reasons.
(iii) Mr. Abhas is of the view that he has not violated any provisions of the PMLA. Provide your views in this regard and evaluate the consequences under the relevant provisions.

Answer to Case study 4

1. (C) - Real owner
2. (D) – The transaction is not a benami transaction
3. (B) –Yes, he is liable to punishment for commitment of offence under Part C of the Schedule to the Prevention of Money Laundering Act, 2002
4. (A) – Yes, the mother in law of Mr. Abhas is a benamidar
5. (C) – No, because he is the son of Mr. Rahim, who paid the consideration

Answer 6

(i) As per the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, prohibition on acquisition or transfer of immovable property in India has been marked by the citizens of certain countries.

No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea (DPRK) without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years.

Provided this prohibition shall not apply to an Overseas Citizen of India. An NRI or an OCI may acquire immovable property in India other than agricultural land/farm house/plantation property. Purchase of agricultural land by Mr. Rahim in the name of his wife, Mrs. Susan is not valid.

Further, also purchase of property in the name of his wife is a benami property acquired partially from unknown source for his immediate or future benefit.

Accordingly, in the case study, the acquisition of property by Mr. Rahim, is not valid from the very beginning for the purchasing of agricultural land and that to it is also a benami transaction. The whole transaction is unlawful in the eyes of law. Therefore, the contention of Mr. Rahim that Mrs. Susan has no right to sell the property which was purchased by him, is right.

If any such transaction of benami property is made, it will be termed as illegal and shall be void. Further as per section 6 of the Prohibition of Benami property transactions Act, 1988, there is a Prohibition on retransfer of property by benamidar.

(ii) As per section 2(9) of the Prohibition of Benami Property Transactions, Act, 1988, "Benami transaction" means a transaction or an arrangement—

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

Except when the property is held by any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual.

In the given case, purchase of property by Mr. Aslam jointly in the name of his mother Mrs. Heena, is not a benami transaction.

(iii)As per the information given in the case study, following acts of Abhas can be classified as an offence committed under the Prevention of Money Laundering Act, 2002:

(a) **Jewellery gifted by maternal grandfather of Mr. Abhas-** As per Section 2(1)(u) of the PMLA, "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;

"Proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.

(b) Purchase of property in the name of his (Abhas) mother in law to bear less cost in the form of stamp duty:

Said act is an offence committed under Part C (3) of the schedule of the PMLA, w.r.t. the offence of wilful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (undisclosed foreign income and assets) and Imposition of Tax Act, 2015.

Consequences for commission of an offences under the PMLA, 2002: Section 4 provides for the Punishment for Money-Laundering-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.

Past Exam/Dec 2021/Case Study-5
(IBC, RERA)
Mr. Prem Agarwal

Mr. Prem Agarwal is an Indian businessman. He is the chairman of the Courage Industries Limited, which was created in July 1984 by Mr. Prem Agarwal's father, Mr. D. D. Agarwal. After his father's death in 2004, Mr. Prem Agarwal became the chairman of the Company. The Company is running multiple businesses such as Financing, Infrastructure. Telecommunications,, etc.

To pay the existing debts and to make the Company work efficiently. Courage Industries Limited took bank loans from consortium of Indian banks. The Company wanted to expand its telecoms business and DTH services in India. So this time the Company approached foreign banks for the loan. Being one of the pioneer companies of India and on its credibility all the three foreign banks - Global Bank of America, Exim Bank of Scotland and Chartered Bank of London, sanctioned the required loan amounts.

The Indian lenders of Courage Industries Limited included ABD State Bank with an exposure of over ₹1,245 crore followed by Bank of Ajmer (₹ 1,090 crore), P&G National Bank (₹ 810 crore) and JV National Bank (₹792 crore). Among overseas lenders, Global Bank of America had an exposure of ₹ 700 crore, followed by Exim Bank of Scotland (₹ 430 crore) and Chartered Bank of London (₹ 350 crore). The loans were also personally guaranteed by Mr. Prem Agarwal. All the four Indian banks as aforesaid, sanctioned the loans in the year 2012 in a consortium agreement. Courage Industries Limited assured the bank to pay all the instalments on time. The Company as per their commitment paid instalments on time.

Everything went well but from August 2017, due to heavy losses, the Company defaulted in paying instalments to all the Nationalised as well as the foreign banks. Due to tough competition in telecommunicatains market and entry of new giants in the market, the rates of voice call and data plan reduced considerably. The Banks started sending reminders to the Courage Industries Limited to clear all of their respective dues.

The JV National Bank had a warehouse in Mumbai which it seized in the insolvency proceedings of PQR Company. After many attempts, the Bank was not able to recover its Loan by selling the property at the expected market price. So the bank had decided to lease the premises. Courage Industries Limited had come to know about it and had approached the bank in May 2016 to take the premises on lease. The annual rent of the premises had been fixed at ₹ 1.5 crore. As the Courage Industries went in losses from the year 2017, it defaulted in paying lease rentals for the last two years, which amounted to ₹ 3 Crore. Due to non-payment of dues by some other companies as well along with Courage Industries Limited to JV National Bank, the NPA of JV National Bank rose to sixty-five percent. JV National Bank, has been grappling with mounting bad loans since last two years.

Aditya Agarwal, sun of Prem Agarwal, commenced four real estate projects across different cities of Maharashtra as part of which he announced four real estate projects in Mumbai, Nagpur, Pune and Nashik on 21st November 2019. The details of the project were as follows:

- Courage Serene in Vashi Mumbai, where the proposed projects consists of area of five hundred square meters and the number of proposed apartments will be twelve.
- Courage Codename in Nagpur, where the proposed consists of fifty thousand square meters and the number of proposed apartments will be eighty.
- Courage Lifestyle in Pune, where the props project area consists of five thousand square meters and the number of proposed apartment will be eighty.
- Courage Royal Serenity in Nasik, where the proposed project area consists of five thousand square meters and the proposed apartment will be one hundred.

The Company decided that the booking of the apartments in all the projects will start after 24" December, 2019, after obtaining all the legal permissions from the prescribed authority. A Board meeting was held on 5th December, 2019. The Board of Directors was of view that there is shortage of funds with the Company. Ultimately with a unanimous decision, the budget for two projects was reduced. The Company decided to reduce the number of apartments in two projects. Now the Company will build only eight apartments in Courage Serene in Vashi Mumbai and in case of Courage Codename in Nagpur, the construction will take place in two phases. In the first phase, twenty-five thousand Square metres area will be developed with construction of forty flats and in second phase another twenty-five thousand square metres area will be developed for constructing remaining forty flats. As per the Act, all the required documents were then submitted by the Company for RERA registration. Considering the latest NGT requirements and amendments in the policy about the environment (applicable for civil construction in the embankment

areas of large rivers), certain structural changes relating to the height and common area landscape was made to the sanctioned plan of the Courage Royal Serenity project in Nasik, whch was built on the banks of the river Godavari.

From 25" December 2019, the Company started the booking of flats in all the four projects. As a Christmas day offer, the Company gave an extra two lakh rupees discount in each project on the booking of the flat within 6 months of starting of construction work. People started kDKing flats in all the four projects.

The cost of the flats in all the four projects started from rupees three crores to seven crores. The Company started the work in all the projects in full swing after getting commencement of work certificate for each of the projects from the authority. Mr. Harshit Khana, a registered real estate agent, is owner of a firm called Harshit Homa. He wanted to get associated with Courage Industries Limited for selling the flats of Mumbai as well as Nagpur projects respectively. Mr. Harshit gave an advertisement without the Company's knowledge, in the newspaper for the sale of flats along with an offer that whosoever books any flats via his firm will get extra one percent discount in booking amount. The Company overall got a good response for the three projects except the Nasik project. It got only seventy percent of the total booking slots till mid of February. A Board meeting was held on 26" February, 2020 in which it was decided that due to losses in other businesses of the Company and being heavily in debt to the creditors, the Company will sell its Nasik project to 4 third party, XYZ Infrastructure Company. After taking over the project, XYZ Infrastructure Company made certain changes in the layouts of the project. Courage industries limited tried to sell its assets to various companies, including its rival Tele Tones Company, to clear the debts but the deals did not crystallize as expected. Later, the insolvency proceedings against Courage Industries Limited started on a plea filed by Japanese Telecom Company after the Company failed to clear its dues.

The CoC final meeting was to be held on 25" March 2020, but amidst the nation- wide lockdown it got cancelled. According to the order National Company Law Tribunal, CoC needs to complete the entire process 6y 30" March, 2020 and the resolution professional, Legal Hawk needs to fide resolution plan with the NCLT, Mumbai by 2nd April, 2020.

Answer the following questions:

1. The Company decided to construct the Nagpur project in two different phases due to shortage of funds. What shall be the impact of the decision on the project?
   (A) Both the phases are part of one project and so no separate registration is required for each phase
   (B) Separate registration of the project is required only in case where it is developed by two different promoters.
   (C) Each phase will be considered as a stand- alone project and separate registration is required for both the phases.
   (D) If the second phase is immediately started after completion of first phase then no separate registration of the phases is required.

2. Mr. Harshit has himself announced that any person making bookings via their agency will be given extra discount. With regard to the provisions of RERA, this announcement can be deemed as -
   (A) Voidable at the option of the Courage Industries Limited.
   (B) Misleading the buyers for services that are not intended to be offered
   (C) Correct and to be intended to be offered by the Company.
   (D) to be reliable as made by registered agent of the Company

3. The final meeting of Committee of Creditors was to be held on 25th March, 2020. Is it necessary to hold the meeting in person or can it be arranged otherwise?
   (A) Since it is a final meeting everyone needs to be present in person.
   (B) Meeting in person is not necessary and it can be held via video conferencing
   (C) Only resolution plan can be discussed via video conferencing and voting needs to done in person
   (D) With prior permission of the Tribunal (NCLT), resolution professional can hold meeting via video conferencing.

4. XYZ Infrastructure Company after takeover of the project, did changes in the layouts of the project. Is it authorised to do the changes to the layouts of the ongoing project ? Which of the following statements is not correct?
   (A) Before doing any changes in the project, it has to take prior approval of the RERA Authority
   (B) As a new promoter of the project, it is authorised to make necessary changes
   (C) With the permission of the two- third allottees of the flats, they can make necessary changes.
   (D) The new promoter is required to carry forward the project by complying with all the pending obligations of the erstwhile promoter.

5. In which of the four real estate projects started by Courage Industries Limited, registration of the project is not mandatory?
(A) Courage Codename
(B) Courage Royal Serenity
(C) Courage Serene
(D) Courage Lifestyle

6. Answer the following questions:

(i) Answer the following questions with respect to the constitution of Committee of Creditors :
(a) All the four Indian banks, as a consortium gave loans to Courage Industries Limited. How they will form part of Committee of Creditors and how their voting shares would be determined?
(b) JV National Bank is financial as well as operational creditor of the Courage Industries Limited. Can JV National Bank club both the debts and claim it as a financial debt?
(c) The Banks decided to enforce the personal guarantee provided by Mr. Agarwal. But he contended that the demand is not maintainable in view of the ongoing Corporate Insolvency Resolution Process. Evaluate.

(ii) Aditya is of the view that since the alteration in the sanctioned plan was enforced by changes in policy matters, the approval for such changes in the sanctioned plans was not required to be obtained from the allottees. Evaluate in the context of the provisions of RERA.

ANSWER TO CASE STUDY- 5

1. (C) - Each Phase will be considered as a stand alone project and separate registration is required for both the phase
2. (B) - Misleading the buyers for services that are not intended to be offered.
3. (B) - Meeting in person is not necessary and it can be held via video conferencing
4. (B) - As a new promoter of the project, it is authorised to make necessary changes
5. (C) - Courage Serene

Answer 6

(i) (a)

According to Section 21(3) of the IBC, 2016, Subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them. Hence, each of the Indian bank and overseas lenders will form part of the committee of creditors and their voting shares would be determined on the basis of financial debts (loan) owed to them by the Courage Industries Limited in line with section 5(28) of the Code.

Accordingly following shall be the voting shares of the lenders of Courage Industries:

Lenders	Amount in crores	Voting share in %
ABD Sate Bank	1,245	23
Bank of Ajmer	1,090	20
P&G National Bank	810	15
JV National Bank	792	15
Global Bank of America	700	13
Exim Bank of Scotland	430	8
Chartered Bank of London	350	6
Total	5,417	

Hence, in the given case, all the four Indian banks along with the overseas lenders will form part of the committee of creditors and their voting shares would be determined as above.

(b)

According to Section 21(4) of the IBC, 2016, where any person is a financial creditor as well as an operational creditor,—

(i) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(ii) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

So, in the above-mentioned scenario, JV National Bank has no right to club both the debts and claim it as financial debt, as the bank would be considered as a financial creditor only to the extent of financial debts owed by it.

(c)

Enforcement of Personal Guarantee provided by Mr. Agarwal by Bank

As per section 60(1) of the Code, the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

Further as per Section 60(2), where a CIRP or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before such National Company Law Tribunal.

