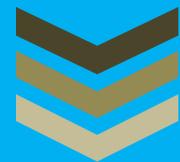


Referencer for Quick Revision



Final Course Paper-6D: Economic Laws

A compendium of subject-wise capsules published in the
monthly journal "The Chartered Accountant Student"



**Board of Studies
(Academic)
ICAI**

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This capsule on Paper 6D: Economic Laws, Final (New) course is another step of Board of Studies in its endeavour to provide quality academic inputs to Final course students of Chartered Accountancy course. As students are aware that this is an open book examination and duration is 4 hours. The question paper would comprise five case studies of 25 marks each, out of which the student would be required to attempt any four. Students must divide their four hours between four case studies to be answered meticulously. Once the case studies have been opted, give them a comprehensively reading while attempting the same. Some of the illustrative case studies have been provided below for practice purpose. Students are suggested to solve the same in examination condition and check for the answers only after attempting the case studies.

CASE STUDY 1

Mr. M R Gulati is renowned and influential real estate agent. Mr. M R Gulati has over 30 year of experience in real estate business and enjoys good reputation, also due to standing of his father Late Mr. Rattan Mal Gulati, in education sector. Mr. Rattan Mal Gulati was managing trustee of Easy Key Educational Trust, along with other family members as stated below;

SN	Name	Relation to Mr. Rattan Mal Gulati	Status
1	Mr. Rattan Mal 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 group of agriculture colleges. Rita and Radha are cousin from Mohanty family with political background, which supports the businesses of Gulati Family, where ever possible.

Post to death of Mr. Rattan Mal Gulati last year, Ms. Alka admitted as member trustee to Easy Key Education Trust and Mr. M R Gulati took charge as managing trustee. Ms. Alka is daughter of Mrs. Radha & Mr. O P Gulati; she is studying Agriculture Economics and Business Administration in one of dual degree programme of Kansas State University, Manhattan, United States. Mr. O P Gulati remitted US \$ 260,000 to Ms. Alka through authorised person for tuition fee and personal expenditure.

On 21st birthday of Ms. Alka, both the parent Mrs. Radha & Mr. O P Gulati, decided to visit to Ms. Alka in States, to congratulate her and on same day there is 25th Wedding Anniversary of Mrs. Radha & Mr. O P Gulati. While passing by streets in Manhattan Mrs. Radha, find Jewelry showroom which offers latest design and exciting offers. Mr. O P Gulati agrees to buy gold for Mrs. Radha, who was fond of jewelry and from investment prospective. Price offered by Gold smith is US\$ 45 per gram, which is cheaper than

prevailing prices of gold in India. Therefore, Mr. O P Gulati apart from purchase of 70 grams of gold ornaments (jewelry) and 20 grams gold in form of gold coins; he also purchased latest gizmo device, which is not yet launched in India. On arrival to India, both Mrs. Radha & Mr. O P Gulati, pass through green channel; without making any disclosure/declaration to custom authority.

Mr. Pandey, a child-hood friend of Mr. M R Gulati approached him, and explained about financial crisis in his business and make a proposal to Mr. M R Gulati for sale of his ancestral land situated in Vikas-Khand (which now declared as an Industrial town, with tax holiday) at price below the market prevailed prices of similar land. Mr. M R Gulati, with intention to develop elite corporate plaza named 'G Square' where Board Meetings, Trade Conferences, Conventions, Workshops can be held, plans to buy land from Mr. Pandey. After negotiation, price for land settled at INRs 4 crore, out of which he paid INRs 1 crore in cash and balance INRs 3 crore in form of account payee cheque. Said cash of INRs 1 crore later deposited in 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 favour of Mr. Alok, and wish that his son should join his business.

To arrange fund for purchase of land situated in Vikas-Khand, Mr. M R Gulati sold one of his earlier acquired property for INRs 5 Crore. After making payment of INRs 4 crore with residual amount of INRs 1 crore, Mr. M R Gulati start a housing project named 'Paradise' which comprises 6 flats (1 building of 3 floors with 2 flat at each floor) in 650 Square Meters.

Advance equal to 25% of estimated (due to escalation clause) price collected from customer who booked the flats, and 20% of these advance amounts used to complete one of already existing ongoing project by Mr. M R Gulati and remaining amount kept in separate bank account. Project Paradise is not registered with 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 increase the floors from 3 to 5. Installment 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 friend to family of Mr. M R Gulati, is also qualified lawyer by qualification but hotelier by profession, told Mr. M R Gulati about registration requirements of project under Real Estate (Regulation and Development) Act, 2016; and Mr. M R Gulati applied for same. In mean time Mr. M R Gulati using his influence took permission from Municipal Corporation of city for increase of floor.

Mr. Alok who is fickle minded young-star, graduated from top notch B-School willing to start his business of solar panels, 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 private company with 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 financial institution at relatively high interest rate. Due to his capricious nature, no experience in business of solar panel and stiff economic conditions; business went into losses. Situation of debt trap arises in second year of operation. Liquidity and solvency position of business of Mr. Alok is this much bad that he is unable to pay-off trade creditor, despite multiple month long reminders from vendors. One of unpaid operational creditor 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 programme; she joined the governing body of group of agriculture colleges operated by Easy Key Educational Trust. She planned for strategic restructuring of the business. She decided to attain dominance in market and beat the competition by acquisition of the only another agriculture college operational in state. New programmes are also launched which are research based and featuring industry immersion as unique selling point. She ensured that all the group agriculture colleges of group must be accredited from ICAR. Down the line having aspiration, that these affiliated colleges either must emerge as autonomous colleges or become research based universities. Due to monopoly in agriculture courses, all fees apart from tuitions fee doubled from upcoming academic year.

Questions

Part A- Multiple Choice Questions (2 Marks each)

1. What will be amount of penalty, in regard to excess remittances in USD to United States done by Mr. O P 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 maximum amount of advance to book flat
 - (a) INRs 1,50,000
 - (b) INRs 5,00,000
 - (c) INRs 6,00,000
 - (d) INRs 6,50,000
3. Out of the following acts of Mr. M R Gulati, which can be held as offence under Real Estate (Regulation and Development) Act, 2016
 - i. Not applied for registration of the project at earlier stage (prior to extension of floors)
 - ii. Receive the advance and installments without/prior registration of Project.
 - iii. Use 20% of Fund for completion of other already on-going existing project
 - (a) Only ii
 - (b) Both i and ii
 - (c) Both i and iii
 - (d) Both ii and iii

4. In how many days 'Power Sun Private Limited' need to respond demand notice of operational creditor served on 15th November 2019
 - (a) latest by 22nd November 2019
 - (b) latest by 23rd November 2019
 - (c) Latest by 25th November 2019
 - (d) latest by 15th December 2019
5. Can Mr. Alok be held as Benamidar under Prohibition of Benami Property Transactions Act, 1988?
 - (a) Yes, because consideration paid by Mr. M R Gulati, but property registered in his name
 - (b) Yes, because he is party to transaction
 - (c) No, because he is son of Mr. M R Gulati, who paid the consideration
 - (d) No, because he didn't participate in negotiation of price and payment there-of.

Part B- Descriptive Questions

6. Is the act of Mrs. Radha & Mr. O P Gulati, on arrival to India, without making any disclosure and pass through green channel along with the article purchased from Manhattan, United States, constitute an offence under the Prevention of Money Laundering Act, 2002. (5 Marks)
7. 'Power Sun Private Limited' find it difficult to run the operations further and it is already defaulting in making payment to both financial and operational creditors. So, if 'Power Sun Private Limited' wants to initiate insolvency resolution process, examine whether it can initiate the process? (6 Marks)
8. Ms. Alka is highly passionate about implementing the strategies, that she learned during her business administration classes. Is any of her actions or implication of strategies adopted by her is in contravention to provisions of the Competition Act, 2002? Advise (4 Marks)

Answers

Part A

1. (d) USD 30,000
Reason - Amount involved in contravention is USD 10,000 because amount permissible by Schedule III of Foreign Exchange Management (Permissible Current Account Transactions) Regulations 2000 is USD 250,000. Hence amount of penalty will be USD 30,000 (i.e. 3 times of USD 10,000) [Section 13 of Foreign Exchange Management Act, 1999]
2. (b) INRs 5,00,000
Reason - Maximum amount of advance to book flat is INRs 5,00,000 (i.e. 10% of 50,00,000) [Section 13 (1) of Real Estate (Regulation and Development) Act, 2016]
3. (b) Both i and ii
Reason - Section 3 require prior registration, if area of land for proposed project is more than 500 square meters or there are more than 8 units; Since area is 650 square meters, hence project require prior registration. No amount should be received from allottee prior to registration of project. Hence both i and ii shall be constituted as offence.
 Section 4(2) (l) d require 70% of amount realized for project from allottee need to be kept in separate bank

account and will be used for that projects according to degree of completion withdrawal from said account can be made. Here in this case 80% deposited into separate account, hence not an offence.

4. (c) Latest by 25th November 2019
Reason – Section 8(2) of Insolvency and Bankruptcy Code, 2016 provides, that corporate debtor shall, within a period of ten days of the receipt of the demand notice, bring to the notice of the operational creditor that either the litigation is pending or payment of unpaid operational debt done.
5. (c) No, because he is son of Mr. M R Gulati, who paid the consideration
Reason –By virtue of 2 (9) (A) (iii) - Property registered in name of child will not be considered as Benami transaction. Hence this property is not a Benami property and Mr. Alok is not Benamidar.
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.

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 as per part B of schedule to the Prevention of Money Laundering Act 2002, offences under the section 132 of Customs Act, 1962 regarding False declaration, false documents, are considered as scheduled offence under the Prevention of Money Laundering Act, 2002.

Since baggage item are also subject to duty beyond certain limit and gold and jewelry purchased by Mrs. Radha & Mr. O P Gulati either not permitted as baggage through green channel and not filling declaration leads to evasion of duty. Hence, if no declaration made to custom officer on arrival at airport will constitute as scheduled offence.

Hence act of Mrs. Radha & Mr. O P Gulati, on arrival to India; without making any disclosure/declaration to custom authority and pass through green channel along with the article purchased from Manhattan, United States, constitute an offence under the Prevention of Money Laundering Act, 2002.

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 under the section 7, 9, & 10 of the Code. Hence, yes ‘Power Sun Private Limited’ being a corporate debtor can

initiate insolvency resolution process against itself as per section 10 of the Code.

Initiation of corporate insolvency resolution process ‘Power Sun Private Limited’: Application shall be filed in form and manner with such fee as may be prescribed for initiating corporate insolvency resolution process with the Adjudicating Authority.

- Furnish the information relating to its books of account and such other documents relating to such period as may be specified; and the resolution professional proposed to be appointed as an interim resolution professional.
- The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order either admit the application, if it is complete; or reject the application, if it is incomplete. 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.
- The corporate insolvency resolution process shall commence from the date of admission of the application.