Accordingly in the given question, Contention of Mr. Agarwal that the demand of enforceability of the personal guarantee given by him is not maintainable in view of the ongoing CIRP, is not correct.

(ii) Section 14 of the RERA, 2016 requires a promoter to adhere to the sanctioned plans and the project specifications.

According to the Act, the proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities. According to the law, generally, the promoter shall not make any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, without the previous consent of that person.

However, Promoter can make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorized Architect or Engineer after proper declaration and intimation to the allottee.

Since “Minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

As per the facts given in the question, considering NGT requirements and amendments in the policy about the environment (applicable for civil construction in the embankment areas of large rivers), certain structural changes relating to the height and common area landscape was made in the sanctioned plan of the Courage Royal Serenity Project in Nasik, which was built on the banks of the river Godavari.

Since these changes are, other than minor alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project, it requires previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Student Journal/April 2020/Case Study-1 (CSD -45)

Student Journal/April 2020/Case Study-2 (CSD - 42)

Student Journal/April 2020/Case Study-3 (CSD -37)

Student Journal/May 2021/Case Study-1 (Same as Case study 2 of Nov 2021 MTP)

Student Journal/May 2021/Case Study-2 (IBC, PMLA)

Rajeshwari Industries Limited

Rajeshwari Industries Limited (here-in-after referred to as RIL) manufactures a wide range of electronic heaters under the brand 'Glen'. Glen, which was a popular name among the retailers and customers till a few years back, has been losing the market share; the major reason for same is stiff competition from emerging competitors who are offering a complete range of electronic products and also offers free delivery at customers address.

To sustain the market share RIL decided to expand the product range and improve outbound logistic facilities for which it requires more funds. RIL took a term loan of ₹ 3.5 crore from National Bank (here-in-after referred to as bank). Since the newly developed products, fails to make much impact in the market, hence RIL faces a financial crunch and not in a position to serve the financial debt.

A pandemic causes another jolt to the financial health of the business, hence on 15th April, 2020 (the due date for payment of instalment), RIL conveyed to the bank its inability to repay the remaining outstanding loan amount. As of 15th April, 2020, the total outstanding amount against RIL is ₹ 46 lakh (including interest).

The officers from the recovery cell and the concerned branch of the bank warns the RIL that default may result in insolvency proceedings against the RIL. The RIL pleaded that default is not wilful, instead, this RIL said it really willing to continue its business operations and repay the loan amount as and when the business conditions improve. But it seems, it will not be in a position to repay the loan at-least in the year to come.

Mr. Anonymous, an employee in the IT and ERP department at RIL uses his workstation to hack the IT server of security and intelligence services of the country, such as the research and analysis wing, and capture the top-secret information. The information which he captured, if leaked; can put the defence and sovereignty of India at severe risk. Mr. Anonymous also indulge in funding and other arrangements for a terror attack in the financial capital of India 'Mumbai'. Indian authorities caught hold of Mr. anonymous while he was transmitting such topsecret information through the internet and took him to custody.

One of the executive directors at RIL, Mr. Mohan Bhave sought some funds into his bank account to acquire any immovable property in Mumbai for ₹ 2.5 crore. He has around ₹1.25 crore in his bank accounts and for the balance amount he ask to his friend Mr. Maan in Country M. The friend transferred money to Mr. Ganpat's Account in Country G. Mr. Ganpat transferred the half of funds to Ms. Bhosle in Country B and remaining half to Ms. Indrani in Country I. Ms. Bhosle and Ms. Indrani, in turn, transferred the funds to Mr. Kavir in Country K and Ms. Sonam in Country S, respectively.

Rocky, the son of Mr. Mohan Bhave is a rock star and singing sensation across the South Asian and European countries. Rocky performed numerous successful tours abroad. Rocky has acquired immovable properties abroad from the consideration he accepts from organisers of his shows, he recently buys a luxurious yacht.

Rocky accepted said money from Mr. Kavir (in Country K) and Ms. Sonam (in Country S) as an advance for his singing performance at their functions/parties, with the understanding that on a later date prior to the show date Mr. Kavir and Ms. Sonam express their inability to arrange functions/parties and request to cancel the performance; and money will be forfeited by Mr. Rocky. In this way, Mr. Mohan Bhave will get money to acquire the immovable property.

Rocky was arrested by the officers of the Enforcement Directorate at Delhi Airport on his return to India for an offence relating to the possessing and disposal of illegally acquired foreign exchange and taken before the Additional Chief Metropolitan Magistrate, New Delhi on the very next date. Enforcement Officer moved the application to seek 'judicial remand' (detention) on the ground that it was necessary to complete the investigation.

Office of director conducts an inquiry under section 13 of Prevention of Money-Laundering Act, 2002. Mr. Gulati is an officer of the concerned reporting entity and summoned to attend the proceeding. Mr. Gulati joined the reporting entity just 3 months back whereas the principle matter of inquiry is older than that, hence Mr. Gulati finds the summon unjustified. Mr. Gulati has to attend a global business conference as a guest speaker which is falling on same day and date which is mentioned in summon.

Multiple Choice Questions

1. Can the bank file the insolvency proceedings against RIL?
   (a) No, the bank can't take the RIL to insolvency proceedings.
   (b) Yes, the bank can take the RIL to insolvency proceedings because the default is considered as default, willingness is irrelevant.
   (c) Yes, the bank can take RIL to insolvency proceedings because the amount of default exceeds ₹1 lakh
   (d) No, the bank can't take the RIL to insolvency proceedings because the amount of default is less than the threshold limit of ₹50 lakh.

2. At what stage, is the laundering process when it reached the hands of Mr. Kavir?
   (a) Integration
   (b) Layering
   (c) Stratifying
   (d) Splitting

3. What shall be the punishment for the wrongdoing done by Mr. Anonymous?
   (a) Fine or rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years.
   (b) Fine and rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years.
   (c) Fine and rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years.
   (d) Fine upto ₹ 5 lakh and rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years.

4. Who has the authority to provisionally attach the property of Mr. Mohan Bhave?
   (i) Director
   (ii) Deputy Director
   (iii) Deputy Director authorised by the Director
   (iv) Judicial Magistrate

   (a) i, ii, and iv
   (b) i, iii, and iv
   (c) i and ii
   (d) i and iii

5. Within how many days, the authority who provisionally attached the property has to file a complaint with Adjudicating Authority?
   (a) Within 14 days from the attachment
   (b) Within 30 days from the attachment
   (c) Within 45 days from the attachment
   (d) Within 60 days from the attachment

Descriptive Questions

1. Examine the legal position of the stated situations in the light of the given facts under the Prevention of Money Laundering Act, 2002, whether Enforcement Directorate is competent to arrest and take judicial remand of an arrested person? Whether the Magistrate before whom a person arrested is produced has jurisdiction to authorise the detention of that person?

2. Advise the Banks officials who consulted you 'is the amount of default is significant criteria to invoke application under the Insolvency and Bankruptcy Code for Insolvency Resolution and Liquidation for Corporate Persons?'

3. Comment can Mr. Gulati be summoned? Whether a Mr. Gulati is bound to attend the proceeding in person? State the nature of proceeding taken here under the case study ?

Answer to MCQs

1. **(a)**

   Reason: A new section 10A inserted (vide Insolvency and Bankruptcy Code (Second Amendment) Act 2020, subsequent to an ordinance dated 5th June 2020) considering the possible adverse impact of the pandemic on businesses, which read as notwithstanding anything contained in sections 7, 9, and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf. It is also provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

   Moreover, Ministry of Corporate Affairs vide notification S.O. 1205(E) dated 24th March 2020, in the exercise of the powers conferred by the proviso to section 4 of the Insolvency and Bankruptcy Code, 2016, the Central Government hereby specifies one crore rupees as the minimum amount of default for the purposes of the said section.

Thus, since the default is taken place after 24th March 2020 (falling in the specified period under section 10A) and the amount of default of the company is less than ₹1 crore, hence bank can't drag the RIL for insolvency proceedings.

Note- Vide SO 3265 (E) dated 24th Sep 2020 application of section 10A extended by a further period of 3 months from 25th Sep 2020. Further, vide SO 4638 (E) dated 22nd Dec 2020 application of section 10A once again extended by a further period of 3 months from 25th Dec 2020 (Hence period specified under section 10A ranges from 25th March 2020 to 24th March 2021)

2. **(b)**
Reason: Money laundering is a single process, however; its cycle can be broken down into three distinct stages

• Placement is the first and the initial stage when the crime money is injected into the formal financial system.

• Layering is the second stage, in this money injected into the system is layered and moved or spread over various transactions in different accounts and different countries. Thus, it will become difficult to detect the origin of the money.

• Integration is the third and final stage, in this money enters the financial system in such a way that original association with the crime is sought to be obliterated so that the money can then be used by the offender or person receiving as clean money.

Thus, from the above, when funds reached Mr. Kavir, it is difficult to detect the origin of the money, thus, it is the stage of layering.

3. **(b)**
Reason: Section 4 of the Prevention of Money Laundering Act 2002 provides for the Punishment for Money-Laundering - 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.

But where the proceeds of crime involved in moneylaundering relate to any offence specified under paragraph 2 of Part A of the Schedule (i.e. Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985), the maximum punishment may extend to ten years instead of seven years.

Since, offence committed by Mr. Anonymous 'waging or attempting to wage war or abetting waging of war, against the Government of India', is covered under paragraph 1 of Part A of the Schedule, hence he will be liable to fine and imprisonment for a term which shall not be less than three years but which may extend to seven years

4. **(d)**
Reason: Section 5(1) of the Prevention of Money Laundering Act 2002, provides where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that

(a) Any person is in possession of any proceeds of crime; and

(b) Such proceeds of crime are likely to be concealed, transferred, or dealt with in any manner which may result in frustrating any proceedings relating to the confiscation of such proceeds of crime under this Chapter,

He may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

5. **(b)**
Reason: Section 5(5) of the Prevention of Money Laundering Act 2002 provides that the Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

Answers to Descriptive Questions

1. The facts given in the case are similar to the case of Directorate of Enforcement vs. Deepak Mahajan (SC, Criminal Appeal No. 537 of 1990 dated 31.01.1994) wherein while disposing of the SLP (Special Leave Petition), the hon'ble apex court answered the important question of law 'Whether the

Directorate of Enforcement fall within the definition of 'Police Officer' under Section 167 of CrPC (Criminal Procedure Code) or not?' The Supreme Court stated that the pre-requisite of arrest that 'it should have been effected only by a police officer and no one else' and 'there must necessarily be records of entries of a case diary', may be dispensed to invoke Section 167(1) of CrPC (Criminal Procedure Code). Hence the Supreme Court stated that the Enforcement Officer can be termed as 'police officer' for the purpose of arrest.

Hence in the given case Enforcement Directorate is competent to arrest and take judicial remand of an arrested person.

Further, the Supreme Court held that "sub-sections (1) and (2) of Section 167 are squarely applicable with regard to the production and detention of a person arrested under the provisions of Section 35 of FERA (now the corresponding provision of FEMA) and Section 104 of Customs Act and that the Magistrate has jurisdiction under Section 167(2) to authorise the detention of a person arrested by an authorized officer of the Enforcement under FERA (now the FEMA) and taken to the Magistrate in compliance of Section 35(2) of FERA (now the corresponding provision of FEMA).

Hence in a given case, against the application of the enforcement officer, the Magistrate before whom a person arrested is produced has to authorise the jurisdiction detention of that person.

2. Yes, the minimum amount of default is significant criteria to invoke the application under the Insolvency and Bankruptcy Code for insolvency resolution and liquidation for corporate persons.

   Section 4 of the Code read as 'This Part (PART II dealing with insolvency resolution and liquidation for corporate persons) shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one crore rupees.

   There is a proviso to section 4 which read as 'the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupee'

   It is important to note here, that Ministry of Corporate Affairs vide notification S.O. 1205(E) dated 24th March 2020, in the exercise of the powers conferred by the proviso to section 4 of the Insolvency and Bankruptcy Code, 2016, the Central Government hereby specifies one crore rupees as the minimum amount of default for the purposes of the said section.

   Prior to 24th March 2020, this threshold limit was one lakh instead of one crore.

3. Section 50 of the Prevention of Money Laundering Act 2002, deals with the power of authorities, which they can exercise; especially while conducting any inquiry or any proceeding.

   As per sub-section 2 of section 50, the Director, Additional Director, Joint Director, Deputy Director, or Assistant Director shall have the power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act. Hence, Mr. Gulati can be summoned.

   As per Sub-section 3 to section 50, all the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.

   Hence, Mr. Gulati is bound to attend the proceeding; but if the office of the director directs or authorises he can attend the meeting through authorised agents rather than in person.

   Further, as per Sub-section 4 of section 50, every proceeding under Sub-section (2) and (3) shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code.

Student Journal/May 2021/Case Study-3 (IBC, Cometition) XYZ Limited

XYZ Limited (Corporate Debtor) is undergoing the Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (Code or IBC) which was commenced on 17th July, 2019 and is under a moratorium. The Resolution Professional of the Corporate Debtor invited expression of interest (EoI) by publishing relevant form in the newspapers and subsequently received two expressions of interest from prospective Resolution Applicants (Resolution Applicant 1 and Resolution Applicant 2).