However, ‘Power Sun Private Limited’ shall not be entitled to make an application to initiate corporate insolvency resolution process in terms of section 11 of the Code under any of the following situations:

- If already undergoing a corporate insolvency resolution process; or completed corporate insolvency resolution process twelve months preceding the date of making of the application
- If violated any of the terms of resolution plan which was approved twelve months before the date of making of an application
- If a liquidation order already has been made.

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 “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 of goods or service.

In given case, decision by Ms. Alka to attain dominance by acquisition of the another agriculture college operational in state, is not in contravention to provisions of the Competition Act, 2002.

But increasing all the fees apart from tuitions fee to double due to monopoly which comes out of dominance over market by killing the competition, is in contravention to provisions of the Competition Act, 2002.

[Note – Acquiring dominance is not offence, but abuse of dominance is an offence.]

CASE STUDY 2

In the year 2001, Keshav and Tanishk formed Ketan Builders and Constructions Private Limited (KBCPL) having registered office in Karol Bagh, New Delhi. The company provided spacious and plush homes with well-designed landscapes, gymnasiums along with multi-tiered security and recreational spaces involving more than one lac sq. ft. in Faridabad and Gurugram.

Their construction business was flourishing day-by-day. 'KBCPL' was now a brand which 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 construction of residential units, office spaces and a mall. The modus operandi was to invest around ₹ 1200 crore for developing the township at Greater Noida under '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 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 ₹ 80.00 lacs (i.e. 80% of the cost of ₹ 1.00 crore for a 4BHK apartment and an office space in the mall). He discussed the matter with his father Ramashankar who arranged ₹ 65.00 lacs by raising loan against his fixed deposits. Remaining ₹ 15.00 lacs were arranged by Aayush as gold loan by pledging the jewelry of his wife Meera. According to the MOU entered by Aayush with the company, he would be paid ₹ 80,000 per month through NEFT from October, 2015 onwards till the handing over of the fully constructed property. The difference of ₹ 20.00 lacs (i.e. ₹ 1.00 crore minus ₹ 80.00 lacs) would be paid by Aayush when he will be having the possession of the apartment as well as 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 sometime.

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. His uncle, Rajinder Kumar, was an exporter, exporting readymade leather bags of various sizes to South Africa, catering to latest fashion trends.

Vansh informed Aayush that due to some significant amendments in Insolvency and Bankruptcy Code, 2016 (IBC, 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 initiation of 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 the 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 IBC. This acted as 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 enquiry, he gathered that the company had defaulted in repayment of a term loan of ₹ 100 crore which was obtained from National Bank of India. Accordingly, the Hon'ble National Company Law Tribunal (NCLT), Delhi, on the application of National Bank of India, had ordered the commencement of 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.

Questions

Part A - Multiple Choice Questions (2 Marks each)

- In the given case study, National Bank of India filed an application for corporate insolvency resolution process (CIRP) with 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?
 - From the date of submission of the application.
 - From the date of admission of the application.
 - From the date of ascertaining the existence of default by the NCLT.
 - From the date of appointment of Insolvency Resolution Professional (IRP).

2. Suppose Radhika had given a loan of ₹ 15,00,000 to KBCPL which remained outstanding when Corporate Insolvency Resolution Process was ordered. As financial creditor whether she could be a part of Committee of Creditors (CoC) after she submitted her claim in 'Form C'.
 - (a) Yes, she could be a part of Committee of Creditors (CoC) as she had given loan to KBCPL which was more than ₹ 5,00,000.
 - (b) No, she being a director of KBCPL, could not be a part of Committee of Creditors (CoC).
 - (c) Yes, she could be a part of Committee of Creditors (CoC), if Interim Resolution Professional (IRP) permitted her despite the fact that she was a director of KBCPL.
 - (d) Yes, she could be a part of Committee of Creditors (CoC), if Interim Resolution Professional (IRP) sought permission of minimum 75% 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 5%
 - (b) Not more than 10%
 - (c) Not more than 15%
 - (d) Not more than 20%
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. It was intimated to National Bank of India through notice issued on 24th October 2018. The said notice was received by National Bank of India on 26th October, 2018. The time period within which the defects must be rectified by National Bank of India, so that insolvency process may be started by the National Company Law Tribunal, Delhi.
 - (a) latest by 31st October, 2018
 - (b) latest by 2nd November, 2018
 - (c) latest by 5th November, 2018
 - (d) latest by 10th November, 2018
5. In the given case study, Aayush, as '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:
 - (a) ₹ 50,000
 - (b) ₹ 1,00,000
 - (c) ₹ 10,00,000
 - (d) ₹ 20,00,000

Part B- 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 the following:
 - (a) Mention the provisions which enable a 'home-buyer' to be considered as a 'financial creditor'. (5 Marks)
 - (b) Identify when a 'financial creditor' can also be categorised as an 'operational creditor'? (5 Marks)
7. 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 application for initiating Corporate Insolvency Resolution Process (CIRP) against KBCPL with the National Company Law Tribunal (NCLT), Delhi. What could have been the documents which Aayush might have furnished along with application filed for initiating Corporate Insolvency Resolution Process (CIRP)? (5 Marks)