One of directors at XYZ Limited who gave a personal guarantee against the borrowings of XYZ Limited has credence that after the declaration of moratorium under section 14 of IBC, legal action against him is barred too.

Pursuant to the regulations, the Resolution Professional had sent an information memorandum, evaluation matrix, and request for a resolution plan to both the prospective Resolution Applicants.

Resolution Applicant 1 had filed its resolution plan on 20th October 2019 and the Resolution Professional had rejected that resolution plan on 1st November 2019 on the ground that it is in violation of the provisions of the Code pertaining to ineligibility of the Resolution Applicant. The Resolution Applicant 1 protested the decision of the Resolution Professional, by filing an application before the Adjudicating Authority with a prayer to direct the Resolution Professional to accept the Resolution Plan filed by the Resolution Applicant 1. In reply to the application filed by the Resolution Applicant 1 before the Adjudicating Authority, the Resolution Professional made the following submissions in his counter-affidavit filed with the Adjudicating Authority:

- Resolution Applicant 1 meets the following ineligibilities:
    - The directors of one of the subsidiaries of the Resolution Applicant 1 are declared as wilful defaulters
    - The step-down subsidiary of the RA has been declared as Non-Performing Asset and it remained as a Non-Performing Asset for more than one year.
- The Resolution Applicant 1 had filed an affidavit as required under the Code and the Regulations made thereunder but had failed to disclose the abovementioned ineligibilities in the affidavit thereby misleading the Resolution Professional.
- Since Resolution Applicant 1 meets the ineligibility criteria as stipulated by the Code, the instant application filed by the Resolution Applicant 1 be dismissed.

In response to the submissions made by the Resolution Professional, Resolution Applicant 1 stated that as on the date of submission of resolution plan with the resolution professional it does not meet any of the above-stated ineligibilities and that the Resolution Professional has analysed the position as on the Insolvency Commencement Date instead of the date of submission of the resolution plan and hence his arguments do not hold any water. The matter was pending before the Adjudicating Authority.

On the other hand, the resolution plan received from the other Resolution Applicant, i.e. Resolution Applicant 2 was forwarded by the Resolution Professional to the Committee of Creditors for their consideration and evaluation on 1st November 2019. During the evaluation, it was observed that the resolution plan submitted by Resolution Applicant 2 meets the criteria prescribed for combinations under the provisions of the Competition Act, 2002. Accordingly, Resolution Applicant 2 filed an application before the Competition Commission of India for its approval of the proposed combination as per the submitted resolution plan.

On 15th November 2019, the Competition Commission of India summoned Resolution Applicant 2 for a hearing on the approval of said combination. During the hearing, the Competition Commission of India raised various questions to understand if such a combination has any appreciable adverse effect on relevant product market and relevant geographic market in India. Accordingly, Resolution Applicant 2 had filed its reply to the Competition Commission of India both orally during the hearing as well as in writing on November 20, 2019. Having heard the Resolution Applicant 2 and also having gathered relevant information to understand whether the combination causes an appreciable adverse effect on competition in the relevant market in India or not; the competition commission of India had passed its order approving the combination on 3rd February, 2020.

On 1st January 2020, the committee of creditors negotiated with the Resolution Applicant 2 for modifications in the resolution amount which was duly agreed to by the resolution applicant, and post-modification of resolution plan, the revised resolution plan of the Resolution Applicant 2 has been evaluated by the members of the committee of creditors. On 10th January, 2020 the Committee of Creditors decided to vote on the resolution plan of Resolution Applicant 2 as one hundred and eighty days from the insolvency commencement date is set to conclude on 13th January, 2020. Accordingly, the committee of creditors had voted on the resolution plan submitted by Resolution Applicant 2 and approved the same with the voting share of 85%. Post approval of resolution plan by the Committee of Creditors, the Resolution Professional filed the same with the Adjudicating Authority on 13th January, 2020.

Multiple Choice Questions

(1) While examining the ineligibility of resolution applicants pursuant to the provisions of the Code, which among the following statements are incorrect:
(i) The ineligibility shall be as on the date of submission of the Resolution Plan by the Resolution Applicants
(ii) The ineligibility shall be as on the insolvency commencement date
(iii)The ineligibility may be removed if the overdue amounts relating to Non-Performing Accounts are paid before submission of the resolution plan

(a) i only
(b) ii only
(c) i and iii
(d) ii and iii

(2) Pursuant to the provisions of the Insolvency and Bankruptcy Code, 2016, what shall be time to obtain the approval of the Competition Commission of India?
(a) After submission of resolution plan but before the approval of the same by Committee of Creditors
(b) Before the submission of the resolution plan
(c) After approval of Committee of Creditors
(d) After submission of resolution plan but before filing the plan with the Adjudicating Authority

(3) Who among the following can file an application to the Adjudicating Authority for extension of the period of CIRP?
(a) Committee of Creditors after passing a resolution with more than 66% of voting share in their meeting
(b) Any stakeholder interested in the affairs of the Corporate Debtor
(c) Resolution Professional upon instructions do so by resolution passes at the meeting of the Committee of Creditors by 66% voting share
(d) Resolution Professional at its own

(4) Which among the following are the duties of the Resolution Professional?
(i) To present to the Committee of Creditors, only those resolution plans which confirm the conditions prescribed under the Code
(ii) To present Creditors all resolution plans to the Committee of
(iii)To obtain approval of the Competition Commission of India for the resolution plans approved by the Committee of Creditors

(a) i only
(b) ii only
(c) i and iii
(d) ii and iii

(5) Which of the following shall be considered to ascertain as to whether the Resolution Applicant and the Corporate Debtor meet the definition of combination under the Competition Act, 2002?
(i) Assets
(ii) Net Worth
(iii)Turnover
(iv) Control

(a) i, ii, and iv
(b) i and iii
(c) ii, iii, and iv
(d) i, iii, and iv

Descriptive Questions

1. Clarify how the Competition Commission of India investigates combinations (to regulate) before giving its approval under section 31 of the Competition Act, 2002.

2. One of the directors at XYZ Limited who gave a personal guarantee against the borrowings of XYZ Limited has credence that after the declaration of moratorium under section 14 of IBC, legal action against him is barred too. Is the credence of the director valid? Apart from provisions from the bare act, support your opinion with settled judicial precedent.

Answer to MCQs

1. (b)
Reason: The opening line of section 29A of the Insolvency and Bankruptcy Code 2016, and then further of clause 'c' in it clearly states 'at the time of submission of resolution plan' hence point i is correct and point ii is incorrect.

Further first proviso to section 29A (c), provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan hence point iii also correct.

2. (a)
Reason: Proviso to section 31 (4) of the Insolvency and Bankruptcy Code 2016, provides where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.

3. (c)
Reason: As per section 12 (2) of the Insolvency and Bankruptcy Code 2016, the resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixtysix percent of the voting shares.

4. (b)
Reason: Section 25 (2) shall be read along with section 30 (3) of the Insolvency and Bankruptcy Code 2016, the combined reading of these signifies that the resolution professional shall present all resolution plans at the meetings of the committee of creditors.

Further as per section 30 (6), the resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

Extra reference note for students
As per proviso to section 31 (4), where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.

5. (d)
Reason: Section 5 of the Competition Act 2002, provide the thresholds relating to the value of assets and amount of turnover, beyond which the merger and acquisition resulting in a gain of control over enterprise by another enterprise either individually or in group constituted as a combination.

Extra reference note for students
It is important to note here that, under section 20 (3) of the Competition Act 2002, the Central Government shall at the expiry of every two years, in consultation with the Commission, by notification, enhance or reduce the value of assets or the value of turnover mentioned above (for purpose of section 5 'combination'), on the basis of the wholesale price index or fluctuations in the exchange rate of rupee or foreign currencies. *Vide notification number S.O. 675(E) dated 4th March 2016, in the exercise of the powers conferred by section 20 (3) the Central Government enhances, the value of assets and the value of turnover, by hundred percent from the date of publication of this notification in the Official Gazette. The publication date is also 4th March 2016.

Hence w.e.f. 4th March 2016 above table (threshold under section 5) shall be read as;

Threshold applicable to		Enterprises Level	Group Level
In India	Joint Assets	₹2,000 Cr	₹8,000 Cr
	Joint Turnover	₹6,000 Cr	₹24,000 Cr
In India and Outside	Joint Total Assets	US$ 1000 Million	US$ 4000 Million
	Minimum Indian Component	₹1,000 Cr	₹1,000 Cr
	Joint Total Turnover	US$ 3,000 Million	US$ 12,000 Million
	Minimum Indian Component	₹3,000 Cr	₹3,000 Cr

Answers to Descriptive Questions

1. Section 6 (1) of the Competition Act 2002, simply prohibits the person or enterprise from entering into a combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

   Further, the review process for a combination under the Act involves mandatory notification to the Commission of the proposed combination. To give effect to this section 6 (2) provide, any person or enterprise proposing to enter into a combination shall give notice (as prescribed in section 30) to the Commission in the specified form disclosing the details of the proposed combination within 30 days of the approval of the proposal relating to merger or amalgamation by the board of directors or of the execution of any agreement or other document in relation to the acquisition, as the case may be.

   Further, as per section 20 (1), the Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India. Here it worth noting that the Commission shall not initiate any inquiry under this subsection after the expiry of one year from the date on which such combination has taken effect

   Further section 20 (2) [inquiry in response to notice under section 6(2)] read with section 31 (framing of opinion to pass an order) and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 the Commission shall form firstly prima facie opinion as to whether the combination is likely to cause or has caused an appreciable adverse effect on competition within the relevant market in India or not. For this, investigation by director-general can be ordered under section 29.

   Section 20 (4) laid down factors to be considered by the Commission while evaluating the appreciable adverse effect of Combinations on competition in the relevant market include the following:

   (a) Actual and potential level of competition through imports in the market;

   (b) Extent of barriers to entry into the market;

   (c) Level of concentration in the market;

   (d) Degree of countervailing power in the market;

   (e) Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

   (f) Extent of effective competition likely to sustain in a market;

   (g) Extent to which substitutes are available or are likely to be available in the market;

   (h) Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

   (i) Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

   (j) Nature and extent of vertical integration in the market;

   (k) Possibility of a failing business;

   (l) Nature and extent of innovation;

   (m) Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have an appreciable adverse effect on competition;

   (n) Whether the benefits of the combination outweigh the adverse impact of the combination if any.

2. The Director of XYZ Limited, hold credence that section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) would apply to the personal guarantor as well, as a result of which proceedings against the personal guarantor and his property would have to stay if moratorium declared.

   Clause (b) section 14 (3) of the Insolvency and Bankruptcy Code, 2016 (IBC), read as the provisions of sub-section (1) shall not apply to a surety in a contract of guarantee to a corporate debtor. It important here to note that sub-section (1) gave power to Adjudicating Authority to declare a moratorium.

   The validity of directors' credence can be denied based on the State Bank of India vs. V. Ramakrishnan (SC, Civil Appeal No. 3595 of 2018), wherein the facts are largely similar to the present case.

The Hon'ble Supreme Court first considers the fact that different provisions of the Insolvency and Bankruptcy Code are applicable to the insolvency of different categories of persons. Section 96 and 101 of the Code provide for separate provision for a moratorium for the personal guarantor, whereas section 14 deals with corporates.

Court also observed that different provisions of law brought into effect on different dates and some of the provisions were not yet enforced (on the date of the judgment). Provisions pertaining to sections 96 and 101 have not been brought into force.

Further, the apex court makes observations on relevant sections. The court observed that Section 14 of the Code authorizes Adjudicating Authority to pass an order of moratorium during which there is the prohibition on the institution of suits or continuation of pending suits against the corporate debtor, transfer of property of the corporate debtor, or any action to foreclose or enforce any security interest.

The apex court also consider the following facts importantly -

Report of Insolvency Law Committee dated 26.03.2018 clarified that the period of moratorium under section 14 is not applicable to personal guarantors,

- Amendment Ordinance dated 6th June 2018, which amended the provision of section 14 and proviso clearly states that the moratorium period envisaged in section 14 is not applicable to a personal guarantor to a corporate debtor. (Note – this ordinance later enacted as act 26 of 2018 – and enforced w.r.e.f. 6th June 2018)

Hence, as the provisions of section 96 and 101 have not been brought into force, the personal guarantor is not entitled to a moratorium period under the Insolvency and Bankruptcy Code.

Hence, the credence of the Director of XYZ Limited that 'that section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) would apply to the personal guarantor as well' is not tenable. (Even before 6th June 2018 when sub-section 3 to section 14 substituted).

Student Journal/May 2021/Case Study-4
(RERA, PBPTA, FEMA, IBC)
Mr. Aman Chawla

Mr. Aman Chawla belongs to Delhi based business family and has ancestral roots in Kharar, a Town in the Sahibzada Ajit Singh Nagar (Mohali) district in the state of Punjab (around 15 KMs away from Chandigarh). Chawla family owns the chain of restaurants, snacks points, and Ice-Cream parlours across the nation. Few of these are owned properties, but a large number are leased properties. The holding company is Chawla Snacks and Refreshment Limited (CSRL). Mr. Aman is an electrical engineer, joined an MNC in the role of system engineer after college. But Mr. Aman is inspired by constructing the buildings, towers, landscapes, hence decided to quit the job to pursue his passion.

Despite the Chawla family owning a major stake in the business, the business model is unlike to autocratic monarchy. It is managed professionally and listed on the stock exchange. Family members (father, grand-mother and elder brother of Mr. Aman) are part of the Board of Directors, whereas few other family members are also engaged with CSRL but in form of employment (or in a professional capacity).

Mr. Aman joined his brother-in-law, Mr Vivek, in his construction business, Mr. Aman assists Mr. Vivek in ongoing projects, and one among them is Rishi Enclave whose centre of attraction is state of art yoga centre which will be one of its type in the world apart from the common area which is turned into with mesmerising landscapes. The project is located near Jolly Grant Airport on out-skirt of the holy town of Rishikesh. Rishi Enclave (Project) consists of 120 units of 2BHKs, 3BHKs (Flats and Floors), and Independent Houses or Villas in totality. The project is registered under the RERA. All 120 units' subscribed/ booked by allottees except 2 Flats kept by Mr. Vivek (promoter). Mr. Tirlochan Negi booked 3 floors one in his own name, another one in the name of his daughter in law and the third one in name of his company. Mr Dabral also booked a flat and a villa (both in his name). Rest all allottee booked one unit each. Soon allottees form a residential association. Considering the latest NGT decisions and amendments in policy about the environment (applicable for civil construction in hill or foothill area concerning the height of the building), certain structural changes relating to the height and common area landscape is required in sanctioned plan of the project. Mr. Vivek is of opinion since the alteration in sanctioned plan enforced by changes in policy matter hence the approval of allottees is not required.

Mr. Aman recently visited Kharar after a long time to meet his friends Mr. Onkar Singh and Mr. Dipan Ahuja of early childhood. They all admitted that the town has developed substantially especially the townships and Skyscrapers as tri-city (Mohali, Chandigarh, and Panchkula) turns into metropolitan and hub of service entities. The lifestyle of people also improves. Mr. Onkar is settled in Canada and holding a Canadian passport and citizenship as his family migrate there when he was in school only. In Canada, he own a transport business. Currently, he is on a visit to India to attend a relative' marriage. Mr. Dipan Ahuja is a supplier of construction materials and planning to venture into the solar panel business under make in India drive, considering the enhancing role of solar energy for household and commercial uses. Mr. Dipan believes Mr. Aman (considering his engineering background) should join him in his solar panel venture.

The ancestral property of Mr. Onkar' family has been unoccupied for a long, hence turned into a mud house. Mr. Onkar offered Mr. Aman to develop residential apartments on such property after the name of his grand-father 'Satnam Apartments'. A chunk of land on the backside of such property is also available for sale at a reasonable price because it has no connectivity. Mr. Aman found it a good idea to develop the residential apartments as backside land can be acquired at a cheaper rate than prevailing in the market. Mr. Onkar talked to his father [property inherited, hence registered in his name in land revenue records after the death of grandfather (who was resident in India) of Mr. Onkar] and ready to transfer (sale) the property for INRs 2.5 Crore. The Father of Mr. Onkar is a resident outside India who never registered as OCI. Mr. Aman after communicating with Mr. Vivek agreed to deal.

Mr Aman heard about the importance of keeping capital low to generate more wealth and attain high ROI (Return on Investment). He decided to borrow money from a private investor from the States (US) based on showing growth prospect in his business to his investor. The investor was a good friend of Mr. Dipan and originally from Mohali named Mr. Tarun and settled in Philadelphia (Pennsylvania, US). Mr. Tarun agreed to invest US$1 Million in the said real estate project.

The money got transferred from an overseas branch in Philadelphia of some Indian bank (through banking channel) to the Kharar branch (Mohali, India). The Branch Manager in India is the friend of an elder brother of Mr. Aman and was excited to get one project in Mohali and thus approved the investment without any opinion from any Finance Professional.

CSRL witnessed the bad jolts (of financial turbulence) as revenue vanished and reserves are socked to meet maintenance costs of properties & employee cost due to lock-down and afterword restrictions. The financial cost and lease rentals not only erode the working capital but also forces the CSRL to land into a debt trap situation wherefrom meeting financial obligations seems near to impossible. The only way left to management is restructuring of business hence board decided to shut a few points and parlours (to reduce lease rental obligation, and freeup one-two owned properties so that sale proceed can be infused as working capital)

One of the properties sold by CSRL, acquired by Ms. Vijeta in name of her mother-in-law (as she is a senior citizen female – to bear less registration cost in form of stamp duty), consideration for which is paid out of the known sources of the Mr. Vijeta. Despite the best efforts made by management at CSRL, still, the bottom line is in deep red; resulting in default in repayment of financial debts and such default continues since the 2nd quarter of Fiscal 2020-21. Management gave assurance to financial creditors that soon it will overcome the solvency issue and they already took corrective measures. On 19th, March 2021, one of the financial creditors moved an application for initiation of corporate insolvency resolution proceeding (CIRP) whose outstanding claim is of INRs 120 lakh. On 26th March 2021, another financial creditor file an application to NCLT for initiation of CIRP against CSRL in their case amount of default is INRs 35 lakh and such default took place in the 3rd Quarter of fiscal 2020-21.

Multiple Choice Questions

1. Regarding the state of art yoga centre and common area situated in Rishi Enclave, which of the following statement is correct;
   (a) Promoter will keep the possession and title both
   (b) Promoter may handover physical possession of these to the association of allottees or competent authority as per the local laws
   (c) In absence of any local law promoter shall hand over within thirty days after obtaining the occupancy certificate.
   (d) In absence of any local law promoter shall hand over within thirty days after obtaining the completion certificate.

2. State the legal position of mother-in-law of Ms. Vijeta as benamidar in the case study-
   (a) Yes, the mother-in-law of Ms. Vijeta is benamidar
   (b) No, the mother-in-law of Ms. Vijeta is not benamidar as she is covered under the exceptions stated
   (c) No, mother-in-law of Ms. Vijeta is not benamidar as consideration is paid out of the known source of Ms Vijeta
   (d) Both b and c above.

3. Which of the following statements is correct regarding the acquiring, holding, owning and transfer of property, in a case by the father of Mr. Onkar in India
   (a) Being a person resident outside India he can acquire, hold, own and transfer any immovable property in India, but with RBI permission only
   (b) Being a person resident outside India he can acquire, hold, own and transfer any immovable property in India, but only in joint ownership with any person resident in India
   (c) Being a person resident outside India he can acquire, hold, own and transfer any immovable property in India, if inherited by him from the person who was a resident of India
   (d) Being a person resident outside India he can acquire, hold, own and transfer any immovable property in India, if inherited by him when he himself was resident in India

4. Whether the application moved on 19th Mar 2021 be admitted by NCLT to initiate CIRP against CSRL-.
   (a) Yes, because CSRL made default in repayment of financial debts
   (b) Yes, because the amount of default is more than one crore
   (c) No, because management gave assurance to financial creditors that soon it will overcome the solvency issue and they already took corrective measures
   (d) No, because an application for initiation of CIRP shall not be filled.

5. Whether the application moved on 26th March 2021 can be admitted by NCLT to initiate CIRP against CSRL.
   (a) Yes, because CSRL made default in repayment of financial debts
   (b) Yes, because the application for initiation of CIRP may be filled by the financial creditor as a period of suspension of section 7 is over.
   (c) No, because the amount of default is less than one crore
   (d) No, because default occurred during a period of suspension.

Descriptive Questions

1. Mr. Vivek is of opinion since the alteration in sanctioned plan enforced by changes in policy matter hence the approval of allottees is not required. Are the changes in sectioned plan minor in nature? Evaluate the opinion of Mr. Vivek in the context of the provision contained in the RERA 2016? Support your answer with reason and calculation if any.

2. What would be your opinion related to the repatriation of funds in India as an Investment of US$1 million into the real estate project in Kharar (Mohali, India)?

3. Can the father of Mr. Onkar repatriate the sale proceed of ancestral property inherited by him to Canada from India? Elucidate in the light of the relevant provision of applicable law, the stated legal issue.

Answer to MCQs

1. (d)
Reason - As per section 17 (2) of the Real Estate (Regulation and Development) Act 2016, it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws:

Provided that, in the absence of any local law, the promoter shall hand over the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the completion certificate.

2. (a)
Reason – As per clause (9) to section 2 of the Prevention of Benami Property Transaction Act 1988, the transaction is a benami transaction under sub-clause (A) because the same is not covered under exception iv. Since the transaction is benami hence the property become benami under section 2 (8), hence benamidar under 2 (10).

3. (c)
Reason – As per section 6(5) of the Foreign Exchange Management Act, 1999 a person resident outside India may hold, own, transfer or invest in any immovable property situated in India if such property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

Here is worth noting that regulation 3 and 6 of the Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulation 2018 gave the right to NRI and OCI (in case of regulation 3) and with the exclusion of other than agriculture land/farmhouse/ plantation property (both in case of regulation 3 and 6)

4. (d)
Reason – As per section 10A of the Insolvency and Bankruptcy Code 2016 notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf.

On 24th September 2020 vide S.O. 3265(E) the Central Government hereby notifies a further period of three months from the 25th September 2020 for the purposes of section 10A. Hence application can't be filled under section 7 by the financial creditor till 24th March 2021.

5. (d)
Reason – As per section 10A of the Insolvency and Bankruptcy Code 2016 notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th Mar 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf.

Further the proviso to said section provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

On 24th September 2020 vide S.O. 3265(E) the Central Government hereby notifies a further period of three months from the 25th September 2020 for the purposes of section 10A.

Hence application can't be filled under section 7 by a financial creditor for the default that occurred till 24th March 2021.

Candidates also advised to note the explanation provided to section 7(1), for the purposes of subsection (1) to section 7, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor. Hence option C is not correct and mind it 10A is an overriding section

Answers to descriptive questions

1. The Real Estate (Regulation and Development) Act 2016 (herein-after RERA) under its section 14 provides the adherence to sanctioned plan and project specifications by the Promoter.

   Sub-section 1 provides the proposed project shall be developed and completed by the promoter following the sanctioned plans, layout plans and specifications as approved by the competent authorities.

   Sub-section 2 has an overriding effect and its clause (i) provide the promoter shall not make any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person who agrees to take one or more of the said apartment, plot or building, as the case may be.

   Here it is worth noting that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

   For this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

   Since in the given case certain structural changes (in the sanctioned plan of the project) relating to height is required, hence the changes in sectioned plan are not minor in nature.

   Further clause (ii) of Sub-section 2 provides the promoter shall not make any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

   It is worth noting here that for this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

   In the given case all 120 units' subscribed/booked by allottees except 2 Flats kept by Mr. Vivek (promoter). Out of 118, Mr. Tirlochan Negi booked 3 floors one in his own name, another one in the name of his daughter in law and the third one in name of his company, whereas Mr. Dabral booked a flat and a villa (both in his name); rest all allottee booked one unit each. Hence the total number of allottee for purpose of section 14(2)(ii) is 115 (118-2-1) considering Mr Tirlochan (3) and Mr Dabral (2) as a single allottee each. At least 2/3 allottee shall be 77 (2/3rd of 115 – round up to next whole integer), whose previous written consent is required; before making changes to sanctioned plan.

   Hence the opinion of Mr. Vivek in the context of the provision contained in RERA, 2016 is untenable and incorrect.

2. Investments are considered as capital account transactions, hence governed by section 6 of the Foreign Exchange Management Act, 1999 read with The Foreign Exchange Management (Permissible Capital Account Transactions) Regulations 2000 (herein-after regulations).

   Clause (b) of regulation 4 of such regulations describe the prohibitions. Although regulation 4 (b) (iv) provides no person resident outside India shall invest in India, in any form, in any company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage in real estate business. But explanation 1 provides a certain exclusion from real estate business, explanation read as 'for this regulation, 'real estate business shall not include development of townships, construction of residential/commercial premises, roads or bridges and real estate investment trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014.

Hence repatriation of funds in India as Investment into the real estate project (construction of residential apartments) in Kharar (Mohali, Kharar) can be seen as a permissible capital account transaction under clause (a) to schedule II of regulations.

3. As per clause (a) to regulation 8 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, a person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section.

   Whereas section 6(5) of the Foreign Exchange Management Act, 1999 provides a person resident outside India may hold, own, transfer or invest in any immovable property situated in India if such property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

   Since in the given case father of Mr. Onkar acquired the property through inheritance from his father who was resident in India, hence fall within the scope of section 6 (5). Therefore with the permission of RBI, he can repatriate the sale proceed of ancestral property inherited by him to Canada from India.

Student Journal/Dec 2021/Case Study-1
(RERA, FEMA, Competition Act)
Nadus (P) Ltd.