Answers

Part A

1. (b) From the date of admission of the application.
Reason: According to Section 7 (6), the corporate insolvency resolution process shall commence from the date of admission of the application.
2. (b) No, she being a director of KBCPL, could not be a part of Committee of Creditors (CoC).
Reason: Refer First Proviso to Section 21 (2) which states that a financial creditor, who is a related party of the corporate debtor, shall not have any right of participation or voting in a meeting of the Committee of Creditors (CoC). Radhika being a director of the company was a 'related party' in terms of Section 5 (24).
3. (b) Not more than 10%
Reason: Refer Section 13 (1) of the Real Estate (Regulation and Development), Act, 2016 which 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.
4. (b) latest by 2nd November, 2018
Reason: According to Proviso to Section 7 (5), any defect in the application needs to be rectified within 7 days of receipt of notice from the Adjudicating Authority. As the notice of NCLT was received by National Bank of India on 26th October, 2018, so it needs to be rectified within 7 days of receipt of notice i.e latest by 2nd November, 2018
5. (b) ₹ 1,00,000
Reason: Refer Section 4 (1) which states that the insolvency and liquidation in respect of corporate debtors shall be triggered where the minimum amount of the default is ₹ 1,00,000.

Part B

- 6 (a). In order to categorise the home-buyers as 'financial creditors', Section 5 (8) of the Insolvency and Bankruptcy Code, 2016, which defines the term 'financial debt', was amended by the *Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 w.e.f. 06-06-2018*. The amendment involved inserting Explanation (i) in Clause (f) of Section 5 (8) as under:
Explanation (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'.
By inserting above-mentioned Explanation (i) in Section 5 (8) (f), the law makes it clear that the 'financial debt' includes any amount which is raised from an allottee under a real estate project. Further, such amount shall be deemed to be an amount having the commercial effect of a borrowing. The phrase 'commercial effect of a borrowing' means that the

borrower has borrowed money for the purpose of business activities.

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'.

(b). 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 'operational creditor' also, in addition to 'financial creditor', he should have made provision of goods, for example, 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.

7. As required by Section 9(3) of the Insolvency and Bankruptcy Code, 2016, Aayush by having developed a customized software for KBCPL, provided a service to KBCPL. Thus, he acts as an operational creditor. So, by section 9 of the IBC, operational creditor will be regulated for initiation of CIRP against Corporate Debtor. As per sub-section 9(3), Aayush as an 'operational creditor' might have furnished the following documents along with the application for CIRP:

- (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. [this requirement under (c) is not mandatory w.e.f. 06-06-2018]
- (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 3

Rajath and his two sons, Lokesh and Ramesh are the promoters of **RAJATH BEVERAGES LTD (RBL)**. Rajath is the Chief Managing Director (CMD) of the Company.

Lokesh looks after finance and marketing; Ramesh takes care of production and human resources.

Production unit is located in Patna, Bihar. The business of the Company is manufacturing and selling of mineral water. The company was formed with a small investment of ₹ 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 an ambitious as well as a shrewd business man. He always tried to beat the competition through flexibility in 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. Board of Directors of RBL decided to go for public issue and listing of its Equity Shares, mainly 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, location next to the existing mineral water unit. First 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 scarcity in supply of mangoes, mango pulp and some other basic raw materials required for 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 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 the Company, offering further financial assistance/investment. With all the productive measures, RBL could achieve the position of strength in 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 abuse of dominance by RBL by contravening various provisions of the relevant law. The Commission initiated an enquiry and was of the opinion that

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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 investigation and were found to be mainly because of the business competition. The Report of the DG recommended that there is no contravention, since there is no appreciable adverse effect on competition.

The Commission forwarded copies of the Report to both the 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.

Questions

Part A- Multiple Choice Questions (2 Marks each)

- Board of Directors of RBL decided to go for public issue and listing of its Equity Shares, for business 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. In the context of above case, which one of the following statement is correct?
 - Shares cannot be considered as "goods", since nothing has to do with manufacturing, processing, or mining.
 - Shares can be considered as "goods" at the share application stage, since application monies are paid for acquisition of shares.
 - Shares can be considered as "goods" only during their purchase or sale i.e. trading in the Stock market or otherwise.
 - Shares can be considered as "goods" after allotment.
- RBL also entered into a joint venture agreement with RAMAN PULP PRIVATE LIMITED (RPPL) of Punjab to ensure continuous supply of mango pulp and some other raw materials to its mango juice manufacturing unit. Joint Venture agreement between RBL and RPPL:
 - Is an anti-competitive agreement, since resulted in increased turnover for one company, as against others
 - Not to be considered anti- competitive, since it enhanced the production efficiency of RBL
 - Is anti- competitive, since RBL could reach advantageous position in Bihar because of this Agreement
 - The agreement between RBL and RPPL is void and inoperative ab- initio since resulted in more sales to one Company as compared to others in Bihar.
- The continuing business competition also resulted in the Commission receiving formal information from one of the Trade Associations in Bihar that there is 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:
 - Chair Person and not less than 2 and not more than other 6 members, to be appointed by the State Government.
 - Commissioner and not less than 3 and not more than 5 members, to be appointed by the Central Government
 - Chair Person and not less than 2 and not more than other 6 members, to be appointed by the Central Government.
 - Chief Executive officer and not less than 3 and not more than 5 members, to be appointed by the State Government

- 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 Trade Association of Bihar in the aforesaid case:
 - Is only an arrangement, not enforceable
 - Can be converted into a written Agreement at a later date and can be enforceable only thereafter.
 - a valid Agreement
 - a valid Agreement only if all the parties involved therein confirm it in writing at a later date.
- 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 is termed as:
 - Monopolistic price
 - Minimum Retail Price (MRP)
 - Eliminatory Price
 - Predatory Price