Nadus (P) Ltd. is engaged in the business of real estate since 12 years. The company is founded by two friends, Mr. Mayur Agarwal and Mr. Neerav Sutaria, who are also its directors. Mr. Urmil Dave, brother in law of Mr. Mayur, is the manager of the company.

It had acquired 10% shares of a company in Egypt, named Belashom LLC which is engaged in the construction of commercial premises. Recently, it had received some bonus shares from the said company.

Belashom LLC was looking for a commercial property in India for opening its branch office in order to expand its business. For that purpose, Mr. Franklin, an international real estate agent in Egypt was contacted by Belashom LLC and he told that one of his clients in India, a private limited company named Autukya (P) Ltd., wanted to sale, one of its commercial properties in India.

After going through the details of the said property, Belashom LLC became interested in such property and it was decided to send Mr. James, a director of Belashom LLC to India to meet the client of Mr. Franklin in India and finalise the deal for the property.

Mr. Neerav who was on a visit to meet his old friend in Bhutan, came to know that Mr. James was going to visit India. So he shortened his trip and came to India bringing 30,000 INR in form of currency notes with denominations of ₹100 and 20,000 INR in form of currency notes with denominations of ₹500, respectively, received as a gift from his friend.

Mr. James visited India bringing with him, some amount of Egyptian Pounds (EGP) as follows:

Particulars	EGP
Currency Notes	90,000
Bank Notes	30,000
Travelers Cheque	22,500

Mr. Neerav accompanied him. Mr. James met the representative of Autukya (P) Ltd., Mr. Rajiv and after two rounds of discussion between them; the deal for the property was finalized for ₹650 lakhs. Autukya (P) Ltd. remitted 4,50,000 EGPs to Mr. Franklin as commission amount out of its EEFC account. All the expenses incurred by Mr. James in INR on account of his boarding, lodging and travelling in India were paid by Nadus (P) Ltd., which was going to be reimbursed later on by Belashom LLC.

Nadus (P) Ltd. was developing a real estate project in Mihan area of Nagpur City named 'Suvas'. It had made certain agreements with real estate agents mainly operating in that area which required the said agents to promote and negotiate deals, only, for the units in Suvas and not for any other real estate project in Mihan area and for entering into such agreement, a lumpsum amount was paid to such agents in cash.

Vikrama Builders (P) Ltd.'s business was affected due to such arrangement of Nadus (P) Ltd. and so it filed a complaint with the authority under RERA against such arrangement. The case was assigned to Mr. Sumit Joshi, a RERA member. Mr. Sumit, in order to understand the arrangement being made by Nadus (P) Ltd. with real estate agents, contacted his close friend, Mr. Aman who was a real estate agent, and asked him to enter into an agreement with Nadus (P) Ltd as normal & then provide him all the details of such agreement.

Mr. Aman did the same and provided all the details to Mr. Sumit. Mr. Sumit discussed the matter with the other members of the authority under RERA in the meeting of the authority and it was decided that such agreements made by Nadus (P) Ltd. affected competition in the relevant market and so the case was referred to the Competition Commission of India. However, the required quorum was not present throughout the said meeting of the authority under RERA.

The CCI on receipt of such reference from the authority under RERA initiated an inquiry into the matter and formed an opinion on the existence of prima facie case and directed the Director General to cause an investigation into the matter.

The Director General, during the investigation, received certain evidences on affidavit from few employees of Nadus (P) Ltd. certain books and papers of Nadus (P) Ltd. were also called for by the Director General which he kept in his custody for 2 months.

The Director General found that the Company Secretary of Nadus (P) Ltd., Mrs. Ridhima Sen, had assisted in drafting the impugned agreements with the real estate agents. Mr. Urmil, the manager, however, pleaded before the Director General, that though he knew of such agreements being entered into by Nadus (P) Ltd., he never gave his consent to such an act of the company.

The copy of the report of investigation was forwarded by the CCI to Nadus (P) Ltd. and the authority under RERA, respectively.

After making further inquiry, the CCI closed the matter and passed a cease and desist order as well as a penalty order to pay an amount equivalent to 25% of the revenue earned by Nadus (P) Ltd. by making such anti-competitive agreements with the real estate brokers.

Multiple Choice Questions

1. Whether Mr. Neerav has validly brought INR currency notes into India?
   (a) No, Mr. Neerav has brought in excess R25,000 from the prescribed limit.
   (b) Yes, as there is no restriction of bringing any amount into India from Nepal or Bhutan.
   (c) No, Mr. Neerav has brought INR currency notes with denominations of R500.
   (d) Yes, if Mr. Neerav has provided declaration in respect of the same to the Custom Authorities.

2. Whether it was necessary for Mr. James to provide any declaration to the Custom Authorities of India in respect of the Egyptian Pounds brought by him into India, if 1 USD = 15 EGPs?
   (a) No, as Mr. James is a person resident outside India
   (b) Yes, as the amount of currency notes exceeded $ 5,000 in equivalent
   (c) No, as the aggregate of EGPs in all forms did not exceed $ 10,000 in equivalent
   (d) No, as there is no restriction in bringing foreign exchange, without any limit, in any form in India.

3. Whether it was mandatory for the CCI to forward the copy of the report of investigation to Nadus (P) Ltd. and the authority under RERA, respectively?
   (a) Yes, as based upon such report, Nadus (P) Ltd. would have been able to draft its response to the CCI and because of reference of the authority under RERA, such investigation was caused to be made.
   (b) It was optional for the CCI to forward the copy of the report of investigation to Nadus (P) Ltd. but it was mandatory to forward the same to the authority under RERA.
   (c) It was optional for the CCI to forward the copy of the report of investigation to Nadus (P) Ltd. and in case of the authority under RERA, report was only required to be forwarded if it was required by such authority.
   (d) It was mandatory for the CCI to forward the copy of the report of investigation to Nadus (P) Ltd. as it was the party under investigation and in case of the authority under RERA, report was only required to be forwarded if it was required by such authority.

4. Whether the Director General was having the authority to exercise such powers as were exercised by him during the investigation?
   (a) He was having the authority to exercise such powers only if the prior permission of the CCI was obtained in that regard.
   (b) He was having the power to receive evidences on affidavit but was not having the power to keep the books and papers of Nadus (P) Ltd. in his custody.
   (c) He was having the power to receive evidences on affidavit as well as to keep the books and papers of Nadus (P) Ltd. in his custody, respectively.
   (d) He was having the power to receive evidences on affidavit but for keeping the books and papers of Nadus (P) Ltd. in his custody, prior permission of the CCI was required.

5. Which of the following persons would be deemed to be guilty of the contravention committed by Nadus (P) Ltd. of the provisions of the Competition Act, 2013?
   (a) Nadus (P) Ltd., Mr. Mayur, Mr. Neerav and Mrs. Ridhima, respectively.
   (b) Nadus (P) Ltd. only.
   (c) Nadus (P) Ltd., Mr. Mayur and Mr. Neerav, respectively.
   (d) Nadus (P) Ltd., Mr. Mayur, Mr. Neerav, Mr. Urmil and Mrs. Ridhima, respectively.

Descriptive Questions

6.
(i) Whether Nadus (P) Ltd. was having any prohibition on making investment in Belashom LLC?
(ii) Whether Nadus (P) Ltd. was required to take any permission for receiving bonus shares from Belashom LLC?

7.
(i) Whether Nadus (P) Ltd. was permitted to make payment for meeting expenses of Mr. James in India?
(ii) Whether Autukya (P) Ltd. was required to have any permissions for remitting the amount of commission to Mr. Franklin, if 1 USD = 15 EGPs and 1 USD = R75?

8.

(i) Whether any action can be taken against Mr. Sumit for inducing his friend, Mr. Aman to enter into an agreement with Nadus (P) Ltd.?

(ii) Whether the authority under RERA was having the power to make reference to the Competition Commission of India in respect of the case of Nadus (P) Ltd.?

ANSWERS TO CASE STUDY 1

1. (c)

Reason: As per Master Direction No. 17 – Import of Goods and Services:

(i) Any person resident in India who had gone out of India on a temporary visit, may bring into India at the time of his return from any place outside India (other than from Nepal and Bhutan), currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding ₹25,000 (Rupees twenty five thousand only).

(ii) A person may bring into India from Nepal or Bhutan, currency notes of Government of India and Reserve Bank of India for any amount in denominations up to ₹100/-.

Mr. Neerav came to India bringing 30,000 INR in form of currency notes with denominations of ₹100 and 20,000 INR in form of currency notes with denominations of ₹500, respectively, received as a gift from his friend.

It can be said that Mr. Neerav has not validly brought 20,000 INR in form of currency notes with denominations of ₹500 into India.

2. (b)

Reason: As per Master Direction No. 17 – Import of Goods and Services:

Import of Foreign Exchange into India: A person may–

(i) Send into India, without limit, foreign exchange in any form (other than currency notes, bank notes and travelers cheques);

(ii) Bring into India from any place outside India, without limit, foreign exchange (other than unissued notes), subject to the condition that such person makes, on arrival in India, a declaration to the Custom Authorities at the Airport in the Currency Declaration Form (CDF) annexed to these Regulations;

Provided further that it shall not be necessary to make such declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or travelers cheques brought in by such person at any one time does not exceed USD 10,000 (US Dollars ten thousand) or its equivalent and/or the aggregate value of foreign currency notes (cash portion) alone brought in by such person at any one time does not exceed USD 5,000 (US Dollars five thousand) or its equivalent.

Here, 1 USD = 15 EGPs & Mr. James has brought with him following Egyptian Pounds (EGP):-

Particulars	EGP	Converted to USD
Currency Notes	90,000	6,000
Bank Notes	30,000	2,000
Travelers Cheque	22,500	1,500
Total	1,42,500	9,500

Thus, it was necessary for Mr. James to provide declaration to the Custom Authorities of India in respect of the Egyptian Pounds brought by him into India as the amount of currency notes exceeded $ 5,000 in equivalent.

3. (b)

Reason: As per Section 26 of the Competition Act, 2002, the Commission may forward a copy of the report of the Director General to the parties concerned.

The Commission shall forward a copy of the report of the Director General to Central Government or the State Government or the statutory authority if the investigation is caused to be made based on reference received from them.

Thus, it was optional for the CCI to forward the copy of the report of investigation to Nadus (P) Ltd. but it was mandatory to forward the same to the authority under RERA.

4. (c)

Reason: As per Section 41 of the Competition Act, 2002, the Director General shall assist the commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder when so directed by the Commission.

The Director General shall have all the powers as are conferred upon the commission under section 36(2) i.e. power vested with the civil court.

The power vested with inspector under sections 217 (Production of documents and evidence) and 220 (Seizure of documents by the inspector) of the Companies Act, 2013, shall available to Director General while investigating or any other person investigating under his authority.

Thus, the Director General was having the power to receive evidences on affidavit, as powers of a civil court are vested upon him as well as to keep the books and papers of Nadus (P) Ltd. in his custody, as he has been vested with the powers of an inspector under Section 217 of the Companies Act, 2013.

Note: As per Section 217(3) of the Companies Act, 2013, the inspector shall not keep in his custody any books and papers produced under sub-section (1) or sub-section (2) for more than one hundred and eighty days and return the same to the company, body corporate, firm or individual by whom or on whose behalf the books and papers were produced.

5. (d)

Reason: As per Section 48 of the Competition Act, 2002, where a company committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder, then following shall be deemed to be guilty of the contravention; hence liable to be proceeded against and punished accordingly;

Every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company.

Any such person who is liable to any punishment, if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the Commission of such contravention, then he will not be punishable.

Where it is proved that the contravention has taken place with the consent or connivance of or is attributable to any neglect on the part of, any director, manager, secretary or other officers of the company, then he also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

For the purposes of this section, company means a body corporate and includes a firm or other association of individuals, and director in relation to a firm, means a partner in the firm.

Here, the persons that would be deemed to be guilty of the contravention committed by Nadus (P) Ltd. of the provisions of the Competition Act, 2002 would be- Nadus (P) Ltd., Mr. Mayur, Mr. Neerav, Mr. Urmil and Mrs. Ridhima, respectively.

Mr. Mayur, Mr. Neerav and Mr. Urmil are the persons responsible to the company for the conduct of the business of the company. Though Mr. Urmil never gave his consent to such an act of the company, however, he was having the knowledge of such agreements being entered into by Nadus (P) Ltd.

Mrs. Ridhima assisted Nadus (P) Ltd. in drafting the impugned agreements with the real estate agents and so it can be said that contravention has taken place due to her connivance.

6.

(i) As per Regulation 5 of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004

(a) Indian Parties are prohibited from making investment (or financial commitment) in foreign entity engaged in real estate (meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges) or banking business, without the prior approval of the Reserve Bank.

(b) An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the Reserve Bank.

Here, in the given case, Nadus (P) Ltd. had made investment i.e. acquired 10% shares of Belashom LLC, an Egyptian company which is engaged in the construction of commercial premises.

As per the aforesaid provisions, there is prohibition in investing in real estate company abroad but real estate, for this purpose, does not include construction of residential/commercial premises, etc.

Thus, Nadus (P) Ltd. was not having any prohibition on making of investment in Belashom LLC.

(ii) As per Regulation 4 of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004

General permission has been granted to persons resident in India for purchase / acquisition of securities in the following manner:

(a) out of the funds held in RFC account;

(b) as bonus shares on existing holding of foreign currency shares; and

(c) when not permanently resident in India, out of their foreign currency resources outside India.

General permission is also available to sell the shares so purchased or acquired.

In the instance case study, Nadus (P) Ltd. had received some bonus shares from the Belashom LLC for which general permission has been granted. So, Nadus (P) Ltd. was not required to take any permission for the same.

7. **(i) As per Master Direction No. 17 – Import of Goods and Services,** a person resident in India may make payment in rupees towards meeting expenses on account of boarding, lodging and services related thereto or travel to and from and within India of a person resident outside India who is on a visit to India.

As per Section 2(v) of the FEMA, 1999, person resident in India, inter-alia, means any person or body corporate registered or incorporated in India.

Here in the case study, all the expenses incurred by Mr. James in INR on account of his boarding, lodging and travelling in India were paid by Nadus (P) Ltd. for which it was going to be reimbursed later on by Belashom LLC.

As per the aforesaid provisions, Nadus (P) Ltd. being a person resident in India, was given general permission for incurring such expenses.

(ii) As per Schedule III (Transactions which are prohibited)-Foreign Exchange Management (Current Account Transactions) Rules, 2000, remittance of commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more, by persons other than individuals shall require prior approval of the Reserve Bank of India, irrespective of whether it is made through EEFC account or not.

In the given case, the deal for the commercial property was finalized for (₹650 lakhs and Autukya (P) Ltd. remitted 4,50,000 EGPs to Mr. Franklin as commission amount, out of its EEFC account.

5% of inward remittance from sale of property = (₹650 lakhs*5% = (₹32.5 lakhs which is equivalent to USD 43,333.33 (₹32,50,000/(₹75) and commission amount remitted = 4,50,000 EGPs which is equivalent to USD 30,000 (4,50,000/15).

Thus, Autukya (P) Ltd. was required to have prior permission of RBI for remitting the amount of commission to Mr. Franklin as the amount remitted is more than USD 25,000.

8. **(i) As per Section 90 of the Real Estate (Regulation and Development) Act, 2016,** no suit, prosecution or other legal proceedings shall lie against the appropriate Government or the Authority or any officer of the appropriate Government or any member, officer or other employees of the Authority for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

Here, complaint was filed with the authority under RERA by Vikrama Builders (P) Ltd. against Nadus (P) Ltd. in respect of the arrangements being made by it with the real estate agents. The case was assigned to Mr. Sumit Joshi, a RERA member and Mr. Sumit, in good faith, in order to understand the arrangements being made by Nadus (P) Ltd. with the real estate agents took help of his friend, Mr. Aman.

Thus, no action can be taken against Mr. Sumit who induced his friend, Mr. Aman to enter into an agreement with Nadus (P) Ltd. as it was done in good faith by Mr. Sumit.

(ii) As per Section 38 of the Real Estate (Regulation and Development) Act, 2016, where an issue is raised relating to agreement, action, omission, practice or procedure that—

(a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or

(b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India.

Here, the issue was related to the arrangements being made by Nadus (P) Ltd. with the real estate agents which affected the competition in the relevant market and thus, the authority under RERA was having the power to make reference to the Competition Commission of India in respect of the case of Nadus (P) Ltd.

Student Journal/Dec 2021/Case Study-2
(IBC, RERA, FEMA)
Prahasti Ltd.

Prahasti Ltd. is an unlisted public company, situated in Chennai, Tamil Nadu, with seven directors on its Board and it has share capital of R10 crore with 150 shareholders. It is engaged in the business of cloth garments manufacturing and wholesaling. Also, it exports outside India.

As part of its export trade policy, it provides trade samples free of cost to the prospective customers and if it receives an export order of delivering more than 1000 cloth garments, then it has to export further 50 cloth garments worth R2 lakhs free of cost to the customer.

Recently, in the month of June, it had received an export order of delivering 1500 cloth garments to a company in Germany for which the full export value declared was R63,00,000 (70,000 Euros). However, the said company returned 200 pieces of clothes worth R8,40,000 back to Prahasti Ltd. in the month of July. Remaining export value was realized by it and repatriated through the authorised dealer in India.

Also, in order to have business security, there is an exclusive distribution agreement entered into between different exporters of cloth garments in Tamil Nadu exporting in Europe whereby each exporter has been allocated different markets of Europe in which they are allowed to do business.

One of the directors of Prahasti Ltd., Mr. Karan, had withdrawn 50,000 Euros equivalent to $ 60,000, for the purpose of business trip to Germany and Italy, respectively, for which he was going to be reimbursed by Prahasti Ltd. but however due to the reason of Covid-19 pandemic, the trip was cancelled and so after utilizing 20,000 Euros for studies for her daughter in Germany, he returned back the remaining amount to the authorised dealer within 140 days.

Prahasti Ltd. was expanding its business for the same purpose, one another corporate office was being searched by the company in Chennai city only. One of its employees, Mr. Raj was searching online for a property and he visited a website, named 'propertylelo.com', whereby Mr. Raj was asked to enter certain details which were then going to be disclosed with certain promoters of real estate projects in Chennai for which the promoters were charged by the website. Also after taking permission of a director by Mr. Raj, on payment of some fees, a virtual 3D tour of a real estate project was arranged by the said website. The said website portal was not registered as a real estate agent.

The company found a property near its location but came to know later that the registration of such real estate project was revoked by the authority under RERA. The authority under RERA decided to hand over the task of the remaining development works of the said real estate project to the competent authority as the association of allottees had refused to do the same and at that time, 45 days had passed from the date of receipt of order of revocation of registration by the promoter.

In case of one of the debtors of Prahasti Ltd. Named Tamprabha Ltd., corporate insolvency resolution process was initiated against it by one of its operational creditor. Mr. Dev Sharma, was appointed as the Interim Resolution Professional (IRP) who is partner of Sharma & Co., a law consulting firm which had transactions of following amounts with Tamprabha Ltd. during the last 5 financial years:-

Financial Year	Turnover of Sharma & Co. (₹)	Total amount of Transactions with Tamprabha Ltd. during each F.Y. (₹)
2016-17	220 lakhs	10 lakhs
2017-18	180 lakhs	8 lakhs
2018-19	200 lakhs	9 lakhs
2019-20	190 lakhs	9 lakhs
2020-21	150 lakhs	8 lakhs

All the financial creditors of Tamprabha Ltd. were related parties and it had 15 operational creditors. Mr. Dev was appointed as the resolution professional (RP) and he sanctioned a transaction of supply of goods to an associate company of Tamprabha Ltd. during the insolvency process for which approval of the committee of creditors was not obtained by him.

The resolution plan of Tamprabha Ltd. contained a provision of combination as per Section 5 of the Competition Act, 2002 and it was approved by the prescribed authorities. As a result of the implementation of the resolution plan, there was change in the entire management of Tamprabha Ltd. and its control has been handed over to persons who have not been its related parties and against whom no legal proceedings are going on under any statue.

Also, Tamprabha Ltd. was liable for an offence committed under the provisions of the Companies Act, 2013, prior to the commencement of corporate insolvency resolution process.

Multiple Choice Questions

1. On expiry, how many further days from the date of receipt of order of revocation of registration by the promoter, the decision of the authority under RERA for carrying out of the remaining development works should have taken effect?
   (a) 15 days
   (b) 60 days
   (c) 45 days
   (d) It shall be immediately effective

2. Is there any contravention of the provisions of the FEMA, 1999, by Karan?
   (a) No, as Mr. Karan has utilized the foreign currency amount for a permissible transaction and within the limits as per the 'LRS'.
   (b) Yes, as Mr. Karan has not utilized the foreign currency amount for the purpose for which it was acquired.
   (c) No, as Mr. Karan after utilizing the foreign currency amount for a permissible transaction, has surrendered the remaining amount with the authorised dealer within the specified period.
   (d) No, as Mr. Karan was eligible to utilize the foreign currency amount for any other permissible transaction as the business trip was cancelled due to a genuine reason and not because of default on his part.

3. Whether Mr. Dev has validly sanctioned the transaction of supply of goods by Tamprabha Ltd.?
   (a) No, he was required to take prior approval of the committee of creditors before sanctioning such transaction.
   (b) No, due to applicability of order of moratorium by the Adjudicating Authority, such a transaction should have not taken place.
   (c) Yes, the IBC, 2016, itself has given authority to the resolution professional to undertake such actions necessary for the continued business operations of the corporate debtor.
   (d) Yes, provided the transaction was conducted at arm's length price.

4. Which authorities would have approved the resolution plan of Tamprabha Ltd. and in what sequence?
   (a) Committee of Creditors and then Adjudicating Authority, respectively.
   (b) Committee of Creditors, Adjudicating Authority and then Competition Commission of India, respectively.
   (c) Committee of Creditors, Competition Commission of India and then Adjudicating Authority, respectively.
   (d) Competition Commission of India, Committee of Creditors and then Adjudicating Authority, respectively.

5. Mr. Dev Sharma would have been ineligible to be appointed as the Interim Resolution Professional of Tamprabha Ltd. if:
   (a) Sharma & Co. would have entered into transaction(s) of further amount of R1 lakh or more with Tamprabha Ltd. during any of the last 3 financial years.
   (b) Sharma & Co. would have entered into transaction(s) of further amount of R1 lakh or more during F.Y. 2018-19 and transaction(s) of further amount of R50,000 or more during F.Y. 2019-20 with Tamprabha Ltd., respectively.
   (c) Sharma & Co. would have entered into transaction(s) of further amount of R3 lakhs or more with Tamprabha Ltd. during any of the last 5 financial years.
   (d) Sharma & Co. would have entered into transaction(s) of further amount of R28 lakhs or more with Tamprabha Ltd. during any of the last 3 financial years.

Descriptive Questions

6.

(i) Whether Prahasti Ltd. needs to furnish declaration in case of goods which are exported free of cost as per its trade policy?

(ii) Whether Prahasti Ltd. can be said to have realized full export value with respect to the export order from the company in Germany?

7. Whether the agreement made between different exporters of cloth garments in Tamil Nadu can be considered as an anticompetitive agreement?

8. Whether the website portal named 'propertylelo.com' would be required to be registered as a real estate agent? (Please support your answer on the basis of a relevant case law)

9.

(i) What would have been the constitution of committee of creditors of Tamprabha Ltd.?

(ii) Whether Tamprabha Ltd. would be prosecuted for the offence committed under the provisions of the Companies Act, 2013, prior to the commencement of corporate insolvency resolution process?

ANSWERS TO CASE STUDY

1. (a) As per Section 8 of the RERA, 2016, upon lapse of the registration or on revocation of the registration under this Act, the Authority, may consult the appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority.

   It is provided that no direction, decision or order of the Authority under this section shall take effect until the expiry of the period of appeal provided under the provisions of this Act.

   Time period for filing appeal is 60 days from the date of receipt of order by the aggrieved person as per Section 44 of the Act.

   Here, 45 days had passed from the date of receipt of order of revocation of registration by the promoter, so, after expiry of further 15 days, the decision of the authority under RERA for carrying out of the remaining development works should have taken effect.

2. (b) As per the provisions of the FEMA, 1999, if any person, other than an authorized person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorized person.
   - Does not use it for such purpose, or
   - Does not surrender it to the authorized person within the specified period, or
   - Uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made there under,

   Such person shall be deemed to have committed contravention of the provisions of the Act.

3. (a) As per Section 5(24) of the IBC, 2016, an associate company is considered as a related party of the corporate debtor.

   According to section 28 of the Code, the resolution professional, during the corporate insolvency resolution process, shall not undertake any related party transaction without the prior approval of the committee of creditors.

   Thus, Mr. Dev has not validly sanctioned the transaction of supply of goods to an associate company of Tamprabha Ltd. during the insolvency process because approval of the committee of creditors was required to be obtained by him for such transaction as aforesaid.

4. (d) As per Section 31 of the IBC, 2016, if the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements as per section 30(2), it shall by order approve the resolution plan.

   Where the resolution plan contains a provision for combination, as per section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.

   On reading of the aforesaid provisions, the authorities and the sequence of approval that can be derived is:- Competition Commission of India, Committee of Creditors and then Adjudicating Authority, respectively.

5. (a) As per Regulation 3 of the Insolvency and Bankruptcy (Insolvency Resolution process for Corporate Persons) Regulation, 2016, an insolvency professional shall be eligible for appointment as a resolution professional for a corporate insolvency process if he is not an employee or proprietor or a partner of a legal or 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.