Part B- Descriptive Questions

- With all the productive measures, RBL could achieve the position of strength in Bihar market to operate independently of competitive forces. "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 statement with reference to the provisions of the relevant law in India, including the factors which the Commission will consider to determine the facts. (5 Marks)
- 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.
 - Instead of any directions by the Commission, is there any possibility of a Director General to suo motu initiate investigation in the above case under any of the provisions of the relevant Indian law? (1 Mark)
 - 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 division of enterprise enjoying position of strength as stated under the law". Enumerate the provisions of the relevant Law on the matters that may be provided for in the Order? (3 Marks)
 - The Articles of Association of RBL provides that the Managing Director and the Directors are entitled to claim compensation to the extent mentioned therein, if there is division of enterprise for any reasons and in case they cease to hold their office(s) in consequence thereof. Is Ramesh, one of the directors of RBL, on cessation of his office entitled to claim compensation, because of the position stated in point (b) above i.e. Commission passing an Order for division of enterprise? (1 Mark)
- In the above 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". Identify and enumerates such Agreements. (5 Marks)

Answers

Part A

1. (d)

Reason: Refer to Section 2 (i) (B) of the Competition Act, 2002

2. (b)

Reason: Refer to Provision to Section 3 (3) of the Competition Act, 2002

3. (c)

Reason: Refer to Section 8 of the Competition Act, 2002

4. (c)

Reason: Refer to Definition in Section 2 (b) of the Competition Act, 2002

5. (d)

Reason: Refer to Explanation (b) to Section 4 of the Competition Act, 2002

Part B

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 exploited to gain undue advantages".

It may be noted that attaining the position of strength or "dominant position" is not prohibited; Every enterprise has the freedom and legal right to grow up; but it is only the "abuse of dominant position" in an area, affecting the competition and as such prohibited under the Competition Act, 2002. Mere achieving of the position of strength in Bihar market by RBL to operate independently of competitive forces does not come under the area of prohibition under any of the Indian laws.

Abuse of dominant position impedes fair competition between firms, exploits consumers and makes it difficult for the other players to compete with the dominant undertaking on merit.

Under Section 4 Explanation (a) 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 favor.

Section 4 (1) of the Competition Act, 2002 expressly prohibits any enterprise or group from abusing its dominant position. 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 services or
 - (ii) price in purchase or sale (including predatory price) of goods or services or
- (b) limits or restricts production of goods or provision of services or market there for 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.

For the purpose of determining whether an enterprise enjoys dominant position or not under Section 4, the Competition Commission of India (CCI) shall have due regard to all or any of the following factors viz.,

- (i) Market Share of the enterprise;
- (ii) Size and Resource of the enterprise;
- (iii) Size and importance of the competitors;
- (iv) Economic power of the enterprise including commercial advantages over competitors;
- (v) Vertical integration of the enterprises or sale or service network of such enterprises;
- (vi) Dependence of consumers on the enterprise;
- (vii) Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government or a public sector undertaking or otherwise;
- (viii) 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 service for consumers;
- (ix) Countervailing buying power;
- (x) Market structure and size of market;
- (xi) Social obligations and social costs;
- (xii) 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;
- (xiii) Any other factor, which the Commission may consider relevant for the inquiry.

It may be noted that the Commission shall have due regard to the "relevant geographic market" and "relevant product market" for determining as to what constitutes a "relevant market"

For determining the "relevant geographic market" the Commission shall have due regard to all or any of the following factors, viz.,

- (i) Regulatory trade barriers;
- (ii) Local specification requirements;
- (iii) National procurement policies;
- (iv) Adequate distribution facilities;
- (v) Transport costs;
- (vi) Language;
- (vii) Consumer preferences;
- (viii) Need for secure, regular supplies or rapid after-sales service.

Similarly, while determining "relevant product market", the Commission shall have due regard to all or any of the following factors viz.,

- (i) Physical characteristics or end use of goods;
- (ii) Price of goods or service;
- (iii) Consumer preferences;
- (iv) Exclusion of in-house production;
- (v) Existence of specialized producers;
- (vi) Classification of industrial products.

7. (a) No. The role of the Director General is actually to assist the Competition Commission in the effective discharge of its duties. The Director General would be able to act only if so directed by the CCI, but will not have any suo motu powers for initiating investigations. Under Section 16, the Central Government may, by notification, appoint a Director General for the

purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of the Competition Act, 2002 and for performing such other functions as are, or may be, provided by or under the Act.

- (b) Section 28 of the Competition Act, 2002 deals with the provisions relating to division of enterprise enjoying dominant position.

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.

The Order of the Commission referred to above may provide for all or any of the following matters, viz.,-

- (i) The transfer or vesting of property, rights, liabilities or obligations;
 - (ii) The adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
 - (iii) The creation, allotment, surrender or cancellation of any shares, stocks or securities;
 - (iv) 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;
 - (v) 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;
 - (vi) Any other matter, which may be necessary to give effect to the division of the enterprise or group.
- (c) 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. [Section 28 (3) the Competition Act, 2002]. As such, Ramesh is not entitled to claim any compensation.

8. 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 shall be a void agreement if it causes or is likely to cause an appreciable adverse effect on competition in India, including-

Tie in arrangement: includes any agreement, requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

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.

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.

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.

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.