Financial Year	Turnover of Sharma & Co. (₹)	Total amount of Transactions with Tamprabha Ltd. during each F.Y. (₹)
2018-19	200 lakhs	9 lakhs
2019-20	190 lakhs	9 lakhs
2020-21	150 lakhs	8 lakhs
Total	**540 lakhs**	**26 lakhs**

Here, 5% of R540 lakhs comes to R27 lakhs and Sharma & Co. has already rendered transaction(s) amounting to Rs. 26 lakhs to Tamprabha Ltd. So, Mr. Dev Sharma would have been ineligible to be appointed as the Interim Resolution Professional of Tamprabha Ltd. if Sharma & Co. would have entered into transaction(s) of further amount of R1 lakh or more with Tamprabha Ltd. during any of the last 3 financial years.

Note: Resolution Professional includes an Interim Resolution Professional as per Section 5(27) of the IBC, 2016.

6. **(i) Legal Position:** As per Regulation 4 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, export of goods / software may be made without furnishing the declaration in the following cases, inter-alia, namely:

   (a) trade samples of goods and publicity material supplied free of payment.

   (b) by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value.

   Given Case and Analysis: As part of its export trade policy, Prahasti Ltd. provides trade samples **free of cost** to the prospective customers and if it receives an export order of delivering more than 1000 cloth garments, then it exports extra 50 cloth garments worth ₹2 lakhs free of cost which is less than value of ₹5 lakhs as prescribed.

   Thus, Prahasti Ltd. is not required to furnish declaration in case of aforesaid goods which are exported free of cost as per its trade policy.

   (ii) Legal Position: As per Regulation 4 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, unless otherwise authorised by the Reserve Bank, the amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 as amended from time to time.

   Explanation—For the purpose of this regulation, re-import into India, within the period specified for realisation of the export value, of the exported goods in respect of which a declaration was made under Regulation 3, shall be deemed to be realisation of full export value of such goods.

   As per Regulation 9 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, the amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India **within nine months or within such period** as may be specified by the Reserve Bank, in consultation with the Government, from time to time, from the date of export, provided.

   Given Case and Analysis: Full export value declared by Prahasti Ltd. was ₹63,00,000 in respect to export order from the company in Germany.

   However, Prahasti Ltd. re-imported 200 pieces of clothes worth ₹8,40,000 from the said company in the month of July i.e. within the period specified for realisation of the export value. So, it shall be deemed to be realisation of full export value of such goods as per explanation to the Regulation 4 as aforesaid.

   Also, remaining export value had been realized by Prahasti Ltd. and repatriated through the authorised dealer in India.

   Thus, it can be said that Prahasti Ltd. has realized full export value with respect to the export order from the company in Germany.

7. **Legal Position**: As per Section 3 of the Competition Act, 2002, it shall be unlawful for any enterprise or association of enterprises or person or association of persons to **'enter' into any agreement** in respect of production, supply, storage, distribution, acquisition or control of goods or provision of

services, which causes or is likely to cause an **appreciable adverse effect on competition within India**; and such agreements **shall be void**.

Sub-section 5 to the said section 3 protects the right of specific persons by restricting the application of section 3 to their rights, hence become exceptions to section 3.

One of such exceptions is:- **Any agreement or part there-of shall not be considered as anti-competitive,** hence not void **to the extent it is exclusively related** to production, supply, distribution or control of goods or provision of services for purpose of export of goods from India.

Given Case and Analysis: Here, in the given case, the agreement entered into between different exporters of cloth garments in Tamil Nadu exporting in Europe is for the purpose of export goods from India and hence cannot be considered as an anti-competitive agreement as it has been covered by the exception as aforesaid.

8. **Legal Position:** The facts in the given case are similar to the case law with citation, MahaRera Order in the Suo Moto Enquiry No.17/2018 dated 03.10.2019, where in it was decided that a digital portal needs to be registered as a real estate agent if it carries out the following functions:

   1. Portals when they collect the details of the viewer and share them with advertiser/seller and also disclose the information of promoters to buyers, they introduce the parties to the sale transaction.
   2. If the portal simply provide the information about the real estate project, its offering for sale to the public at large, then they are simply the agencies engaged for advertisement and when an individual is targeted by contacting and persuading him by the portals for sale and purchase of listed properties they come under the legal definition of negotiation.
   3. Web Portals introduce the buyer and seller with each other, they provide the information of the project to the buyer, they arrange virtual tour of the project and also provide other information useful for taking an informative decision. Hence, they facilitate the sale of the real estate project.
   4. Once any monetary gain is derived for the purpose of performing any act of the real estate agent by whichever name it amounts the receipt of the fees under the RERA.
   5. The Parliament has not carved out any exceptions to the applicability of the provisions of RERA, Hence, we hold that RERA overrides section 79 of the IT Act.

   Given Case & Analysis: Here, in the website, named 'propertylelo.com', Mr. Raj was asked to enter certain details which were then going to be disclosed with certain promoters of real estate projects in Chennai for which such promoters were charged by the website.

   Accordingly, Mr. Raj has been introduced to the sale transaction and he would be contacted by such promoters for a property deal. Due to this, the website has earned monitory gain for exchange of information of prospective buyers with the promoters.

   Also, on payment of some fees by Mr. Raj on permission of director, a virtual 3D tour of a real estate project was arranged by the said website. This type of facility helps in taking an informative decision to the prospective buyer.

   Thus, it can be said that the website portal named 'propertylelo. com' would be required to be registered as it carries out the functions of the real estate agent as explained above.

9. **(i) Legal Position:** As per Regulation 16 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, where the corporate debtor has no financial debt or **where all financial creditors are related parties of the corporate debtor**, the committee shall be set up in accordance with this Regulation.

   The committee formed under this Regulation shall consist of members as under –
   (a) 18 largest operational creditors by value:
   Provided that if the number of operational creditors is less than 18, the committee shall include all such operational creditors;
   (b) 1 representative elected by all workmen; and
   (c) 1 representative elected by all employees.
   Given Case & Analysis: Here, all the financial creditors of Tamprabha Ltd. were related parties and it had 15 operational creditors, so the committee of creditors constituted would have been as follows:
   (a) All the 15 operational creditors (as it has less than 18 operational creditors);
   (b) 1 representative elected by all workmen; and
   (c) 1 representative elected by all employees.

(ii) Legal Position: As per Section 32A(1) of the Insolvency and Bankruptcy Code, 2016, notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having fulfilled.

Given Case & Analysis: Here, it is given that, as a result of the resolution plan, there was change in the entire management of Tamprabha Ltd. and its control has been handed over to persons who have not been its related parties and against whom no legal proceedings are going on under any statue.

It appears from the given facts that conditions as demonstrated in section 32A(1) has been satisfied by Tamprabha Ltd. and thus, the liability of Tamprabha Ltd. for an offence committed under the provisions of the Companies Act, 2013, prior to the commencement of the corporate insolvency resolution process shall cease, and it shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31.

Student Journal/Dec 2021/Case Study-3
(IBC, RERA, PBPT Act)
Trees Estate Ltd.

The Adjudicating authority under the Insolvency and Bankruptcy Code, 2016, had received different applications during the July month, in respect of certain corporate persons, as follows:-

Sr. No	Details of the Applicant	Details relating to the Application
1	Ukrin Ltd., operational creditor of Kaptcha Ltd., corporate debtor	Ukrin Ltd. submitted a withdrawal application on 26th May for consideration by the Committee of Creditors which was approved by it, by a vote of 92%, on 1st June and Mr. Tanmay, the Interim Resolution Professional, then submitted such application to the Adjudicating authority on 5th June on behalf of Ukrin Ltd.
2	Certain allottees of Trees Estate Ltd., corporate debtor	30 allottees out of 310 allottees of Trees Estate Ltd. jointly filed an application for initiating corporate insolvency resolution process against it, as the said allottees, on the basis of model apartment had purchased the properties in the project and according to them it was not as per model displayed and the promoter company refused to return the investment amount of such allottees. (Note 1)
3	Turf Enterprise, an operational creditor of JLC (P) Ltd.	Turf Enterprise filed an application along with the relevant enclosures on 10th June for initiating corporate insolvency resolution process against JLC (P) Ltd. (Note 2)
4	Mr. Ravi, Resolution Professional of Saath Ltd., corporate debtor	Mr. Ravi filed an application for declaring two undervalued transactions entered into by Saath Ltd. as void and to reverse the effect of such transactions. (Note 3)
5	KC & Sons, an operational creditor of FAL Ltd.	KC & Sons filed an application for obtaining liquidation order against FAL Ltd. on the ground that FAL Ltd. had contravened the resolution plan approved by the Adjudicating Authority because as per the said plan, FAL Ltd. had to pay 60% of pending dues to KC & Sons as a full & final settlement amount but it had paid only 20% of its pending dues as a full & final settlement amount. (Note 4)
6	Mr. Rohan, Interim Resolution Professional of Tadan Ltd., corporate debtor	Mr. Rohan made an application along with a list of financial creditors for appointment of authorised representative to act on behalf of such creditors during the corporate insolvency resolution process. (Note 5)
7	TLF (P) Ltd., a secured creditor of Anmoli Ltd.	TLF (P) Ltd. filed an application for realizing the secured asset of Anmoli Ltd. during the liquidation proceedings for which it faced resistance from Mr. Raj, director of Anmoli Ltd. (Note 6)

Notes:

1. Such allottees then filed a complaint against Trees Estate Ltd. with the Real Estate Regulatory Authority under Section 31 of the Real Estate (Regulation & Development) Act, 2016. The said authority under RERA passed an order imposing maximum penalty upon the promoter company, Trees Estate Ltd. with a direction to compensate the said 30 allottees by returning their cumulative investment amount of R20 crores along with total interest of R2 crores. The estimated cost of the real estate project was R200 crores. Trees Estate Ltd. filed an appeal with the Appellate Tribunal against the said order of Real Estate Regulatory Authority.

2. It was found by the Adjudicating authority that JLC (P) Ltd. had notified vide an e-mail to Turf Enterprise within 10 days of the demand notice, of the dispute that existed, and the said matter was going to be referred for arbitration by JLC (P) Ltd. and accordingly, the Adjudicating authority passed a penalty order with a fine amount of R70,000 against Turf Enterprise, after opportunity of being heard, for willful non-disclosure of such fact of notice of dispute and also rejected its application.

3. One of such transactions was entered by Saath Ltd. before 19 months preceding the insolvency commencement date with Janam Ltd. which involved supplying of goods by Saath Ltd. for R4.4 crores which Saath Ltd. would have normally sold for 4.6 crores in its ordinary course of business. Saath Ltd. and Janam Ltd. were having two directors in common.

   The other transaction was entered by Saath Ltd. before 17 months preceding the insolvency commencement date with Mr. Mahesh which involved sale of property of Saath Ltd. for R15 crore, the stamp duty value of which was R35 crore. Mr. Mahesh is a house worker of Mr. Sunil, the director of Saath Ltd. There was a case under the Prohibition of Benami Property Transactions Act, 1988, going

against Mr. Mahesh and Mr. Sunil, due to acquisition of such property in the name of Mr. Mahesh and it was held that Mr. Mahesh was the 'benamidar' and Mr. Sunil was the 'beneficial owner' and the property was ordered to be confiscated and consequently has been disposed off.

4. Adjudicating authority passed the liquidation order of FAL Ltd. on the basis of application of KC & Sons. However, KC & Sons, afterwards, filed a suit against FAL Ltd. in the City Civil Court for realizing its dues as per the resolution plan approved by the Adjudicating authority under the Insolvency and Bankruptcy Code, 2016.

5. Mr. Rohan had offered names of three insolvency professionals to such class of financial creditors to act as its authorised representative who belonged to three different states:- Gujarat, Maharashtra and Rajasthan, respectively. The highest number of such creditors of Tadan Ltd. belonged to the state of Gujarat.

6. The application of TLF (P) Ltd. was approved by the Adjudicating authority and TLF (P) Ltd. was permitted to realize its security interest in the asset. Accordingly, TLF (P) Ltd. enforced its security interest and yielded amount of R2 crores in excess of its debts due from Anmoli Ltd.

Apart from the aforesaid applications received by the Adjudicating authority during the July month there were few other applications received by it in respect of certain corporate persons which could not be disposed of within the time periods as specified in the IBC, 2016, for which the reasons were recorded in writing by the Adjudicating authority.

Multiple Choice Questions

1. Till what date the Committee of Creditors should have considered the withdrawal application submitted by Ukrin Ltd. and till what date, such application should have been submitted with the Adjudicating authority for approval by Mr. Tanmay?
   (a) 2nd June and 9th June, respectively.
   (b) 31st May and 5th June, respectively.
   (c) 9th June and 12th June, respectively.
   (d) 2nd June and 4th June, respectively.

2. Whether the application filed by the 30 allottees of Trees Estate Ltd. can be considered to be admissible by the Adjudicating authority?
   (a) No, as an application is already with the authority under RERA, so simultaneously two proceedings cannot be initiated for the same matter.
   (b) Yes, as the amount of default involved is more than R1 crore.
   (c) No, as the application is filed jointly by lesser number of allottees than prescribed.
   (d) Yes, such application can be admitted as the RERA Act provides an additional remedy to the homebuyer which will not bar other remedies available to the homebuyer.

3. What minimum fine amount should have been imposed on Turf Enterprise by the Adjudicating authority and what amount of maximum fine it could have imposed on Turf Enterprise?
   (a) Adjudicating authority should have imposed minimum fine of R1 lakh on Turf Enterprise and maximum fine of R3 lakhs could have been imposed by it.
   (b) Adjudicating authority should have imposed minimum fine of R1 lakh on Turf Enterprise and maximum fine of R1 crore could have been imposed by it. However, it possesses the discretion to impose a lower amount of fine.
   (c) Adjudicating authority should have imposed minimum fine of R1 lakh on Turf Enterprise and maximum fine of R5 lakhs could have been imposed by it.
   (d) Adjudicating authority should have imposed minimum fine of R1 lakh on Turf Enterprise and maximum fine of R1 crore could have been imposed by it.

4. Whether the names offered by Mr. Rohan for appointment as authorised representative can be considered proper and till what time the Adjudicating authority should have appointed such authorised representative?
   (a) Yes, as one name is from Gujarat and other two names belong to such states which are nearby to Gujarat. The Adjudicating authority should have appointed such authorised representative prior to the first meeting of the committee of creditors.
   (b) No, all the three names offered should have been from Gujarat. The Adjudicating authority should have appointed such authorised representative prior to the first meeting of the committee of creditors.
   (c) No, all the three names offered should have been from Gujarat. The Adjudicating authority should have appointed such authorised representative prior to the formation of the committee of creditors.
   (d) Yes, as at least one name offered should have been from Gujarat. The Adjudicating authority should have appointed such authorised representative prior to the formation of the committee of creditors.

5. Who can extend the time period for disposing of the few other applications received by the Adjudicating authority during the July month?
   (a) The President of the National Company Law Tribunal can extend the time periods specified in the Act but not exceeding ten days.
   (b) The Chairperson of the National Company Law Appellate Tribunal can extend the time periods specified in the Act but not exceeding seven days.
   (c) The Chairperson of the National Company Law Tribunal can extend the time periods specified in the Act but not exceeding ten days.
   (d) The Chairperson of the National Company Law Appellate Tribunal can extend the time periods specified in the Act but not exceeding seven days.

Descriptive Questions

6. For contravention of which provisions the penalty would have been imposed by the authority under RERA upon the promoter company, Trees Estate Ltd. and of what amount? Also, how much amount of pre-deposit would have been made by it for filing the appeal with the Appellate Tribunal?

7.
(i) Whether the two transactions entered by Saath Ltd. can be said to have entered within the relevant period for considering them as undervalued transactions?
(ii) Whether the two transactions entered into by Saath Ltd., as aforesaid, can be considered as undervalued transactions as contemplated by Mr. Ravi in the application filed with the Adjudicating Authority?

8. Whether KC & Sons should have instituted a suit against FAL Ltd. in the City Civil Court and whether such court can entertain such suit?

9. What shall be done by TLF (P) Ltd. with respect to amount of R2 crores yielded in excess of its debts due from Anmoli Ltd. and before realizing such security interest by TLF (P) Ltd., what kind of verification would have been made by the liquidator?

ANSWERS TO CASE STUDY

1. (d) Withdrawal of application shall be pursuant to Section 12A of the Code read with Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

   Once application is admitted and after Constitution of CoC but before issue of Invitation for Expression of Interest ("EoI"):- An application for withdrawal made by the Applicant shall be firstly considered by the CoC, within seven days of its receipt. Such withdrawal of application shall be approved by the CoC with ninety percent voting share, upon which the resolution professional shall submit such withdrawal application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval

   Ukrin Ltd. submitted a withdrawal application on 26th May for consideration by the Committee of Creditors. So, the Committee of Creditors should have considered such application by 2nd June i.e. 7 days from 26th May.

   The Committee of Creditors approved such application by a vote of 92% on 1st June. So, Mr. Tanmay should have been submitted with the Adjudicating authority for approval by 4th June i.e. 3 days from 1st June.

2. (c) Section 7 of the IBC, 2016:
   A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

   Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor **shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less.**

   Here, 30 allottees out of 310 allottees of Trees Estate Ltd. jointly filed an application for initiating corporate insolvency resolution process against it. But as the proviso above, 100 allottees or 31 allottees (10% of 310) whichever is less, should have jointly filed such application.

   So, the application filed by the said 30 allottees of Trees Estate Ltd. is not admissible by the Adjudicating authority as it is filed jointly by lesser number of allottees than prescribed.

3. **(d) As per Section 76 of the IBC, 2016:-** Where an operational creditor has **wilfully or knowingly concealed** in an application under section 9 the fact that the corporate debtor had **notified him of a dispute in respect of the unpaid operational debt** or the full and final payment of the unpaid operational debt.

   Such operational creditor or person, as the case may be, shall be punishable with imprisonment for a term **which shall not be less than one year but may extend to five years or with fine which shall not be less than one lakh rupees but may extend to one crore rupees, or with both.**

4. (b) As per section 21(6A) of the IBC, 2016, where a financial debt is owed to a class of creditors other than the creditors covered above, the IRP shall make an application to the AA along with the list of all financial creditors, with the name of an insolvency professional to act as their authorised representative appointed by the Adjudicating Authority **prior to the first meeting of the COC**.

   Authorised Representative from the State or Union Territory having highest number of creditors in class

   The Interim Resolution Professional shall offer the names of three insolvency professionals to be voted upon by the class of creditors, who must be from the State or Union Territory, which has the highest number of creditors in the class as per records of the corporate debtor.

   Where such State or UT does not have adequate number of insolvency professionals, the insolvency professionals having addresses in a nearby State or UT, as the case may be, shall be considered.

   Here, the highest number of such creditors of Tadan Ltd. belonged to the state of Gujarat. So, all the three names offered should have been from Gujarat by Mr. Rohan.

5. (a) As per Section 64 of the IBC, 2016, where an application is not disposed of or an order is not passed within the period specified in this Code, the National Company Law Tribunal or the National Company Law Appellate Tribunal, as the case may be, shall record the reasons for not doing so within the period so specified; and the President of the National Company Law Tribunal or the Chairperson of the National Company Law Appellate Tribunal, as the case may be, may, after taking into account the reasons so recorded, extend the period specified in the Act but not exceeding ten days. No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the NCLT or the NCLAT under this Code.

6. Section 12 of the Real Estate (Regulation & Development) Act, 2016, contains provisions which deal with the obligations of a promoter regarding veracity of the advertisement or prospectus.

   Accordingly, where any person makes an advance or a deposit on the basis of the information contained in the notice, advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act.

   However, **if the person affected by** such incorrect, false statement contained in the notice, advertisement or prospectus, or **the model apartment**, plot or building, as the case may be, intends to withdraw from the proposed project, **he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act.**

   In the given case, the 30 allottees on the basis of model apartment had purchased the properties in the project and according to them it was not as per model displayed and the promoter company refused to return the investment amount of such allottees.

   Thus, for contravention of provisions of section 12, as aforesaid, the promoter company, Trees Estate Ltd. would have been penalized.

   As per Section 61 of the Real Estate (Regulation & Development) Act, 2016, if any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent of the estimated cost of the real estate project as determined by the Authority.

   Here it is given, that the authority under RERA passed an order imposing maximum penalty upon the promoter company, Trees Estate Ltd. and the estimated cost of the real estate project was ₹200 crores, so the amount of penalty would have been 5% of ₹200 crores = ₹10 crores.

   As per Section 43 of the Real Estate (Regulation & Development) Act, 2016, any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act

may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter.

Where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal atleast thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

Explanation—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

In the given case, the authority under RERA has imposed a penalty on Trees Estate Ltd. as well as directed to it to compensate the said 30 allottees by returning their cumulative investment amount of ₹20 crores along with total interest of ₹2 crores.

Thus, the amount of pre-deposit that would have been made by Trees Estate Ltd. for filing the appeal with the Appellate Tribunal would be:

- 30% of ₹10 crore = ₹3 crore or such higher percentage as may be determined by the Appellate Tribunal and;
- The total amount to be paid to the allottee including interest and compensation imposed on him i.e. ₹20 crores + ₹2 crores = ₹22 crores.

7. (i) As per Section 46 of the IBC, 2016, in an application for avoiding a transaction at undervalue, the liquidator or resolution professional shall determine :
   a) That the transaction was entered within the period of one year preceding the insolvency commencement date; or
   b) That the transaction was made with a related party within a period of two years preceding the insolvency commencement date.

   The Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions

   In case of transaction entered by Saath Ltd. with Janam Ltd.

   Transaction was entered by Saath Ltd. before 19 months preceding the insolvency commencement date with Janam Ltd. and Saath Ltd. and Janam Ltd. were having two directors in common.

   As per Section 5(24) of the IBC, 2016, related party, in relation to a corporate debtor, inter-alia, means any person who is associated with the corporate debtor on account of having more than two directors in common between the corporate debtor and such person.

   As, Saath Ltd. and Janam Ltd. were having two directors in common, Janam Ltd. would be considered as related party in relation to Saath Ltd. and the transaction took place within 2 years preceding the insolvency commencement date.

   Thus, the said transaction can be said to have entered within the relevant period for considering it as an undervalued transaction.

   In case of transaction entered by Saath Ltd. with Mr. Mahesh

   Transaction was entered by Saath Ltd. before 17 months preceding the insolvency commencement date with Mr. Mahesh. Mr. Mahesh is a house worker of Mr. Sunil, the director of Saath Ltd. There was a case under the Prohibition of Benami Property Transactions Act, 1988, going against Mr. Mahesh and Mr. Sunil, due to acquisition of such property in the name of Mr. Mahesh and it was held that in the order passed that Mr. Mahesh was the 'benamidar' and Mr. Sunil was the 'beneficial owner'.

   As per Section 5(24) of the IBC, 2016, Related party, in relation to a corporate debtor, inter-alia, means — a director or partner or a relative of a director or partner of the corporate debtor

   Now, as per the order passed under the provisions of the Prohibition of Benami Property Transactions Act, 1988, Mr. Mahesh was considered as the 'benamidar' and Mr. Sunil was considered as the 'beneficial owner' and thus, it can be said that, in substance, the transaction was entered by Saath Ltd. with Mr. Sunil and not with Mr. Mahesh and Mr. Sunil being a director of Saath Ltd. would be considered as the Related party in relation to Saath Ltd.

   Also, the transaction took place within 2 years preceding the insolvency commencement date.

   Thus, the said transaction can be said to have entered within the relevant period for considering it as an undervalued transaction.

(ii) As per Section 45 of the IBC, 2016, a transaction shall be considered undervalued where the corporate debtor —
(a) makes a gift to a person; or
(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,
and such transaction has not taken place in the ordinary course of business of the corporate debtor.

In case of transaction entered by Saath Ltd. with Janam Ltd.
Though the transaction has not taken place in the ordinary course of business of the corporate debtor but the consideration for such supply of goods does not appear to be significantly lesser than the value of the consideration provided by the corporate debtor as consideration charged by Saath Ltd. was R4.4 crores which it would have normally sold for 4.6 crores.

Thus, transaction entered by Saath Ltd. with Janam Ltd. cannot be said to be an undervalued transaction even though it has been entered into with a related party within the relevant period.

In case of transaction entered by Saath Ltd. with Mr. Mahesh
Here, Saath Ltd. had sold a property to Mr. Mahesh for R15 crore, the stamp duty value of which was R35 crore. It can be said that consideration charged is significantly less than the value of the consideration provided by the corporate debtor, Saath Ltd.

Further, Mr. Mahesh is a house worker of Mr. Sunil, the director of Saath Ltd. and also an order under the PBPT Act, 1988 was passed against them. So, such transaction also does not appear to take place in the ordinary course of business of the corporate debtor, Saath Ltd.

Thus, the transaction entered by Saath Ltd. with Mr. Mahesh can be said to be an undervalued transaction.

8. As per Section 33(5) of the IBC, 2016, subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor.

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

Thus, KC & Sons should not have instituted a suit against FAL Ltd. in the City Civil Court due to the restrictions as mentioned in the aforesaid provision.

As per Section 63 of the IBC, 2016, no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code.

Civil court not to have jurisdiction.

Here, in the given case, the Adjudicating authority i.e. the NCLT was having the jurisdiction over the matter with respect to non-payment to KC & Sons as per the resolution plan by FAL Ltd. and thus, the City Civil court cannot entertain such suit as it is not having the jurisdiction to do the same.

9. As per Sec 52(7) of the IBC, 2016, where the enforcement of the security interest yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—
(a) account to the liquidator for such surplus; and
(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

Thus, TLF (P) Ltd. should account to the liquidator surplus sum of R2 crores yielded in excess of its debts due from Anmoli Ltd. as well as tender the same to the liquidator.

As per Section 52(7) of the IBC, 2016, before any security interest is realised by the secured creditor, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either—
(a) by the records of such security interest maintained by an information utility; or
(b) by such other means as may be specified by the Board.

Thus, before realizing such security interest by TLF (P) Ltd. the liquidator should have verified the security interest as aforesaid.

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