This capsule on Paper 6D: Economic Laws, Final (New) course is another step of the Board of Studies in its endeavour to provide quality academic inputs to Final course students of Chartered Accountancy course. As students are aware that this is an open book examination and the duration is 4 hours. The question paper would comprise of five case studies of 25 marks each, out of which the student would be required to attempt any four. Students must divide their four hours between four case studies to be answered meticulously. Once the case studies have been opted, give them a comprehensively reading while attempting the same. Some of the illustrative case studies have been provided below for practice purpose. Students are suggested to solve the same in examination condition and check for the answers only after attempting the case studies.

CASE STUDY 1

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 owned 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 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 Harris 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 that 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 her 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 stockist 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 has 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 has 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 was 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 in SCPL with Mr. Arya, conducts the market study and concluded that the RMC (Readymix Concrete) 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, advises 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 studied 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 470,000. She made payment for the same out of her non-resident account.

Multiple Choice Questions

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 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 categorised 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 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

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

1. Decide, whether Blip has dominance and does it abused its dominant position? Support your decision with legal backing.

2. In the light of the given facts, evaluate the following situations in terms of the FEMA, 1999:
 - (i) Can Mr. Joe acquire immovable property in India, independently?
 - (ii) Is the acquisition of a flat by Drishel and Joe jointly, valid as

per the provisions of the Foreign Exchange Management Act and relevant regulations made thereunder?

- (iii) Can Joe acquire another property which is agricultural land, in joint ownership with Drishel for investment purposes?

Answer to MCQs

1. (d): Reason - As per section 2(b) of the Competition Act, 2002 'agreement' includes any arrangement or understanding or action in concert whether or not, is formal or in writing, or is intended to be enforceable by legal proceedings.

In view of the above definition, an understanding reached among the cement manufacturers to control the price and supply of cement will be an 'agreement' even though the understanding is not in writing and not intended to be enforceable by legal proceedings.

2.(c): Explanation to sub-section 4 of section 3 of the Competition Act, 2002 describe five prohibited vertical agreements, and here relevant among those are;

Tie in arrangement includes any agreement, requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

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.

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.

3.(d): The term 'consumer' is defined in section 2(f) of the Competition Act, 2002. Consumer means any person who buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use.

4. (b): As per regulation 3 of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, an NRI may acquire immovable property in India other than agricultural land/ farmhouse/ plantation property subject to two conditions;

a. 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 funds held in any non-resident account maintained in accordance with the provisions of the Act, rules, or regulations framed thereunder.

b. 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.

Since Mrs. Patel holds the status of NRI, hence not allowed to acquire farmhouse and agricultural land in India

- 5.(d): Goods under section 2 (i) of the Competition, Act 2002 means goods as defined in the Sale of Goods Act, 1930 and includes, products manufactured, processed, or mined; debentures, stocks, and shares after allotment; in relation to goods supplied, distributed, or controlled in India, goods imported into India.

Answers to Descriptive Questions

1. 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 is about dominance and its abuse and also the 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 Competition Act, 2002, 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.

2. As per regulation 6 of the 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
- (1) 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;
 - (2) 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;
 - (3) The marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property;
 - (4) The non-resident spouse is not otherwise prohibited from such acquisition.

Following are the answers in the light of the stated provisions:

- (i) 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.
- (ii) 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.
- (iii) No, Joe can't acquire another property being agricultural land in joint ownership with Drishel for investment purposes because;
 - The acquisition of agricultural land, farmhouse, and plantation property is specifically prohibited; and
 - The time since the marriage took place and subsisted is less than two years; and
 - There is a maximum ceiling limit of owning one property

CASE STUDY 2

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 top-secret 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

- Can the bank file the insolvency proceedings against RIL?
 - No, the bank can't take the RIL to insolvency proceedings.
 - Yes, the bank can take the RIL to insolvency proceedings because the default is considered as default, willingness is irrelevant.
 - Yes, the bank can take the RIL to insolvency proceedings because the amount of default exceeds ₹1 lakh
 - 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.
- At what stage, is the laundering process when it reached the hands of Mr. Kavir?
 - Integration
 - Layering
 - Stratifying
 - Splitting
- What shall be the punishment for the wrongdoing done by Mr. Anonymous?
 - Fine or rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years.
 - Fine and rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years.
 - Fine and rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years.
 - 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.
- Who has the authority to provisionally attach the property of Mr. Mohan Bhave?
 - Director
 - Deputy Director
 - Deputy Director authorised by the Director
 - Judicial Magistrate
 - i, ii, and iv
 - i, iii, and iv
 - i and ii
 - i and iii
- Within how many days, the authority who provisionally attached the property has to file a complaint with Adjudicating Authority?
 - Within 14 days from the attachment
 - Within 30 days from the attachment
 - Within 45 days from the attachment
 - Within 60 days from the attachment

Descriptive Questions

- 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): 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) : 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): 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 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. 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): 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): 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 jurisdiction to authorise the 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.

CASE STUDY 3

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 above-mentioned 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 all resolution plans to the Committee of Creditors
 - 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) : 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) : 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): 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 sixty-six percent of the voting shares.

- 4.(b) : 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): 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	₹ 1000 Cr	₹ 1000 Cr
	Joint Total Turnover	US\$ 3000 Million	US\$ 12000 Million
	Minimum Indian Component	₹ 3000 Cr	₹ 3000 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 (Supreme Court, 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).

CASE STUDY 4

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 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 his 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 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

- Regarding the state of art yoga centre and common area situated in Rishi Enclave, which of the following statement is correct;
 - Promoter will keep the possession and title both
 - Promoter may handover physical possession of these to the association of allottees or competent authority as per the local laws
 - In absence of any local law promoter shall hand over within thirty days after obtaining the occupancy certificate.
 - In absence of any local law promoter shall hand over within thirty days after obtaining the completion certificate.
- State the legal position of mother-in-law of Ms. Vijeta as benamidar in the case study-
 - Yes, the mother-in-law of Ms. Vijeta is benamidar
 - 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-
- Being a person resident outside India he can acquire, hold, own and transfer any immovable property in India, but with RBI permission only
 - 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
 - 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
 - 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 March 2021 can be admitted by NCLT to initiate CIRP against CSRL-
- Yes, because CSRL made default in repayment of financial debts
 - Yes, because the amount of default is more than one crore
 - No, because management gave assurance to financial creditors that soon it will overcome the solvency issue and they already took corrective measures
 - 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.
- Yes, because CSRL made default in repayment of financial debts
 - 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.
 - No, because the amount of default is less than one crore
 - No, because default occurred during a period of suspension.

Descriptive Questions

- 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.
- 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)?
- 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

- (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.
- (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).
- (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)
- (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.
- (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.
 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.

CA FINAL - PAPER 6D - ECONOMIC LAWS

This capsule on Paper 6D: Economic Laws, Final (New) course is another step of the Board of Studies in its endeavour to provide quality academic inputs to Final course students of Chartered Accountancy course. This is an open book examination and duration is 4 hours. The question paper would comprise of five case studies of 25 marks each, out of which the student would be required to attempt any four. Students must divide their four hours between four case studies to be answered meticulously. Once the case studies have been opted, give them a comprehensive reading while attempting the same. Some of the illustrative case studies have been provided below for practice purpose. Students are suggested to solve the same in examination condition and check for the answers only after attempting the case studies.

CASE STUDY 1

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 the 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 and 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.

On the basis of the given facts, answer the following questions:

Multiple Choice Questions

- Whether Mr. Neerav has validly brought INR currency notes into India?
 - No, Mr. Neerav has brought in excess ₹25,000 from the prescribed limit.
 - Yes, as there is no restriction of bringing any amount into India from Nepal or Bhutan.
 - No, Mr. Neerav has brought INR currency notes with denominations of ₹500.
 - Yes, if Mr. Neerav has provided declaration in respect of the same to the Custom Authorities.
- 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?
 - No, as Mr. James is a person resident outside India
 - Yes, as the amount of currency notes exceeded \$ 5,000 in equivalent
 - No, as the aggregate of EGPs in all forms did not exceed \$ 10,000 in equivalent
 - No, as there is no restriction in bringing foreign exchange, without any limit, in any form in India.
- 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?
 - 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.
 - 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.
 - 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.
 - 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.
- Whether the Director General was having the authority to exercise such powers as were exercised by him during the investigation?
 - He was having the authority to exercise such powers only if the prior permission of the CCI was obtained in that regard.
 - 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.
 - 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.
 - 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.

- 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?
 - Nadus (P) Ltd., Mr. Mayur, Mr. Neerav and Mrs. Ridhima, respectively.
 - Nadus (P) Ltd. only.
 - Nadus (P) Ltd., Mr. Mayur and Mr. Neerav, respectively.
 - Nadus (P) Ltd., Mr. Mayur, Mr. Neerav, Mr. Urmil and Mrs. Ridhima, respectively.

Descriptive Questions

- Whether Nadus (P) Ltd. was having any prohibition on making investment in Belashom LLC?
 - Whether Nadus (P) Ltd. was required to take any permission for receiving bonus shares from Belashom LLC?
- Whether Nadus (P) Ltd. was permitted to make payment for meeting expenses of Mr. James in India?
 - 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 = ₹75?
- Whether any action can be taken against Mr. Sumit for inducing his friend, Mr. Aman to enter into an agreement with Nadus (P) Ltd.?
 - 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

- (c) As per Master Direction No. 17 – Import of Goods and Services:**
 - 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).
 - 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.
- (b) 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, it is given that 1 USD = 15 EGPs and 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) 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) 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) 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 not required to have prior permission of RBI for remitting the amount of commission to Mr. Franklin as the amount remitted is well within the prescribed limit of 5% of inward remittance.

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.

CASE STUDY 2

Prahasti Ltd. is an unlisted public company, situated in Chennai, Tamil Nadu, with seven directors on its Board and it has share capital of ₹10 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 ₹2 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 ₹63,00,000 (70,000 Euros). However, the said company returned 200 pieces of clothes worth ₹8,40,000 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 statute.

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.

In the light of enumerated facts, answer the following:

Multiple Choice Questions

- 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?
 - days
 - 60 days
 - 45 days
 - It shall be immediately effective
- Is there any contravention of the provisions of the FEMA, 1999, by Karan?
 - No, as Mr. Karan has utilized the foreign currency amount for a permissible transaction and within the limits as per the 'LRS'.
 - Yes, as Mr. Karan has not utilized the foreign currency amount for the purpose for which it was acquired.
 - 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.
 - 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.
- Whether Mr. Dev has validly sanctioned the transaction of supply of goods by Tamprabha Ltd.?
 - 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 ₹1 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 ₹1 lakh or more during F.Y. 2018-19 and transaction(s) of further amount of ₹50,000 or more during F.Y. 2019-20 with Tamprabha Ltd., respectively.
- (c) Sharma & Co. would have entered into transaction(s) of further amount of ₹3 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 ₹28 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 anti-competitive agreement?
8. Whether the website portal named 'propertyleo.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 2

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 ₹540 lakhs comes to ₹27 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 ₹1 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:
- trade samples of goods and publicity material supplied free of payment.
 - 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 of 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 thereof 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:-

- 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 'propertylo.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 monetary 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 'propertylo.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 statute.

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.

CASE STUDY 3

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)

Sr. No.	Details of the Applicant	Details relating to the Application
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:

- 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 ₹20 crores along with total interest of ₹2 crores. The estimated cost of the real estate project was ₹200 crores. Trees Estate Ltd. filed an appeal with the Appellate Tribunal against the said order of Real Estate Regulatory Authority.
- 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 ₹70,000 against Turf Enterprise, after opportunity of being heard, for willful non-disclosure of such fact of notice of dispute and also rejected its application.
- 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 ₹4.4 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 ₹15 crore, the stamp duty value of which was ₹35 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.
- 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.
- Mr. Rohan had offered names of three insolvency professionals to such class of financial creditors to act as its

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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 ₹2 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.

Answer the following questions in the light of the given informations:

Multiple Choice Questions

- 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?
 - 2nd June and 9th June, respectively.
 - 31st May and 5th June, respectively.
 - 9th June and 12th June, respectively.
 - 2nd June and 4th June, respectively.
- Whether the application filed by the 30 allottees of Trees Estate Ltd. can be considered to be admissible by the Adjudicating authority?
 - No, as an application is already with the authority under RERA, so simultaneously two proceedings cannot be initiated for the same matter.
 - Yes, as the amount of default involved is more than ₹1 crore.
 - No, as the application is filed jointly by lesser number of allottees than prescribed.
 - 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.
- 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?
 - Adjudicating authority should have imposed minimum fine of ₹1 lakh on Turf Enterprise and maximum fine of ₹3 lakhs could have been imposed by it.
 - Adjudicating authority should have imposed minimum fine of ₹1 lakh on Turf Enterprise and maximum fine of ₹1 crore could have been imposed by it. However, it possesses the discretion to impose a lower amount of fine.
 - Adjudicating authority should have imposed minimum fine of ₹1 lakh on Turf Enterprise and maximum fine of ₹5 lakhs could have been imposed by it.
 - Adjudicating authority should have imposed minimum fine of ₹1 lakh on Turf Enterprise and maximum fine of ₹1 crore could have been imposed by it.
- 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?
 - 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.
 - 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.
 - 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.
 - 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.
- Who can extend the time period for disposing of the few other applications received by the Adjudicating authority during the July month?
 - The President of the National Company Law Tribunal can extend the time periods specified in the Act but not exceeding ten days.
 - The Chairperson of the National Company Law Appellate Tribunal can extend the time periods specified in the Act but not exceeding seven days.
 - The Chairperson of the National Company Law Tribunal can extend the time periods specified in the Act but not exceeding ten days.
 - 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

- 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?
- Whether the two transactions entered by Saath Ltd. can be said to have entered within the relevant period for considering them as undervalued transactions?
 - 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?
- Whether KC & Sons should have instituted a suit against FAL Ltd. in the City Civil Court and whether such court can entertain such suit?
- What shall be done by TLF (P) Ltd. with respect to amount of ₹2 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 3

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 committee of creditors.**

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 Union Territory does not have adequate number of insolvency professionals, the insolvency professionals having addresses in a nearby State or Union Territory, 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 National Company Law Tribunal or the National Company Law Appellate Tribunal 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 at least 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 ₹4.4 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 ₹15 crore, the stamp duty value of which was ₹35 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 Prohibition of Benami Property Transactions 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 Section 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 ₹2 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.

CASE STUDY 4

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 total 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 the 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 averred 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 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.

Answer the following questions:

Multiple Choice Questions

- The relevant market(s) that the Director-General will identify while making the inquiry is/are
 - Smart Phones in India
 - GSM cellular service in India
 - Smart Phones in America and India(a) Only I
(b) I and II
(c) II and III
(d) I, II, and III
- 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
 - Exclusive supply agreement
 - Horizontal agreement
 - Tie in agreement
 - Refusal to deal
- 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?
 - 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 are 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 that 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 and 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?

ANSWERS TO CASE STUDY 4

1. (b) I and II
2. (c) 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
The honorable apex court in the Civil Appeal no. 11843 of 2017 (**CCI vs Bharti Airtel Ltd**) 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.
4. (c) Yes, as Ms. Rekha has used the iPhone and availed the cellular services, so she indirectly gets affected

5. (a) Central Government
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, have due regard to all or any of the following factors, namely:—
- market share of the enterprise;
 - size and resources of the enterprise;
 - size and importance of the competitors;
 - economic power of the enterprise including commercial advantages over competitors;
 - vertical integration of the enterprises or sale or service network of such enterprises;
 - dependence of consumers on the enterprise;
 - 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;
 - 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;
 - countervailing buying power;
 - market structure and size of the market;
 - social obligations and social costs
 - 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;
 - 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 operate independently of competitive forces prevailing in the relevant market; or 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 tantamounts 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.

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) of the Act.

In the above case, some kind of ‘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. However, none of following - 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 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.

8. As per section 18 of the Competition Act 2002, the duties of the Commission are as follows:
- (a) To eliminate practices having an adverse effect on competition,
 - (b) To promote and sustain competition in markets in India,
 - (c) To protect the interests of consumers and
 - (d) To ensure freedom of trade carried on by other participants in markets in India.

As per section 27 of the Competition Act 2002, where after an inquiry under section 19 regarding alleged contravention of entering into an anti-competitive 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.